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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

Written observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence

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Introduction

1. Pursuant to the order of the Pre-Trial Chamber of 22 July 2024, we respectfully submit our position on some of the questions of jurisdiction and admissibility pending before the Court in connection with the request for arrest warrants submitted by the Prosecutor on 20 May 2024 in case ICC-01/18.
2. One of us has already discussed in 2010 in an academic publication the impact of the Oslo Accords on the Court's jurisdiction.[1] We offer below additional observations, on the basis of our international law expertise and longstanding research on different aspects of the Israeli-Palestinian conflict, regarding the effect of legal and factual developments since 2010 on the Court's jurisdiction. We will also address, in brief, an important question of admissibility relevant to the current proceedings.

I. The general question of ICC jurisdiction v. the specific Oslo Accords question

3. The question of impact of the Oslo Accords on the Court's jurisdiction relates to a broader controversy surrounding the legal status of the State of Palestine under international law. Some aspects of that broader question – i.e., the very capacity of Palestine to authorize the Court to exercise territorial or personal jurisdiction – were reviewed and decided by the Pre-Trial Chamber in its decision of 5 February 2021. Other aspects – most significantly, the specific impact of the Oslo Accords on the Court's *scope* of jurisdiction, were explicitly left undecided by the majority judges.[2] By contrast, judge Kovács held that the *scope* of jurisdiction is seriously affected: "the Prosecutor may exercise her investigative competences under the same circumstances that would allow Palestine, as a State Party, to assert jurisdiction over such crimes under its legal system, namely by duly taking into account the repartition of competences according to the Oslo Accords".
4. Note that the aforementioned 2010 JICJ article offered a similar distinction between the general capacity of Palestine to accept the Court's jurisdiction (which the article supported), and Palestine's specific power to authorize the Court to deal with certain categories of cases that the Oslo Accords explicitly excluded from its own scope of competencies (which the article questioned).[3]

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[1] Yuval Shany, In Defence of Functional Interpretation of Article 12(3) of the Rome Statute, 8 *Journal of International Criminal Justice (JICJ)(2*010) 329–343.

[2] ICC-01/18, Pre-Trial Chamber decision of 5 Feb. 2021 ("[T]he Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the *scope* of the Court's territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments")(emphasis added).

[3] Shany, *supra* note 1, at 342-343 ("It is possible to read Article 12(3) of the ICC Statute in a functional manner and to construe its reference to a 'State which is not a Party to this Statute' as encompassing also certain quasi-states, such as the PNA [Palestinian National Authority]. This is because the differences between 'ordinary' states and certain quasi-states do not appear to be particularly relevant for the purposes of applying criminal jurisdiction under the ICC Statute... At the same time, the ability of quasi-states such as the PNA to delegate jurisdiction is sometimes limited by international agreements, especially those that facilitated their creation. In our case, the Oslo Accords that established the PNA deprived it from exercising jurisdiction over Israelis, and

II. The question of Palestinian statehood

5. The status of the State of Palestine under international law has long been a matter of international controversy. A majority of states has formally recognized it as a state, but such recognitions have not been universal in scope. Furthermore, many acts of recognition have been ambiguous in nature.[4] Whereas the UN General Assembly recently voted in support of the proposition that conditions for statehood and UN admission had been met,[5] the Security Council has not accepted to date the Palestinian admission request, and the most recent report of its Admission Committee shows there is still lack of unanimity among members on the question of whether all conditions for statehood have been met.[6] The ICJ, in its recent advisory opinion, refrained from expressing a view on the matter.[7]
6. Two related legal questions are at the heart of the Palestinian statehood debate: a) whether a new state can be *established* without exercising effective control over *any* part of its territory (the West Bank, where the Palestinian Authority (PA) operates, is under Israeli belligerent occupation – i.e., under Israeli effective control – and the PA does not exercise any governmental power in the Gaza Strip); and b) whether the PA, created with limited powers pursuant to the Oslo Accords, legally meets key conditions of the 1933 Montevideo Convention– an effective government having the capacity to enter into international relations.[8]
7. The ICJ in its recent advisory opinion, reaffirmed on a number of occasions the right of Palestinians to self-determination, including the establishment of an independent and sovereign Palestine state,[9] and called for removing impediments towards realization of this right. This legal position implies, however, that the ICJ considers that the right to an independent state has not yet been realized.

