

## Implications for the ICC on the Resumption of Israeli-Palestinian Cooperation and the Relevance of the Oslo Accords in Current ICC Litigation



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*[Dov Jacobs, Joshua Kern and Daniel Reisner appear as amici curiae on behalf of the IJL in the ongoing proceedings before Pre-Trial Chamber I of the ICC in the Situation in Palestine. The IJL Brief before PTC I is available [here](#). The Pre-Trial Chamber's decision remains sub iudice.]*

On 19 November 2020, it was reported that the Palestinian Authority will resume civil and security cooperation with Israel. Hussein al-Sheikh, a member of the Fatah Central Committee, wrote on [Twitter](#) “that the bilateral agreements signed [with Israel], which are based on international legitimacy, are what governs this relationship.” The bilateral agreements Mr al-Sheikh is referring to are the Oslo Accords, whose operation was reportedly suspended in May.

This, and several further developments discussed below, point towards the conclusion that the Oslo Accords continue to bind the parties, and also continue to enjoy the support of the international community. This is a material issue for Pre-Trial Chamber I to consider as it continues to deliberate on the OTP's Request. More specifically, one can ask what the continuing force of the Oslo Accords means in the context of the ongoing ICC litigation? And how do these developments inform Pre-Trial Chamber I?

### **The Oslo Accords have remained operative throughout**

It is important to recall that the Oslo Accords have remained operative throughout 2020. As early as July, it was reported that the Palestinian authorities were pursuing an arbitration claim at the PCA against Israel which relies on the Oslo agreements' dispute resolution clause and tax provisions (see [here](#)).

On 17 November, Israel sent a letter to the PA ([here](#)), reaffirming that "the bilateral Israeli-Palestinian agreements continue to form the applicable legal framework governing the conduct of the parties." This letter was reportedly among assurances which led to the PA's announcement on the resumption of security coordination with Israel (see [here](#)). On 19 November, a meeting between Israeli and Palestinian officials reportedly took place in Ramallah (see [here](#)).

On the international plane, on 18 November, in a briefing to the Security Council ([here](#)), Special Coordinator for the Middle East Peace Process Nickolay Mladenov welcomed the PA's "decision to restart civilian and security coordination with Israel" and expressed his "appreciation to Israel for confirming that existing bilateral agreements continue to govern relations between both parties, particularly in the context of economic, security and civilian affairs". In referring to the conditions for resolving the conflict, Mr Mladenov said that "[b]oth sides should understand the importance of respecting the validity and continuing force of the framework that they have agreed to govern their relations. Although the existing agreements fall short of meeting the aspirations for peace, security and statehood for the Palestinian people, they provide the basic foundation without which even the beginnings of a return to meaningful negotiations will not be possible."

Meanwhile, several States expressed support for the resumption of cooperation between Israeli and Palestinian authorities on the basis of their bilateral agreements, either in the context of the Security Council meeting of 18 November 2020 ([here](#)) or in the context of public statements ([Estonia](#); [Romania](#); [Norway](#); [Spain](#); [UK](#); [EU](#)).

### **The Oslo Accords and the ICC**

There is little doubt that the status of the Oslo Accords is considered to be relevant by the Pre-Trial Chamber I judges. Indeed, on 26 May 2020, the Judges [invited](#) Palestine, Israel and the OTP to provide the Court with additional information about the legal consequences of a statement made by Mahmoud Abbas on 19 May in which it was suggested that the PLO was no longer bound by the Oslo Accords ([here](#)).

The Palestinian authorities provided an answer on 4 June ([here](#)), somewhat dismissive of the PTC invitation, and going as far as to suggest that the request was not clear (para. 5). The filing essentially recanted Mahmoud Abbas's statement and claimed that the Oslo Accords' termination was conditional on future Israeli action (para. 13).

### **The question of the Oslo Accords' legal effect**

That the parties have recently reiterated their commitment to the Oslo Accords needs to be understood and interpreted in context. In view of the apparent interest of the Pre-Trial Chamber I in the issue, it bears recalling why the Oslo Accords remain relevant. Given that this was an issue that the IJL devoted considerable space in its *amicus* brief before the Pre-Trial Chamber (paras. 5, 47-50, 52, 62-66, 67-70), echoed in comments made by Ambassador Dennis Ross both before the Pre-Trial Chamber ([here](#)), and online ([here](#)), as well as by many other *amici*, it is also worth considering why the Pre-Trial Chamber might be interested in the issue.

