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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

IJL observations submitted pursuant to "Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence" issued by Pre-Trial Chamber I on 22 July 2024

Source: **International Association of Jewish Lawyers and Jurists**

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I. Introduction

1. The IJL submits the following observations pursuant to the Pre-Trial Chamber's "Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence" of 22 July 2024.[1]

2. The unprecedented request by the Prosecutor against the leaders of the State of Israel, a democratic State with a robust and well-respected system of criminal law enforcement, including multifaceted legal oversight mechanisms led by its Attorney General, raises multiple legal and factual issues. Nonetheless, within the space constraints delineated by the Court, the IJL focuses on the following two observations.

II. Observations

1. The arrest warrant requests under consideration in the current proceedings fall outside the scope of the currently opened investigation in this situation

3. The Rome Statute defines a clear procedural framework delineating the capacity of the Prosecutor to investigate crimes falling within the jurisdiction of the Court. The Rome Statute was drafted in this way to make sure that there were limits to prosecutorial discretion to investigate. This is why Article 13 provides for three "trigger mechanisms" that permit the Court to exercise jurisdiction. In each of these cases, the Prosecutor's capacity to investigate is limited to the situation referred (in the context of Article 13(a) and 13(b)) or the scope of the investigation authorised by the Pre-Trial Chamber (in the context of Article 15(4)). The "situation" defines the objective framework within which the Prosecutor operates, as noted by the OTP itself: "the establishment of the Court's jurisdictional scope in accordance with article 53(1)(a) defines in objective terms the parameters within which the Office conducts its investigative activities, i.e. the 'situation.'"[2] In essence, the Prosecutor does not have authority to open an investigation that goes beyond the scope of the situation.

4. While the Rome Statute does not define the term "situation," the Court's case law consistently provides that a situation is defined by certain parameters. Situations "are generally defined in terms of temporal, territorial and in some cases personal parameters."[3] The importance of defining the scope of a "situation" has been highlighted by PTC I in the DRC

[1] ICC-01/18-249.
[2] OTP's Policy Paper on Preliminary Examinations, November 2013, para. 41.
[3] ICC-01/04–101-tEN-Corr, para. 65.

Situation: "Since the submission of a situation to the Court, whether by way of referral or as a consequence of the authorisation to a *motu proprio* investigation, triggers and determines the scope of its jurisdiction according to temporal, territorial and material parameters, the scope of any situation should be identified."[4] The PTC added that "the need for such identification is rooted *inter alia* in the principle of complementarity as the paramount principle governing the relationship between the Court and national jurisdictions, according to which the Court is meant to complement, rather than replace, national jurisdictions."[5]

5. It is therefore incumbent on the Prosecutor to ensure and demonstrate that all procedural steps taken, such as the request for an arrest warrant, fall squarely within the scope of the "situation." In this framework, the IJL observes that the requests for arrest warrants in this case do not fall within the scope of the situation as opened in March 2021.

6. Factually, the requests arise from a different factual context to the one underlying the investigation that is currently open. Indeed, indications on the scope of the "situation" opened in March 2021 can be found in documents produced by the OTP. The situation concerns the alleged conduct of Israeli nationals in the context of its control of the West Bank and East Jerusalem, and operations in the Gaza Strip in 2014 and 2018. In that context, the Prosecutor identified certain conduct that it considers could amount to crimes within the material jurisdiction of the Court,[6] which is distinct from the conduct which the Prosecutor now seeks to charge. Indeed, the IJL would observe that while there have been past events involving hostilities between Israel and Palestinian armed groups, there has been a radical change of circumstances. In essence there is now a new armed conflict, which involves several fronts. It has been instigated by the unprecedented armed attack by Hamas and other terrorist organizations against Israel on 7 October 2023, with over 1,200 casualties (mostly civilians) exclusively on the territory of Israel, involving new categories of crimes (for example widespread and systematic sexual and gender based violence, torture, and taking of hostages), which in turn triggered a specific response by Israel to address these particular events that has led to the Prosecutor's allegations of starvation and population displacement. The attack from the Gaza Strip was immediately followed with continuous and ongoing attacks against Israel from Lebanon, Syria, Yemen, Iraq and Iran, and by the latter's various proxies.

