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International
Criminal
Court

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

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I. Introduction and summary: Oslo's irrelevance

1. The question of whether the supposed limitation in the Oslo Accords to the exercise of criminal jurisdiction by the State of Palestine over Israeli nationals in Palestinian territory effects a corresponding limitation on the jurisdiction of the present Court is based on a false premise. Even assuming, *arguendo*, that the Accords are still in force, their provisions purporting to limit the exercise of Palestinian criminal jurisdiction are legally invalid. In international law, the State of Palestine enjoys plenary criminal jurisdiction over Palestinian territory, with no exclusion of Israeli nationals. There is no question of Oslo somehow limiting the present Court's jurisdiction over Israeli nationals in Palestine, then, since, apart from any other matter (such as the scope of Palestinian jurisdictional entitlements over Palestine being irrelevant to the scope of the Court's jurisdictional entitlements over the same territory), there is no legally-valid Oslo-based limitation of this kind in the first place.

II. Oslo versus the broader normative picture in international law

2. The Oslo Accords purport to provide for certain aspects of Israel's presence in the Palestinian territory it captured in 1967 to continue for an interim period. They also provide for a degree of reduction by Israel of authority in certain areas and, in consequence, enable self-governing Palestinian institutions to operate in these areas. As part of this, they purport to restrict the exercise of criminal jurisdiction by Palestinian institutions over Israeli nationals in Palestinian territory.
3. However, the Palestinian people and their representatives, and the State of Palestine, do not depend on Oslo for their legal entitlement to exercise the prerogatives provided for therein. They enjoy this entitlement anyway, as part of a much broader, general right to exercise exclusive, plenary self-administration, operating throughout the entirety of the Palestinian territory, based on the right of the Palestinian people to self-determination, and the related sovereign entitlements of the State of Palestine, in international law. This right of self-administration includes plenary criminal jurisdiction over all individuals, regardless of nationality. Equally, Israel's legal obligation to permit, and not prevent, the exercise of this right of Palestinian self-administration is not limited to the prerogatives covered by Oslo. As recently affirmed by the International Court of Justice (ICJ) in the *Palestine* Advisory Opinion, under the law of self-determination, Israel is obliged to

permit and not prevent plenary, exclusive Palestinian self-administration throughout the entirety of the West Bank (including East Jerusalem) and Gaza. This necessarily includes the plenary exercise of criminal jurisdiction over all individuals.

4. Oslo amounts, then, to a treaty-based legal obligation on Israel to engage in a partial reduction in its impediment to Palestinian self-administration and, within this, the Palestinian exercise of criminal jurisdiction, in the broader normative context whereby the international law of self-determination obliges Israel to end the impediment completely by withdrawing, entirely, its control from all the Palestinian territory, and, as part of this, to permit and not exercise any impediment over the Palestinian exercise of criminal jurisdiction there.
5. Insofar as there are contradictions between the broader normative context and the provisions of Oslo, the broader position prevails for the following reasons. In the first place, the Palestinian 'agreement' to Oslo was procured by Israel in the context of an illegal use of force. In the second place, the provisions in Oslo purporting to restrict the exercise of Palestinian jurisdiction over Palestinian territory, generally, and as concerns criminal jurisdiction in particular, are contrary to peremptory legal norms. The consequence of these two factors is that those provisions purporting to legalize such restrictions are void (even if, *arguendo*, the Accords as a general matter remain in force).

III. Oslo procured through the illegal use of force

6. The Accords were concluded in the context of the already-existing occupation being conducted by one of the parties over the territory and population of the other party. This occupation was then, as now, an unlawful use of force in international law as a matter of the *jus ad bellum*. In the 2024 *Palestine* Advisory Opinion, the ICJ held that the occupation is (1) a violation of the prohibition of the acquisition of territory through the use of force in the *jus ad bellum*, and (2), in this context, and the context of its finding that the occupation constituted a violation of the right of self-determination of the Palestinian people, existentially illegal and, therefore, should be brought to an end "as rapidly as possible" (para. 267). As part of its reasoning, the Court held that the occupation was a use of force, whose existential legality fell to be determined by the *jus ad bellum* (e.g. para 253). By disposing of the question of existential legality having characterized the occupation as a use of force, the Court necessarily had to have impliedly dismissed the validity of any *jus ad bellum* justification for this use of force. Had it not