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seriously restricted its ability to conduct foreign relations. Acceptance of ICC jurisdiction by way of delegation must respect these limitations, both conceptually (an entity cannot delegate more rights than it possesses), and in practice in order to minimize the disruptive effects of the exercise of ICC jurisdiction on the international legal system").

[4] For a short social media comment on the mixed nature of the recognitions of Palestine, see https://twitter.com/StefanTalmon/status/1793574386571596081. Note that 94 out of 145 international recognitions of the State of Palestine predate the establishment of the Palestinian Authority, and do not include an up-to-date legal evaluation of the conditions for statehood .

[5] Resolution A/ES-10/L.30/Rev.1 (2024), para. 1.

[6] UN Doc. S/2024/313 (2024). The main legal arguments in favor and against were summarized in UN Doc. S/2011/705 (2011).

[7] Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, ICJ advisory opinion of 19 July 2024. We note that one ICJ judge – judge Gómez-Roblado – wrote a separate opinion in support of Palestinian statehood, and criticized the rest of the Court for not seizing the opportunity to pronounce on the matter.

[8] Montevideo Convention on the Rights and Duties of States, 26 Dec. 1933. For a discussion of the "effective government" and "capacity to enter international relations" requirements, see J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, 2007) 55 *et seq*. Crawford was sceptical of the claim that the PA can already be regarded as a state. *Ibid*, at pp. 442-446. The reliance on Crawford by judge Gómez-Roblado in para. 13 his separate opinion, is therefore problematic: Gómez-Roblado reads Crawford's proposition regarding control over *part* of the territory being sufficient as supportive of his position that lack of control over *any* part of the territory suffices. He also cites Crawford's statement on *lex ferenda* re the creation of new states that do not meet objective conditions due to illegal acts by other states, in support for his position on *lex lata*.

[9] ICJ advisory opinion of 19 July 2024, at paras. 237, 283.

8. The uncertainty regarding the existence of a Palestinian state under international law– as opposed to the Palestinian *right* to such as state, which we consider to be beyond legal dispute – implies that international decisions regarding the actual treatment of the "State of Palestine" will be determined on a functional basis, in a cases by case manner, often on the basis of the specific legal and political positions of the relevant interlocutors: Some states will treat it in their bilateral relations as if it were a state, whereas others will treat it only as a 'quasi-state' with certain legal capacities (like they would treat other special entities, such as Taiwan); some international organizations will admit it as a member state, while others will refuse to accord it full membership (e.g., the UN). The decision by ICC organs to confer membership rights on the Palestinian entity follows the same functional logic. Still, the Pre-Trial Chamber was careful to note in its 2021 decision that bestowing jurisdiction on the Court under article 12 of the Statute does not "require a determination as to whether that *entity* fulfils the prerequisites of statehood under general international law" (para. 93), and that the "Court is not constitutionally competent to determine matters of statehood that would *bind* the international community" (para. 108)(emphasis added).
9. We do not question the decision of the Court to accept, on a functional basis, the accession of Palestine to the ICC Statute. Still, we are of the view that the unique features of the Palestinian political entity (i.e., the doubts concerning its fulfilment of traditional criteria for statehood), invite a careful evaluation of its legal powers to refer to the Court certain matters – especially, when such legal powers implicate the legal rights and interests of third states that do not consider Palestine to meet the conditions for statehood under international law, and which have not joined themselves the ICC Statute (and are therefore not legally *bound* by any *inter-partes* effect of decisions taken by ICC organs).

III. The Oslo Accords

10. As Crawford explains, the Oslo Accords (1993-1998) created the PA as an "interim local government body with restricted powers" which "derive from arrangements between Israel and the PLO which neither the Authority nor its people can alter, and which the PLO itself is committed not to alter unilaterally in the interim period".[10] Significantly, the Authority's powers to govern have been delegated to it from Israel, which exercised before 1993 comprehensive legal authority over the West Bank and Gaza Strip under the laws of belligerent occupation. Indeed, article 1(1) of the 1995 Interim Agreement, which is the linchpin of the Oslo Accords self-governance scheme, provides that:

> Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement.