[4] ICC-01/04-575, para. 8.
[5] ICC-01/04-575, para. 9.
[6] Conduct taking place during the 2014 operation in Gaza, conduct "in the context of Israel's occupation of the West Bank, including East Jerusalem" and conduct in the context of the March 2018 demonstrations in Gaza: ICC-01/18-12, para. 93-96; Situation in Palestine, Summary of Preliminary Examination Findings, 3 March 2021.

7. The "situation" that concerns us today is therefore not the situation of Palestine as defined by the Prosecutor in its decision to open an investigation in March 2021, but it is a new "situation" triggered by the events of 7 October 2023. Similarly, the IJL notes that the ICJ itself took the same position in its recent advisory opinion, stating that the "situation in the Gaza Strip has undergone a fundamental change following the murderous attacks committed by Hamas from Gaza on Israeli territory on 7 October 2023 and Israel's large-scale military operation that followed."[7] The ICJ resultantly considered that the response of Israel to the attacks on 7 October by Hamas and other armed groups could not be considered as part of the "ongoing" or "continuing" practices it was addressing in its opinion and it therefore did not address this response in its advisory opinion.[8]

8. Temporally, the IJL would observe that the events covered in the requests postdate the opening of the investigation in March 2021. This is apparent from the OTP's press release which sets 7 October 2023 as the starting date for the temporal scope of the current application for arrest warrants.[9] In such circumstances, it is incumbent upon the Prosecutor to demonstrate why examination of cases and facts that arose after the opening of the investigation in the situation falls within the scope of the previously opened situation because, by definition, this was not addressed in the decision to open the investigation.

9. This is particularly necessary as the language of the Rome Statute indicates that the opening of an investigation is contingent on there being "information available to the Prosecutor" that provides "a reasonable basis to believe that a crime within the jurisdiction of the Court *has been or is being committed*" (Article 53(1)(a) of the Rome Statute), i.e. that the alleged crime is complete or is ongoing at the time that the investigation is opened. This view has been supported in the case law,[10] and most Chambers have *de minimis* required, when it comes to events post-dating the opening of an investigation, that there be a sufficient link with the previously opened investigation.[11]

10. It follows that the situation opened on 3 March 2021 does not confer automatic authority on the Prosecutor to request the issuance of arrest warrants for events which have not been the

[7] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, Joint Opinion of Judges Tomka, Abraham and Aurescu, para. 14.
[8] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 81.
[9] Statement of ICC Prosecutor Karim A.A. Khan KC: Application for arrest warrants in the situation in the State of Palestine, 20 May 2024, para. 1.
[10] ICC-01/09-19, para. 206-207.
[11] *See* for example, ICC-01/04-01/10-451.

object of a preliminary examination and a decision to open an investigation into a new situation,[12] which are the prior procedural requirements under the Rome Statute. The Prosecutor either needs to demonstrate the sufficient link to the previously opened investigation or open a new investigation. Any other interpretation of the Rome Statute would confer on the Prosecutor unlimited authority to initiate open-ended, and indefinite, investigations, without needing to demonstrate that prior appropriate legal and factual analysis has been undertaken and fundamental jurisdictional requirements are met.

11. This is all the more necessary to guarantee that the Prosecutor respects the principle of complementarity, including his notification obligations under Article 18 and States' rights to make a request for deferral under this Article. If the facts are posterior to the decision to open an investigation in a situation, they will logically not have been covered in any initial Article 18 notification and therefore the States will not have been able to mount an informed challenge under Article 18(2). The purpose of Article 18 is to allow States to provide useful information to the court and the OTP about ongoing domestic proceedings in order to assess the admissibility of the cases: "the authors of Article 18 wanted to assign to it a triple objective: underscore once again the crucial importance of the complementarity of the Court, allow States to exercise early their right to investigate and prosecute, and thus avoid parallel investigations or prosecutions, and finally to make it a tool to control the powers of the Prosecutor."[13]

12. It would empty Article 18 of purpose if the Prosecutor is able to notify States of certain investigative directions at the time an investigation in a situation is opened, but is then free to investigate entirely new facts postdating the notification without giving States a chance to use the procedural tools of Article 18(2) on the basis of an adequate notification. There is no such adequate notification in the current proceedings; the facts and circumstances of the Prosecutor's request for arrest warrants were not, and could not, have been envisioned in the decision to open the investigation in the situation in March 2021.