The OTP and the Palestinian authorities claim that the Oslo Accords should be given little consideration (if any) in determining whether the ICC can exercise jurisdiction. In its response to the *amicus* briefs in April, the OTP argued that the Oslo Accords are best viewed as a transfer or delegation of Palestinian enforcement jurisdiction. According to the OTP, because sovereignty resides in the Palestinian people, plenary prescriptive jurisdiction in the territory resides with the Palestinian people's representatives alone (paras. 70, 73). Accordingly, the OTP claims, the Oslo Accords cannot limit that Palestinian plenary prescriptive jurisdiction.

The Oslo Accords reflect, first and foremost, that the question of the allocation of sovereignty over the territories is left to be addressed in bilateral negotiations leading to a permanent status agreement. In the meantime, the Accords created the Palestinian Authority and arranged for the transfer of some limited authority from Israel to the Palestinian Authority, expressly preserving Israel's residual powers.

The Oslo Accords, like the Rome Statute, are a part of the *delicate mosaic* which seeks to accommodate the Palestinian aspiration for national liberation with the Jewish people's historical claim and the Israeli security dilemma. Article I(1)(a) of Annex IV of the Interim Agreement clarifies that the Palestinian Authority will not have jurisdiction – in terms of the *prescription* of criminal law, nor any other type of territorial jurisdiction – over Area C and settlements. Article I(2)(b) of the Interim Agreement states that “Israel *has* sole criminal jurisdiction” over offences committed in Areas A and B by Israelis (emphasis added). The fact that the latter provision states that Israel “has” (as opposed to “shall exercise”) such jurisdiction confirms that the Israel remains the sole authority with jurisdiction to prescribe criminal law over Israelis in the West Bank, Gaza Strip, and East Jerusalem. At the same time, some powers over Areas A and B, and over non-Israelis, were transferred from Israel to the Palestinian Authority. This allocation of authority has been implemented on the ground for the last 25 years by both sides. The Oslo Accords, the same accords which established the Palestinian Authority, reflect the absence of a Palestinian (plenary) prescriptive authority over the disputed territory (see IJL Brief, paras. 47-51, 64-65; see also Ambassador Dennis Ross' analysis [here](#)).

## **Implications for the ICC**

As submitted in March by the IJL ([here](#), paras. 49-50, 62-70), from a legal standpoint the Oslo Accords – and specifically the Interim Agreement of 1995 – define the respective legal competencies of both the Israeli and Palestinian authorities in the territories, including (and critically from the ICC’s perspective) in the realm of criminal jurisdiction. Prior to the Accords, no Palestinian authority had exercised jurisdiction over or within the territory, and any jurisdiction the Palestinian Authority now exercises is the direct result of the Accords (see IJL Amicus Brief, paras. 62 to 66). This is an authority problem, not an enforcement problem. The OTP’s suggestion that the Oslo Accords simply entail the transfer of criminal enforcement jurisdiction from Israel to the Palestinian Authority, and that a State of Palestine has a plenary prescriptive jurisdiction in the territories, cannot be supported by the historical background or the text of the agreements themselves.

To ground a basis for the exercise of jurisdiction in the Situation, the OTP is essentially asking the PTC to disregard these legal arrangements, which remain in force, inviting the Judges to act in a way that undermines them. Yet internationally binding agreements should be respected and honoured, and there is no doubt that the international Judges of PTC I, who play a crucial role in promoting the rules based international order, will be mindful of this imperative when issuing their decision.

Disregarding the Oslo Accords in the manner suggested by the OTP would also run counter to recent developments, which reflect a continuation of and adherence to the legal arrangements agreed by the parties. In particular, the past several months have witnessed significant breakthroughs in the Middle East Peace Process, with Israel having signed peace agreements with and normalised relations with the UAE, Bahrain, Sudan, and Morocco, with potentially more to come.

The ICC does not operate in a political or diplomatic vacuum. These developments demonstrate an important and, potentially, unique opportunity is presented by this moment to both Israeli and Palestinian leaderships. President-elect Biden will shortly be inaugurated and will surely wish to advance negotiations between the Palestinian and Israeli sides. The Oslo Accords are a critical factor in maintaining a legal framework to move such negotiations forward. The moment further emphasises the need for an approach that respects the parties’ agreement and is careful not to disturb the prospects for further advancement in Israeli-Palestinian relations.

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