[10] Crawford, *ibid*, at pp. 444-445.

Israel shall continue to exercise powers and responsibilities not so transferred.

11. Among the powers *not* transferred to the PA are the power to conduct foreign relations (article 9(5));[11] to exercise territorial jurisdiction over certain part of the West Bank and Gaza Strip and *to exercise jurisdiction over Israeli nationals* (article 17(2)). That jurisdiction over Israelis was explicitly retained by Israel under the Interim Agreement (article 17(4)) is reflective of the creation of the PA as a form of *self*-government over local Palestinians. This legal configuration implies that the PA was created under the Oslo Accords as a political entity with limited powers, which fall short of the objective conditions for statehood under international law (especially, effective government and capacity to enter into international relations). Significantly, it was created without legal power to apply its laws to Israeli nationals, even in those areas over which it possesses some governmental authority. The limited nature of the powers transferred to the PA under the Oslo Accords and the retention of residual powers by Israel have been acknowledged in the recent ICJ advisory opinion.[12] The restriction found in the Oslo Accords regarding jurisdiction over Israelis is critical for evaluating the capacity of Palestine to bestow upon the ICC jurisdiction that it itself never had.
12. Some observers argue that four post-1995 developments need to be taken into account when ascertaining the *current* legal status of the PA. We do not believe that any of these development alters the analysis regarding the ability of Palestine to refer to the ICC jurisdiction over Israeli nationals.

(i) The alleged expiry of the Accords: Although the period set out in Oslo Accords for permanent status negotiations had passed by 2000, and despite many violations by both parties, the Accords continue to govern key aspects of the Israeli-Palestinian relationship, including division of competencies across areas A, B and C of the West Bank, the administration by the PA of Areas A and B, and the operation of a *de facto* customs union and security cooperation between Israel and the PA. Significantly, Palestinian courts continue to refrain from asserting criminal jurisdiction over Israeli citizens. This on-the-ground situation amounts to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Vienna Convention on the Law of Treaties, art. 31(3)(b), applied *mutatis mutandis* to the Oslo Accords), which is indicative of the parties' intent to construe key parts of the Accords as indefinitely extended in time, or a *local custom,* which features long standing practice relating to the continuing application of the basic scheme of the Oslo Accords, accepted by the parties as regulating their bilateral relations.[13]

[11] Restrictions on the power to conduct foreign relations are subject to exceptions, mostly in economic areas, where the PLO may conclude agreements on the PA's behalf, and in cultural, scientific and educational areas.
[12] ICJ advisory opinion of 19 July 2024, at paras. 66, 140.
[13] *Cf. Right of Passage over Indian Territory*,(Portugal v. India), 1960 ICJ 6, 39.

(ii) The 2005 Israeli disengagement from the Gaza strip: In August 2005, Israel withdrew from the Gaza strip. Although the withdrawal was unilateral, it followed the logic of gradual transfer of control over territory from Israel to the PA prescribed in the Oslo Accords (although, by 2007, the PA lost its power of governance over the Gaza Strip to Hamas). In any event, the PA continues to regard the Gaza Strip as occupied territory, despite the Israeli withdrawal therefrom,[14] and – as indicated above – its bilateral relations with Israel relating to the territories it controls remain governed by the Oslo Accords framework.

(iii) The UN GA decision: The upgrading of the UN status of the Palestine to observer state status in 2012[15] and the 2013 decree by President Abbas replacing the PA's name with the State of Palestine[16] did not coincide with a new declaration of independence. Rather, the PA continues to rely on the 1988 Declaration by the PLO (which did not meet conditions for statehood given the PLO's lack of any territorial control at the time).[17] The upgrade suggests acceptance by some states that conditions for statehood have been met by the PA, or serves to signal political support for Palestinian self-determination. Still, such recognition – being less than universal in scope and ambiguous in its contents – is not dispositive of the status *erga omnes* of the State of Palestine under international law, especially vis-à-vis states which do not recognize it as a state.