2. The effects of the Oslo Accords on the capacity of the ICC to exercise jurisdiction

2.1. Under Article 12(2) of the Rome Statute, the Court's authority derives from the delegated criminal jurisdiction of States

13. Article 12(2)'s preconditions establish a nexus between the permissible exercise of ICC jurisdiction and the legal status of the Court's States Parties, their territory, and their nationals.

[12] ICC-01/04-01/10-1, para. 6.
[13] Sana "Article 18", in Fernandez, Pacreau et Ubéda-Saillard, Statut de Rome de la Cour pénale internationale, Commentaire Article par Article, 2nd Edition, 2019, p. 902.

The source of the Court's authority is the delegated sovereign authority of States to prescribe, adjudicate, and enforce criminal law.[14] The OTP has also recognised that the Court's jurisdiction derives from the existence of a "sovereign ability to prosecute."[15]

14. These conclusions flow from the position that exercise of an international criminal court's jurisdiction is, effectively, the exercise of sovereign power (namely the power residing in the sovereign to adjudicate criminal law and to punish its violations).[16] It further explains why the exercise of jurisdiction over international crimes by an international criminal tribunal is preconditioned on State or Security Council consent.

15. Without effective State consent to delegation of the sovereign ability to prosecute (either to the Rome Statute or the UN Charter), the Court possesses no authority to exercise jurisdiction over Article 5 conduct.[17] The "delegation" model therefore derives from the text of the Rome Statute read with the law of international organisations, as well as the consent principle.[18]

16. The legal basis of the "delegation" model cannot be displaced by invoking the "different character" of international criminal tribunals.[19] To claim that international courts have a "fundamentally different nature" to domestic courts does not change the position that the source of authority for these tribunals derives from States or the Security Council, given that international criminal tribunals are not created *ex nihilo*. In other words, whatever the proclaimed nature of international tribunals, it will always be necessary to determine the scope and limits of the tribunal's jurisdiction, as consented to by States or the Security Council. In the *Bashir* Appeals Judgment, the Appeals Chamber also relied on an additional basis to exercise jurisdiction; namely, the fact that the Darfur situation had been referred to the Court through a

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[14] *See e.g.* D. Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", 1 J. INT'L CRIM. JUST. (2003) 618, at 621-634. T. de Souza Dias, "The Nature of the Rome Statute and the Place of International Law Before the International Criminal Court", 17 J. INT'L CRIM. JUST. 507, 515 (2019). A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 EJIL (1999) 144, 160.

[15] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, para. 49, 9 April 2018. *See also* ICC-02/17-7-Red, para. 45.

[16] D. Sarooshi, International Organizations and their Exercise of Sovereign Powers (Oxford 2005), 5. *See also* M. Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition', EJIL Vol. 30 No.1, 17-52, 42-43 (Although "sovereignty and property arose from the same acts, they were not to be confused. What was acquired as 'sovereignty' was 'jurisdiction' either in a territorial or a personal sense") *citing* H. Grotius, DIBP, bk II, ch. III, s.IV, 456-457.

[17] This explains why Professor Ambos, while supporting the notion of the *ius puniendi* as a unifying theory of international criminal law, also recognises that Article 12(3) is premised on a delegation-based theory of jurisdiction. *See* K. Ambos, "Palestine UN Non-Member Observer Status and ICC Jurisdiction", EJIL Talk!, 6 May 2014.

[18] Article 21(1) of the Rome Statute. *See also* e.g. J. Klabbers, *An Introduction to International Institutional Law* (Cambridge 2009), 184-186.

[19] *See* L. N. Sadat, "The Conferred Jurisdiction of the International Criminal Court" (hereinafter "Sadat"), 99 NOTRE DAME L. REV. 549, p.593 *citing* ICC-02/05-01/09-397-Corr, para. 115.

Chapter VII Security Council Resolution.[20] In the current proceedings, there is no such Security Council resolution which would provide a legal basis to exercise jurisdiction in the absence of a State's consent to delegation of their sovereign ability to prosecute criminal conduct.

17. The IJL would observe that those who argue that international tribunals are of a special nature never define this category from a legal perspective and rely on a moral statement that an "international court" is one that acts "in the name of the international community as a whole," without further defining this latter concept.[21] It is not sufficient for States creating an "international tribunal" simply to claim to have a universalist ambition,[22] which is not realised, without any attempt to ground this statement in public international law rules or any explanation of how such a moral claim can affect the legal nature of an international organisation.