done so, it could not have concluded that Israel had no right to maintain the occupation. The fact that the Court did not expressly reject the validity of any *jus ad bellum* justification does not alter the fact that, by characterizing the occupation as a use of force and determining that, as such, it was existentially illegal and therefore needed to end as rapidly as possible, this rejection was implied. Equally, although the Court's determination of illegality in the *jus ad bellum* was specific to the issue of purported annexation, its overall finding of existential illegality, applied to a presence it had expressly characterized as a use of force, means, of necessity, that the occupation is a use of force that lacks a valid legal justification, and, as such, is, as a general matter, illegal in the *jus ad bellum* on this second, general, basis. Although the Court did not use the term aggression, the *jus ad bellum* violations it determined to be taking place, both expressly (a purported annexation through the use of force) and impliedly (a use of force in the form of an occupation without valid legal justification) are universally regarded to be paradigmatic examples of *jus ad bellum* violations constituting aggression.

7. In a provision reflective of the position in customary international law, the Vienna Convention on the Law of Treaties (VCLT) stipulates in Article 52 that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". This rule, which the VCLT (using its State-centric language, which can be applied here to a non-state self-determination unit, if that was the legal status of Palestine at the time the Accords were adopted) characterizes (in the same Article) as arising in the context of "coercion of a State by the threat or use of force," reflects the policy position that a State should not be able to use force illegally to gain advantages that would not be obtainable, or would be less easily obtainable, through peaceful means. The lack of such a rule would risk greater recourse to war internationally. The effort to limit war to narrow circumstances of self-defence, in order, in the opening words of the UN Charter, to "save succeeding generations from the scourge of war," presupposes and requires not only that such a doctrine of recourse to force as a means of self-help is itself illegal, but also, to bolster this, that provision is made to deny a State the advantages enabled by illegal war. This is the reason why the use of force to annex territory is not only a violation of the international law on the use of force (hence, as held by the ICJ, Israel's acts of annexation are illegal as breaches of this area of law (para. 179)), but also, in terms of the law of title to territory, treated as a nullity (hence the ICJ stated that Israel is not sovereign over those areas it has purportedly annexed (para. 254)).

8. The existence of the occupation is not only a means, in certain areas, of Israel purporting to assert *de jure* annexation (and so for Israel, this is not an occupation, but an ostensible assertion of sovereignty or at least control over territory in relation to which it claims it has a sovereign right). It is also more generally a means through which Israel establishes 'facts on the ground' to gain advantages when negotiating the terms of any agreement, including insofar as provision might be made for Israel to acquire territorial sovereignty over parts of the Palestinian territory. One such advantage is that the basic fact of this domination manifestly places the Palestinian people in an egregiously weak position when it comes to negotiations on any agreement, whether interim or final-status. This is especially true when the agreement in question, as here, is about the very nature of that domination itself, i.e., re-configuring how the occupation will operate.
9. Representatives of a dominated people were negotiating and supposedly agreeing with the State exercising domination over them about the terms of domination, in the context where this particular form of domination was prohibited by international law as an illegal use of force, and, moreover, on the basis that the domination would not end, but simply be reconfigured, albeit ostensibly on an interim basis. Thus, there is an unbroken continuation and correspondence between the activity the Accords provided for on the part of Israel, and Israel's already-existing illegal use of force. This was a perverse situation where a State was using force illegally to coerce the object of that force to agree to an arrangement that amounts to a continuation, in partly reconfigured form, of the illegal use of force. An immediate and automatic end to the illegal use of force—the occupation—which was not only what the Palestinian people wanted (and want), but also what international law required, was not an option.
10. In the *Chagos* Advisory Opinion, the ICJ noted that

> Heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony … it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter (para. 172).