(iv) The "renunciation" of the Accords: President Abbas stated in May 2020[18] that the Accords were 'dead', and that security cooperation with Israel was terminated. This statement was made, however, in the context of reports about plans for annexation of parts of the West Bank by Israel.[19] These plans did not materialize and security cooperation resumed shortly thereafter. Indeed, a senior Palestinian official reaffirmed in November 2020 the continued applicability of the Accords as the framework governing bilateral Israel-Palestinian relations.[20]

IV. Delegation or conferral

13. In the 2010 JICJ article, it was claimed that article 12 transfers of personal and territorial jurisdiction are based on a theory of delegation of core jurisdictional competencies from states, and that "[t]he right of the [PA] to delegate cases to the ICC is, however, not unlimited, and the limits of the right corresponds to the

[14] See e.g., https://www.un.org/unispal/document/auto-insert-205755/. The ICJ also opined that some of Israel's obligations under the international law of belligerent occupation continued to apply to the Gaza Strip after 2005. ICJ advisory opinion of 19 July 2024, at para. 94. Space constrains do not permit us to elaborate our reservations pertaining this specific conclusion (it is, in any event, irrelevant for this stage of the proceedings before the ICC).
[15] UN Doc. A/RES/67/19 (2012).
[16] https://www.aljazeera.com/opinions/2013/1/10/the-state-of-palestine-exists.
[17] https://www.un.org/unispal/document/auto-insert-178680/.
[18] https://www.theguardian.com/world/2020/may/20/palestinian-leader-mahmoud-abbas-ends-security-agreement-with-israel-and-us.
[19] https://www.i24news.tv/en/news/israel/diplomacy-defense/1605630989-palestinian-authority-says-it-s-resuming-security-coordination-with-israel.
[20] https://twitter.com/HusseinSheikhpl/status/1329410254963171329

scope of criminal jurisdiction the [PA] has under international law to begin with and possibly also to any undertakings it may have assumed relating to its ability to delegate authority. Obviously, neither a state nor a quasi-state can delegate more rights than it actually possesses." The intrinsic limits on jurisdiction placed on the PA by the Oslo Accords, which constituted it and defined its *scope* of legal powers, therefore constrain the *scope* of jurisdiction that the PA can delegate to the Court. The use by the PA of the name "State of Palestine" in its public communications, including with the Court,[21] does not change its scope of legal powers or legal status vis-à-vis states that did not accept its claimed statehood. This is particularly so, in respect of non-parties to the ICC Statute, which are not bound by any decision made by ICC organs regarding the statehood status of entities that accede to the Statute.

14. As mentioned above, the *nemo dat quod non habet* general principle of law was endorsed, and applied to the Palestinian case, by Judge Kovács in his 2021 separate opinion.[22] Note also that Judge Kovács drew in his opinion a distinction between ICC precedents referring to the effect of agreements involving states whose legal status is not contested, and of agreements involving entities, such as Palestine, whose legal status as a state is contested.[23]
15. The approach that considers delegation as one of the two bases of ICC jurisdiction (alongside universality – e.g., re Security Council authorization) has been supported by Prof. Carsten Stahn in a 2016 article, which was cited in the 2020 OTP Request.[24] By contrast, Prof. Leila Sadat claimed that the correct analytical framework is not one of delegation – limited by the existing legal obligations of states – but collective conferral – that is, empowering the Court to act on behalf of the international community.[25] Still, even Sadat concedes that "[t[he Palestine situation is distinguishable if one accepts the view that Palestine is not a state for the purposes of accession to the Rome Statute at all".[26]