18. There is no legal basis under international law for the submission that States are permitted to confer on an international organisation powers that they do not themselves possess. As a foundational matter of international criminal law, such a submission is also contrary to the principle expressed in the Nuremberg Judgment holding that, in consenting to the exercise of an international criminal jurisdiction, States "do together what any one of them might have done singly."[23]

19. Finally, some argue that these institutions, including the Court, are "more than the sum of [their] parts" as they have "independent international legal personality" and are able to "determine the proper contours of their own jurisdiction."[24] However, there is no inconsistency between a conception of the Court as possessing an objective legal personality and acknowledging that it possesses a limited statutory and jurisdictional authority which preconditions the exercise of its jurisdiction, which ultimately derives from the delegated authority of States and is codified in the Rome Statute. States' consent to delegation of their sovereign ability to prosecute is the legal source, directly or indirectly, of the Court's authority.

2.2. The absence of a plenary Palestinian criminal jurisdiction

20. The Pre-Trial Chamber grounded its earlier conclusion that Palestine qualifies as "[t]he State on the territory of which the conduct in question occurred" for the purposes of Article

[20] ICC-02/05-01/09-397-Corr, para. 139-144.
[21] *See* Sadat, p.594 *citing* ICC-02/05-01/09-397-Corr, para. 115.
[22] ICC-02/05-01/09-397-Anx1, para. 57.
[23] Judgment, IMT Nuremberg, 30 September 1946, 22 IMT 447.
[24] Sadat, 555 *citing* C. Stahn, Response: The ICC, Pre-existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton, 49 VAND. J. TRANSNAT'L L. 443, 447 (2016).

12(2)(a) of the Statute on the basis that Palestine is a State Party to the Rome Statute.[25] It did not find that Palestine is constituted as a State under general international law.[26] Nor does the Palestinian people's right to self-determination constitute Palestine as a State.[27] The right to self-determination is insufficient to constitute, and does not equate to a sovereign right to exercise a plenary prescriptive, adjudicative, or enforcement jurisdiction with respect to criminal law. The following points are made on this basis.

21. As Palestinian jurisdiction has never been plenary over the West Bank, Gaza Strip or East Jerusalem, the source of Palestinian authority to prescribe, adjudicate, and enforce criminal law is the Oslo Accords.[28] The Oslo Accords do not simply limit the exercise of Palestinian criminal jurisdiction, or simply represent "national legislation of the territorial state."[29] Rather, the Oslo agreements *constituted* the Palestinian Authority and delegated a limited authority to it. This reflects the Palestinian autonomy that the Oslo process constituted, and did not simply declare.[30] On the OTP's analysis, Palestine was not a "State" under general international law in 2020.[31] There has been no material change in circumstances affecting that conclusion since then.

22. The Interim Agreement clarifies that Palestinian authorities have no jurisdiction over Israelis in any sphere, including the sphere of criminal jurisdiction.[32] Pursuant to its Article I(1)(a) of Annex IV, the Palestinian authorities' criminal jurisdiction is limited to offences committed "by Palestinians and/or non-Israelis" in the territory under its jurisdiction, namely Areas A and B in the West Bank and the Gaza Strip territory.[33] Pursuant to Article I(2)(b) of

[25] ICC-01/18-143 05-02-2021 1/60 EC PT.
[26] *Id.*, para. 93. Nor has this been the position of the OTP. *See also*, e.g. Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12 (hereinafter "Prosecution Request"), para. 42.
[27] *See* e.g. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024 where, notwithstanding the Court's opinion that "Israel has the obligation not to impede the Palestinian people from exercising its right to self-determination" over the West Bank, Gaza Strip and East Jerusalem (para. 262), and that the Palestinians have a *right* to an independent and sovereign State over the entirety of that territory (para. 237), the Court did not conclude that Palestinian statehood had in fact materialised.
[28] The West Bank, Gaza and East Jerusalem have not been governed as a single, territorial unit since 1918. *See* Written Statement submitted by the International Association of Jewish Lawyers and Jurists under ICJ Practice Direction XII in the Advisory Proceedings on the "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem" as initiated by UNGA A/RES/77/247, para. 21, Annex 1.
[29] *Contra* Sadat, 582.
[30] *See* J. Singer "The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects" (1994) 1 Justice 4.
[31] Prosecution Request, para. 121.
[32] *See* Interim Agreement, Article XVII1(a); Annex IV, Articles 2(c), XVII 4(b), I1(a), I2(b), I4(a), II2(c).
[33] Note that Article I(1)(a) also excluded from the territorial jurisdiction of the Palestinian Authority Settlements and the Military Installation Area in Gaza. However, Israel withdrew from the latter in 2005.