Oslo did not, of course, provide for part of the Palestinian territory to form part of Israeli sovereign territory. But it did purport to provide for a significant part of this territory to remain under Israeli control, a situation that can look and be experienced as if Israel does enjoy sovereignty in the sense of legal title (and was treated as unlawful purported annexation by the Court in the *Palestine* Advisory Opinion). The underlying logic behind

the Court's caution that "heightened scrutiny should be given to the issue of consent" is applicable, given that the Palestinian territory "was under the authority" of Israel when the Accords were adopted.

11. Given that much of international law operates on the basis of a fiction of sovereign equality despite *de facto* inequality, treaties between unequal parties are not necessarily invalid for that reason. But one red line is when the powerful party, as here, is subjugating the other party in a particular manner—through an illegal use of force—in a way that has so compromised the freedom of action of that other party when it comes to their consent to the agreement, that the agreement can be understood to have been "procured" through that particular form of subjugation. The Oslo Accords meet this test. Indeed, their procurement in the context of the occupation constitutes a manifest and egregious form of coercion. At stake here is the integrity of the global rules on the use of force, and the legal prohibition on using force on a broad self-help basis.

IV. Conflict with other norms

12. The right of self-determination and the prohibition of aggression that are breached through the existence of the occupation, including in the way the occupation prevents the Palestinian exercise of territorial criminal jurisdiction, are peremptory norms of international law. In the light of this, the Oslo provisions purporting to provide authority for Israel to maintain its presence in certain areas of Palestine and thus limit Palestinian self-governance, in general, and also more specifically limit the exercise of Palestinian criminal jurisdiction, conflict with peremptory norms in the following three ways.
13. In the first place, fundamentally, by purporting to legalize something prohibited by these peremptory norms.
14. In the second place, by enabling Israel to use its illegal occupation (via the coercive effect as outlined above) to gain the advantage of legal cover for maintaining the occupation which would have not been possible, or would have been more difficult, had the illegal occupation not been in existence at the time the Accords were negotiated and agreed. Insofar as they place this advantage on an international legal footing, the Accords conflict with the legal prohibition on the use of force preventing a State from using force other than in self-defence, i.e., the prohibition of its use by Israel to gain these advantages.
15. In the third place, as indicated above, the relevant provisions enable Israel to obtain legal cover for its coercion, through the illegal use of force, of the representatives of the

Palestinian people into 'accepting' the arrangements they contained. This is incompatible with the legal right of self-determination, since according to that right, such acceptance must be freely given. For this reason of bypassing meaningful consent alone, the provisions conflict with the right of self-determination. This is then aggravated by the fact that the arrangements the provisions are concerned with involve, in substance, a continued limitation of the Palestinian people to engage in self-administration. Coercing a people with a right of external self-determination, by means of an unlawful deprivation of this right, to accept a modified continued form of that deprivation, is a violation of the right.

16. The Oslo Accords do not have *jus cogens* status. They must, therefore, be interpreted in a manner compatible with the peremptory character of norms prohibiting the existence and conduct of the occupation by Israel, with any contradictions resolved in favour of the peremptory norms. The approach here is the same as that addressed earlier in terms of the coerced nature of the Palestinian acceptance of the Accords: voiding. The VCLT takes the same approach here as it does, in Article 52, on the earlier matter. Article 53, also understood to reflect the position in customary international law, stipulates that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

V. Voiding: entire Accords, or only certain provisions?

17. A common issue presents itself from foregoing two findings, that (1) the conclusion of the Oslo Accords was brought about through an illegal use of force, and (2) the provisions of the Accords purporting to permit Israel to maintain certain forms of authority over the Palestinian territory and restrict Palestinian self-administration, including exercising criminal jurisdiction, conflict with peremptory norms of international law: does this mean that the Accords are void in their entirety, or only certain provisions in them?
18. The relevant provisions of the VCLT are, as indicated, Articles 52 (on coerced consent) and 53 (on conflict with peremptory norms). They refer to the "treaty" being "void". Applying the principles of treaty interpretation, themselves set out in the VCLT (Article 31), to these provisions requires a term in a treaty to be given an "ordinary meaning" in its "context" and "in the light of" the "object and purpose" of the treaty, and, in addition to context, it is necessary to take "into account", *inter alia*, "relevant rules of international law applicable in the relations between the parties".