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[21] https://www.icc-cpi.int/sites/default/files/Palestine_A_12-3.pdf; ICC Press Release, ICC welcomes Palestine as a new State Party (1 April 2015).
[22] PTC decision of 5 Feb. 2021 (Kovács), at para. 371 ("When the Prosecutor concludes that continuing an investigation may trespass the limits *ratione loci* or *ratione personae* of Palestine's competences in this complex criminal law regime, the Prosecutor should satisfy herself that Israel, a non-State Party having jurisdiction over crimes and perpetrators either ratione loci or ratione personae according to the Oslo Accords, also consents according to article 12(3) of the Statute").
[23] *Ibid*, at para. 283 ("It is worth noting that in order to substantiate this position, the Prosecutor refers to a 'precedent' adopted in a case concerning states whose statehood, territory and borders were not contested (when a sovereign State entered into an agreement with another sovereign State relating to armed forces on its territory). Taking into account the original wording of the judgment, one may ask whether generalization of the dictum was justified").
[24] Carsten Stahn, The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine, 49 *Vanderbilt Law Review* (2021) 443. Stahn concedes that the question of jurisdiction under the Oslo accords is far more complex than the parallel questions of the impact of SOFA on jurisdiction in Afghanistan, and that the "decisive question is who delegated what to whom". *Ibid*, at p. 453. See also Dapo Akande, The Jurisdiction of the International Criminal Court over Nationals of Nonparties: Legal Basis and Limits, 1 *JICJ* (2003) 618, 639-640.
[25] Leila Nadya Sadat, The Conferred Jurisdiction of the International Criminal Court, 99 *Notre Dame Law Review* (2023) 549.
[26] *Ibid*, at p. 582.

16. Our position is more nuanced: Palestine could qualify, on functional grounds, as a state for the purpose of accession on the basis of its international personality (reflected in its UN observer state status). Still, given the special features of its legal status *erga omnes* – in particular, the serious doubts whether it meets conditions for statehood, one cannot assume that it has all the legal powers and competencies that states generally have under international law vis-à-vis any other state. Indeed, we are of the view that the Oslo Accords, which created the PA, curtailed its legal capacity to exercise jurisdiction and to transfer such jurisdiction under article 12 of the ICC Statute, which should be construed, in turn, consistently with the *nemo dat quod non habet* general principle of law (by virtue of article 31(3)(c) of the Vienna Convention on the Law of Treaties). This is because the said jurisdictional transfer affects the legal rights and interest of a third state, Israel, that – (a) does not recognize Palestine as a state; and (b) as a non-ICC member state is not bound by legal determinations made by ICC organs. For such third states, the justification that normally undergirds the international legality *erga omnes* of the article 12(2)(a) jurisdictional regime – that sovereign states have, in principle, unlimited jurisdiction over crimes committed in their territory and may freely decide to refer them to the ICC – is inapplicable.[27]
17. The question of the jurisdictional impact of the Oslo Accords is fundamentally different from questions involving foreign immunities and other limits on domestic jurisdiction raised with respect to states whose legal status is not contested. Sovereign states have full capacity to exercise territorial jurisdiction and can therefore transfer such jurisdiction to the ICC. Any conflicting international obligation that they have undertaken will be dealt with by the Court under article 98 of the Statute. By contrast, the question relating to Palestine is whether it has the legal capacity under international law to exercise and transfer territorial jurisdiction in excess of the legal powers conferred upon it by the Oslo Accords, which constituted it as a self-governance entity with limited power.

V. Objections to the 'restricted international actor' thesis

18. In its 2020 Request, the OTP took the position that the Oslo Accords should not be deemed an obstacle to the Court's jurisdiction. It based its position on the distinction between prescriptive and enforcement jurisdiction, and on the inability of "special agreements" to deny the rights of protected persons. With respect, we consider both arguments to be unpersuasive.
19. The Oslo Accords do *not* draw any distinction between the different forms of jurisdiction allocated to, or excluded from, the PA (referred also to in the agreements as the Palestinian Council). Rather, article 17 of the 1995 Interim Agreement – whose title is "jurisdiction" – provides in sub-section 3 that "[t]he

[27] The link between sovereignty and article 12 jurisdiction has been explained in the following terms: "Article 12 of the Rome Statute is a manifestation of the principle of State sovereignty... The main corollaries of the sovereignty and equality of States include jurisdiction—*prima facie* exclusive—over a territory and the permanent population living there..." Stéphane Bourgon, Jurisdiction *ratione loci*, in *The Rome Statute of the International Criminal Court* (Antonio Cassese *et al* ed., 2002) 559, 562.