Annex IV, "Israel has sole criminal jurisdiction" over offences committed in the territory under Palestinian authority by Israelis.[34] The legal fact that Israel "has" (as opposed to "shall exercise") such jurisdiction confirms that Israel remains the sole plenary authority with jurisdiction to prescribe criminal law over Israelis in the West Bank, Gaza Strip, and East Jerusalem.

23. This is an authority limitation, not an enforcement one.[35] The functional criminal jurisdiction that Palestinian authorities exercise over Palestinians in Areas A and B in the West Bank and in the Gaza Strip is not sufficient to establish a plenary criminal jurisdiction conferring authority to delegate a jurisdiction which those authorities do not possess.[36]

2.3. Binding nature of the Oslo Accords

24. The Oslo Accords are a part of the mutually agreed, and internationally endorsed, legal framework for resolving the Israeli-Palestinian conflict. They are bilateral international agreements entered into between the Israeli and Palestinian authorities, as subjects of international law, pending a final settlement between them.[37] The International Court of Justice,[38] the Security Council,[39] the General Assembly,[40] the Quartet, the Secretary-General's special envoy, and subsequent agreements between the parties,[41] have all referred to the Oslo Accords and their compatibility with applicable UN resolutions.[42]

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[34] Article I(1)(b) of the Protocol Concerning Legal Affairs appended to the Interim Agreement as Annex IV.
[35] *Cf.* C. Stahn, 'Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine', 49 Vanderbilt Journal of Transnational Law 443 (2016), p.446, 450.
[36] Attorney General of the State of Israel, *The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation in Palestine"*, para. 35.
[37] Israel and the PLO specifically reserved rights, claims and positions regarding, *inter alia*, borders pending the outcome of the permanent status negotiations. Interim Agreement, Art. XXXI.6. See also J. Stone, Of Law and Nations (London 1974), p. 79 and pp. 90-95.
[38] *See Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, paras. 78, 133, 263. *See also* Joint Declaration of Judges Nolte and Cleveland, paras. 4, 8; Declaration of Judge Charlesworth, para. 19; Declaration of Judge Tladi, para. 35; Dissenting Opinion of Vice-President Sebutinde; Joint Opinion of Judges Tomka, Abraham and Aurescu, para. 7, 39-49, 55-58.
[39] *See* Security Council, Resolution 1850, pp. 1-2; Security Council Resolution 2334, p. 2.
[40] G.A. Res 67/19.
[41] Israel-Palestinian Liberation Organization, Wye River Memorandum, 1998, 37 ILM 1251 (1998); Sharm-el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 1999, 38 ILM 1465 (1999); Letter Dated 7 May 2003 from the Secretary-General addressed to the Security Council, Annex: A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, U.N. Doc. S/2003/529, 30 April 2003; Aqaba Joint Communique, 26 February 2023, *available at* https://www.state.gov/aqaba-joint-communique/.
[42] See *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18-143 05-02-2021 1/60 EC PT, 5 February 2021, Judge Péter Kovács' Partly Dissenting Opinion (hereinafter "Kovaćs"), paras. 289-291. See also Dissenting Opinion of Vice-President Sebutinde, para. 27.

25. The Interim Agreement states that the Oslo process was "irreversible."[43] The Interim Agreement does not contain a termination clause and provides that neither "side shall initiate or take any step that will change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations."[44] In the absence of termination clauses, general international law presumes that an international agreement remains in force unless either: (1) the parties intended to permit denunciation or withdrawal; or (2) a right of denunciation or withdrawal may be "implied by the nature of the treaty."[45]

26. As a matter of international law, international acceptance, and the parties' reaffirmation and own actions, the provisions of the Oslo Accords continue to govern relations between Israeli and Palestinian authorities. That the parties may claim the other to be responsible for violations of the Accords does not change this; rather, such conduct affirms that the parties continue to view the framework as binding. In Israel, numerous Supreme Court decisions support the view that Israeli courts recognise the continuing legal effect of the Oslo Accords.[46] In areas controlled by the Palestinian Authority,[47] Courts have also confirmed their legal effect. In practice, both the Israeli and the Palestinian authorities rely on the Oslo Accords in their relations, including as they relate to the division of powers and responsbilities between them.