19. Rendering the Accords void in and of themselves, and, necessarily, *ab initio*, would necessarily void the obligations that Israel has under them which, as indicated above, permit a degree of self-administration by the Palestinian people in certain areas. Although, as explained, the right of the Palestinian people to self-administration does not depend, legally, on Oslo (being derived from their self-determination right in international law, which would remain unchanged), nonetheless there is a benefit to Oslo, in terms of the limited exercise of self-determination, insofar as Israel enables this limited exercise because it is stipulated in the Accords rather than because it is obliged to do so in general international law. Voiding the Accords as a whole, and therefore voiding these obligations on Israel, would risk loss of this benefit, insofar as Israel's behaviour is linked to the presence or absence of these *lex specialis* obligations, as distinct from its obligations under general international law to end the occupation. That said, if the Accords are void in their entirety, this would take with it the provisions that purport to permit Israel to maintain the occupation in those areas where authority has not been transferred to the representatives of the Palestinian people, and to limit the Palestinian legal right to exercise criminal jurisdiction over Israelis.
20. As indicated, the "context" for the legal rule of treaty law on voiding when there is coercion through illegal force (reflected in Article 52 of the VCLT) is that one party is not to be permitted to obtain a benefit from the other party, and that other party is not to be subjected to a detriment by the first party (including in the benefit to the former, if relevant), through coercion by the former over the latter through the illegal use of force. The international law rules on the use of force are, of course, "relevant rules of international law applicable in the relations between the parties". Such a benefit/detriment matrix can operate consistently across, and thus at the level of, the treaty in its entirety, in which case the approach of voiding the treaty itself is warranted. But where, as here, a party is coerced through the illegal use of force to 'agree' to a treaty, and is subject to provisions in that treaty partly to its detriment but also partly to its benefit, the automatic approach of drastic treaty-wide voiding only captures the (unfair, because of illegal coercion) detriment and does not also account for the benefit. A more sound approach is that the voiding occurs more specifically to those things in the treaty that are to the detriment of the coerced party, leaving intact those other things that are to its benefit. Thus, Oslo has to be interpreted in a manner that preserves Israel's obligations to enable certain elements of Palestinian self-administration, but voids those elements

that permit Israel to maintain its own presence in the Palestinian territory and limit the Palestinian legal right to exercise criminal jurisdiction over Israeli nationals.

21. The "context" for the legal rule of treaty law on voiding where there is a conflict with peremptory norms of international law (reflected in Article 53 of the VCLT) is, as stated by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in its 1998 Judgment in the *Furundžija* case, that *jus cogens* norms possess

> …a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force (para. 153).

22. Such an approach is necessarily concerned with the rules that have a "higher rank" only. And it is only concerned with a situation where such rules, or their operation, would be derogated from. This has two consequences for the Oslo Accords.

23. In the first place, it only requires that the provisions that purport to legalize the continuation of the occupation, and restrict the exercise of Palestinian self-administration, including limiting the exercise of criminal jurisdiction, are invalidated.

24. In the second place, the concern it has for upholding and protecting the existence and operation of peremptory norms necessarily means that those other parts of Oslo that do involve a partial implementation of the right of self-determination of the Palestinian people must be upheld and cannot be invalidated. To be sure, as indicated above, if Oslo was void in its entirety, including these other key parts, the Palestinian people would still have their legal right to be free of the occupation, since this right does not depend on Oslo for its existence. Nonetheless, the partial supplementary normative weight of Oslo is significant for the reasons indicated above. Taking this away, then, would amount to the removal of an additional guarantee of compliance with a partial aspect of a right that has peremptory status. If the right itself is peremptory, then a guarantee of compliance has to enjoy the same status. Given this, the logic behind a rule such as that in VCLT Article 53 requires the rule to be applied in a way that does not have any knock-on negative consequences for the enjoyment of rights with peremptory status. This requires that only those provisions that violate peremptory norms are void, with the other provisions that provide for a partial realization of the rights that have peremptory status remaining in force.