Council has, within its authority, legislative, executive and judicial powers and responsibilities, *as provided for in this Agreement*". Sub-section 1(a), explicitly excludes Israelis from the PA's jurisdiction. At the same time, subsection 4 provides that: "(a) Israel, through its military government, has the authority over… powers and responsibilities not transferred to the Council *and Israelis*; (b) To this end, the Israeli military government shall retain the necessary *legislative, judicial and executive* powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*" (emphasis added). The text clearly indicates the parties' agreement to exclude all forms of jurisdiction over Israeli citizens from the PA – including legislative (prescriptive) – and to retain all forms of jurisdiction over Israelis in the hands of Israel.

20. Some of the arguments seeking to limit the effect of the Oslo Accords place heavy reliance on Annex IV of the Interim Agreement that addresses issues relating to criminal and civil jurisdiction. While the Annex reaffirms that the PA does not have adjudicative or enforcement jurisdiction over Israelis in criminal matters, it is clearly erroneous to read it as confirming Palestinian prescriptive jurisdiction over persons which article 17 of the Interim Agreement explicitly excluded from any PA jurisdiction. Like other Annexes to the Interim Agreement, Annex IV is a technical agreement that must be read in conformity with the overarching Interim Agreement. This is explicitly stated in article 17(6) of the Interim Agreement: "*Without derogating from the provisions of this Article*, legal arrangements detailed in the Protocol Concerning Legal Matters attached as Annex IV to this Agreement (hereinafter "Annex IV") shall be observed. (emphasis added)
21. The OTP's related claim that the Accords did not bar the PA from signing international agreements is dubious given the explicit limitation found in article 9(5) of the 1995 Interim Agreement on the power of the PA to operate in the sphere of international relations and on concluding agreements (this is subject to certain exceptions and conditions not relevant to the present case). In any event, our focus is not on PA's capacity under the Oslo Accords to sign agreements – in relation to which one could perhaps argue that the lines between the PLO (Israel's counterpart to the Oslo Accords) and the PA have become blurred over the years – but rather on the PA's capacity to transfer to the ICC jurisdictional powers over Israeli nationals which it never had and which it has never exercised. Like judge Kovács noted in his dissent (para. 360), the Palestine situation is very different from those considered in immunity or SOFA cases, where jurisdiction to prescribe remains in place, while jurisdiction to enforce is denied.
22. The specific OTP claim regarding limits on "special agreements" is also unpersuasive, although the principle that special agreements between the occupying power and the local authorities cannot derogate from rights of protected persons under the Geneva Convention is not in doubt.[28] The implicit

[28] The correct term, given the lack of treaty relations between Israel and Palestine under the Geneva Conventions when the Oslo Accords were concluded, is not "special agreements" between high contracting parties (as defined

assertion by the OTP that the Fourth Geneva Convention introduces a non-derogable right for local authorities in occupied territories to exercise jurisdiction over nationals of the occupying power and to transfer such jurisdiction to the ICC lacks support in the text of the Convention (which did not envision, of course, ICC adjudication) or in state practice. Israel and other state parties remain legally obligated to deal with breaches of the Fourth Geneva Convention pursuant to article 146; hence, there is no legal gap that frustrates the very ability to enforce the rights of protected persons. Put differently, the Oslo Accords did not detract from any jurisdictional arrangement that existed under international law before the Accords were concluded, nor from the responsibility of Israel to try or extradite individuals that committed grave breaches of the Geneva Convention. It may be recalled that, here too, judge Kovács was critical of the OTP's approach.[29]