[43] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), hereinafter (Interim Agreement), Preamble, para. 4.
[44] Interim Agreement, Art. XXXI(7).
[45] In any event, Article 70 of the Vienna Convention on the Law of Treaties shows that termination does not affect any right, obligation or "legal situation" of the parties created through the execution of the treaty prior to termination. VCLT, Article 70(1)(b) and Article 71(2)(b). Examples of such "legal situations" are the delimitations of borders, territorial arrangements, and recognitions. G. Fitzmaurice, Special Rapporteur, Law of Treaties – Second Report, Document A/CN.4/107, ILC Yearbook, Vol II (1957) 16, 67. Although the Vienna Convention on the Law of Treaties does not cover agreements between a State and a non-State subject on a conventional basis, it informs us as to the standing of such agreements under customary law, and supports the conclusion that the Oslo Accords remain in force and effect. VCLT, Article 56(1)(b). *See* Y. le Bouthillier and J.F. Bonin, 'Art.3 1969 Vienna Convention' in O. Corten and P. Klein (eds) The Vienna Conventions on the Law of Treaties: A Commentary (2011), p. 74, paras. 25, 30.
[46] *Jamil Hossein Hamdan Abu Sarhan v Commander of the IDF in the West Bank*, 31 August 2023, HCJ 5585/21; *The Association of the Conference of Islamic Sciences and Education v. Jerusalem Assessing Officer*, 27 October 2021, HCJ 2079/20; *Silwad Municipality v. Knesset*, 9 June 2020, HCJ 1308/17; *Hevron Municipality v. State of Israel*, 30 June 2019, HCJ 358/18; *Yesh Din v. IDF Commander in the West Bank*, 26 December 2011, Israeli High Court of Justice (HCJ) 2164/09; *Hof Aza Regional Council v. The Knesset*, 9 June, 2005, HCJ 1661/05; *International Legality of the Security Fence and Sections near Alfei Menashe*, 15 September 2005, HCJ 7957/04; *Zinbakh v. IDF Commander in Gaza*, Judgment, 28 May 2002, HCJ 4363/02*; Gusin v. IDF Commander in Gaza*, HCJ 4219/02, 56(4) P.D. 608 (2002); *Dr. Ahmed Tibi v. The Government of Israel and Others*, Judgment, 18 October 1995, HCJ 6230/95 (unpublished) *See also* Kovaćs, para. 292.
[47] 'In the Name of the Palestinian People: Court Abrogates Oslo Accords', The Legal Agenda (24 February 2015), available at https://www.legal-agenda.com/en/article.php?id=3062. *See also* Kovaćs, paras. 293, 307.

2.4. Protections afforded to the Palestinian people under the Fourth Geneva Convention do not obviate the absence of plenary Palestinian criminal jurisdiction

27. Parts II and III of the Fourth Geneva Convention enumerate protections to "civilian persons." These protections do not include the "duty to prosecute" grave breaches pursuant to Article 146(2) of the Fourth Geneva Convention (listed in Part IV, relating to the "Execution of the Convention"). The duty to prosecute grave breaches has no relationship – in terms of conferring a specific protection on civilians – with Articles 7, 8 or 47 of the Fourth Geneva Convention; it cannot be extended to conferring an authority to delegate criminal jurisdiction to an international criminal court that otherwise would not exist. As the OTP has noted, the Geneva Diplomatic Conference "specially wished to reserve the future position" with respect to whether Article 146(2) of the Fourth Geneva Convention extended to surrender to an international criminal court *with jurisdiction* ("competence… recognized by the Contracting Parties").[48] Article 146(2) of the Fourth Geneva Convention does not displace the determinative nature of the Oslo Accords with respect to whether preconditions to the exercise of jurisdiction under Article 12 are satisfied. This is because it does not resolve the authority problem which arises from the absence of a plenary Palestinian criminal jurisdiction over the West Bank, Gaza Strip, and East Jerusalem.

Respectfully submitted,

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Hila Kugler Ramot Dov Jacobs Joshua Kern

Dated this 6th day of August 2024

At Tel Aviv, Israel, The Hague, Netherlands and London, England

[48] Prosecution Request, n. 603 *citing* ICRC Commentary to Article 146 GCIV, p. 593.