25. The correct approach to these two areas of voidability, then, is the same for each: voiding those parts of Oslo that permit Israel to maintain its presence in the Palestinian territory and restrict Palestinian self-administration (including restricting the exercise of criminal jurisdiction) in particular, rather than the Accords as a whole.
26. It might be said that this approach would run counter to the principle of consent that is embedded in treaty law (and thus part of the "object and purpose" of the VCLT that needs to be accounted for when interpreting Articles 52 and 53), in that the state using illegal force to coerce another party to agree to things that are to its benefit, and which breach peremptory norms, necessarily gave its own agreement to the treaty on the basis of those benefits and breaches being in it. Thus, Israel cannot be considered to have consented to the Oslo Accords if those benefits and breaches are void. The Accords therefore have to be void in their entirety.
27. Such an approach is based on a particular logic concerning reciprocal, bilateral benefits and detriments in treaties that fails to account for the broader context in which some treaties, as here, are adopted, and the international law framework applicable in that broader context. When a treaty involves a deal between two parties enshrining reciprocal rights and obligations of those parties exclusively—i.e. rights and obligations operating mutually, being owed by one to the other, and vice versa—it is always a challenge to unpack the treaty and potentially void certain provisions of benefit to one party, bearing in mind how that party being given these benefits might be linked to its willingness to accept certain other parts of the treaty that are to its detriment. Any unpacking risks disrupting the cost/benefit balance that was the basis for that state agreeing to the treaty in the first place.
28. But treaties are rarely adopted in a legal vacuum whereby the matters they are concerned with are not already the subject of international legal rules. And the Oslo Accords were certainly not adopted in such a vacuum. Indeed, as ostensibly part of a process of dispute settlement, they must (UN Charter Arts. 1(1) and 2(3)) conform with the applicable general international law framework. If the Accords were void in their entirety, the position in international law would be (as it is) that the occupation is existentially illegal, meaning that Israel has no valid legal basis to exercise any authority anywhere in the Palestinian territory. And Israel would have a positive obligation to allow the Palestinian people to exercise full control over that territory. By contrast, if Oslo continues to operate with those provisions in it purporting to provide Israel legal cover to maintain certain forms of authority in the Palestinian territory, and to limit Palestinian self-administration,

including the exercise of criminal jurisdiction, being void, then from the standpoint of Israel, it would be in the same position as if the Accords were void in their entirety. Thus, the two different approaches—voiding the entire Accords, or only those parts of them that purport to legalize Israel's authority over parts of the Palestinian territory and limit Palestinian self-administration, including the exercise of criminal jurisdiction—are identical in outcome when it comes to Israel's rights to exercise authority over Palestinian territory. Understanding Oslo as a reciprocal 'bargain' involving Israel giving up some of its own rights in order to gain certain things that are the rights of the Palestinian people, and vice versa, is fundamentally at odds with the position the two parties were and are in when it comes to international law. Israel had no right to that which it agreed it would enable the Palestinian people to partly exercise. Whereas the Palestinian people already had the legal right to do that which Israel purported to partly grant them the ability to do. Voiding those parts of Oslo that purport to permit Israel to continue the occupation and restrict the Palestinian exercise of jurisdiction, including criminal jurisdiction, does not, therefore, invalidate Oslo in terms of the principle of consent. It would not unfairly deprive Israel of something it was given in exchange for something it gave up, because the thing it 'gave up' was something it had no right to in the first place, which it would be required to give up regardless of any obligation to do so under Oslo, and which *was already the rightful entitlement of the other party*.

VI. Conclusion

29. The Oslo Accords do not have any legal effect in limiting the scope of the jurisdictional entitlement of the State of Palestine to exercise criminal jurisdiction over Israeli nationals in Palestinian territory. Even assuming, then, *arguendo*, that the scope of the jurisdictional entitlements of the State of Palestine over Israeli nationals is somehow relevant to the scope of the Court's jurisdiction with respect to the territory of the State of Palestine when it comes to the same individuals, there is no Palestinian limitation excluding jurisdiction over such individuals in this territory to take account of here.

Respectfully submitted,

Ralph Wilde, Senior Counsel, League of Arab States, 6 August 2024, Cairo, Egypt