VI. Complementarity

23. The limited space available in this *amicus* brief does not allow us to fully develop our concerns regarding compliance by the OTP with the principle of complementarity in the circumstances of the present case. We refer, respectfully, the Court to the position elaborated in our *Just Security* post,[30] where we explain why the lack of a new article 18 notification following the events of 7 October 2023 deprived Israel and other states of a reasonable opportunity to open a 'mirroring investigation' within the timeline envisioned in the Statute.
24. In a nutshell, the OTP should have issued a new article 18 notification, because of the major differences between the factual patterns and categories of suspects implicated in the 2021 notification (which focused on the construction of settlements in the West Bank, and the use of lethal force by the IDF in and around Gaza in specific military campaigns in 2014 and 2018-2019), and the facts and suspects implicated in the request for arrest warrants (covering post-7 October events). The artificial extension of the 2021 notification to completely different circumstances, which merit a wholly new domestic investigatory response, dilutes the Article 18 complementarity regime and weakens the ability of the Pre-Trial Chamber to monitor its implementation. It also renders meaningless the expectation set by the Appeals Chamber that notifications should be "sufficiently specific", so as to enable the investigating state to demonstrate the required "degree of mirroring".[31] In past cases, refraining from issuing new notifications did not present a serious problem, because the new charges were closely related

in article 7 of the Fourth Convention), but an "agreement concluded between the authorities of the occupied territories and the Occupying Power" (as defined in article 47). This has no bearings on the outcome of this case.

[29] PTC decision of 5 Feb. 2021 (Kovács), at para. 348-450 ("[T]he Geneva Convention does not prescribe the victims' individual right to seek justice before international judiciary bodies. Complaints by Palestinians regarding the outcome of military, judicial or disciplinary proceedings or the criminal proceedings before ordinary or military tribunals in Israel are well known and documented in submissions to different international fora. However, these complaints are to be considered within the context of evaluating Israel's implementation of its obligation under the Geneva Convention IV and not used as a basis for invalidating the Oslo Accords").

[30] https://www.justsecurity.org/96296/icc-article-18-complementarity/

[31] ICC-01/21 OA, *Philippines situation*, jugement of 18 July 2023, para. 107 (Appeals Chamber).

to the "defining parameters" of the notified investigation, or because no State was willing and able to investigate them. This is not the case here, however: The request for arrest warrants addresses a new and distinct round of hostilities, unprecedented in its intensity; involves crimes not contemplated by the 2021 notification; and includes some suspects not covered by the 2021 notification. In addition, the Israeli legal system has the capacity to conduct, within realistic timeframes, an independent investigation of the alleged crimes identified by the OTP, including an investigation of the general events underlying the OTP request and of specific criminal charges arising therefrom. In fact, it is already in the process of reviewing hundreds of incidents relating to the hostilities in Gaza.

25. We note that the Pre-Trial Chamber has held before that it is authorized *proprio motu* to review questions of admissibility during the review of requests of arrest warrants pursuant to article 19(1) of the Statute, when there is an ostensible cause.[32] We are of the view that protecting the rights of third states to rely on complementarity, reviewing the exercise of prosecutorial power and upholding the Chamber's related power of judicial review present such an ostensible cause.

Conclusion

26. The Oslo Accords created the PA (which has the same legal personality as the State of Palestine) as a self-governing entity with limited legal powers. It did not obtain powers of jurisdiction over Israelis, and, as a result, could not by virtue of the *nemo dat quod non habet* principle transfer such powers to the ICC. The case of Palestine is distinguishable, in this regard, from that of states whose legal status is not contested. This is especially so, since the case pertains to the legal rights and interests of a state that has not recognized Palestine's statehood, nor is it bound by ICC organs' decisions on its accession. There is no basis in international law for the ICC to exercise jurisdiction against Israelis in the particular circumstances of the case without Israel's consent or Security Council authorization.

27. The request for arrest warrants emanates from an OTP investigation that significantly deviates from the defining parameters of the investigation notified in 2021. By proceedings without issuing a new article 18 notification, the OTP failed to properly implement the complementarity principle as prescribed in the Statute.

Respectfully submitted:

Yuval Shany and Amichai Cohen

Dated this 5 day of August 2024, at Modiin, Israel

[32] ICC-02/04-01/05, *Prosecutor v. Kony*, decision of 10 March 2009, para. 13 *et seq* (Pre-Trial Chamber II)