

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Amicus Curiae Observations of Prof. Michael Lynk and Prof. Richard Falk
Pursuant to Rule 103

Source: Professor Michael Lynk
Professor Richard Falk

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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INTRODUCTION

1. Against the backdrop of almost 40,000 people killed in the Gaza Strip,¹ not including those still trapped under the rubble and dying of disease due to Israel's unrelenting blockade, the Pre-Trial Chamber I's (PTC) authorisation of the UK and others to file written observations pursuant to Rule 103 of its Rules prior to the arrest warrant decisions is unprecedented.² In accordance with the International Criminal Court's (ICC) case-law, such observations are only authorised on an exceptional basis.³ They have also been consistently rejected in the procedural context of Article 58 Rome Statute.⁴
2. This authorisation therefore highlights the recurring political exceptionalism of the Palestinian situation — despite the Prosecutor's warning that "if [the law] is seen as being applied selectively, we will be creating the conditions for its collapse".⁵ It is also causing significant delay in proceedings despite the extreme urgency of the situation. In light of this, and to urge the Pre-Trial Chamber to issue the arrest warrants, we make four observations: States do not delegate jurisdiction to the Court; The State of Palestine has its prescriptive jurisdiction; the Oslo Accords are not an international treaty; and the relevant provisions of the Oslo Accords violate international law.

OBSERVATIONS

I. States do not delegate jurisdiction to the Court

3. Article 12 of the Rome Statute, governing the preconditions to the exercise of jurisdiction, makes clear that States Parties do not delegate or transfer their jurisdiction to the Court. Rather, a State "accepts the jurisdiction of the Court with respect to the

¹ UN Office for the Coordination of Humanitarian Affairs, 'Humanitarian Situation Update #199 | Gaza Strip' (2 August 2024) <<https://www.ochaopt.org/content/humanitarian-situation-update-199-gaza-strip>>

² Situation in the State of Palestine, Public redacted version of 'Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file amicus curiae observations', ICC-01/18, 27 June 2024; Situation in the State of Palestine, Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/18, 22 July 2024

³ Situation in the Republic of Kenya, *Prosecutor v Kenyatta et al*, ICC-01/09-02/11, 12 April 2011; *Prosecutor v Ruto, Kosgey and Sang*, ICC-01/09-01/11, 11 May 2011; Situation in the Democratic Republic of the Congo, *Prosecutor v Ntaganda*, ICC-01/04-02/06, 18 February 2014; Situation in Darfur, Sudan, *Prosecutor v Ali Kushayb*, ICC-02/05-01/20, 20 May 2021; Situation in the Central African Republic, *Prosecutor v Mokom*, ICC-01/14-01/22, 3 November 2023. *See also* Sergey Vasiliev, 'Friendly Feast during the Plague: Is the Pre-Trial Chamber Losing its Way on the Palestine Arrest Warrant Proceedings?' (*EJIL:Talk!*, 1 August 2024) <<https://www.ejiltalk.org/friendly-feast-during-the-plague-is-the-pre-trial-chamber-losing-its-way-on-the-palestine-arrest-warrant-proceedings/>>

⁴ For a striking example, where even the accused was not allowed submit observations to the PTC, *see* Situation in the Republic of Kenya, Decision on Application for Leave to Submit Amicus Curiae Observations, ICC-01/09-35, 18 January 2024, paras. 9-10.

⁵ ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>>

crimes referred to in article 5”.⁶ Moreover, Article 12(2)(a) clearly authorises the Court to exercise jurisdiction over the “territory” or “nationals” of its States Parties. Based on this unambiguous wording, the principle of *nemo dat quod non habet* is rendered irrelevant as the Statute in no way implies that the manner in which individual States exercise criminal jurisdiction is determinative of the jurisdictional scope of the Court, which is already defined.

4. Therefore, in becoming a State Party to the Rome Statute, the State of Palestine had to accept the jurisdictional scope and powers provided by the Rome Statute. This has even been confirmed by the PTC in its February 2021 ruling.⁷
5. The Oslo Accords have no impact on the authority and prosecutorial scope of the Office of the Prosecutor (OTP). As stated in our request to submit observations, the jurisdiction of the Court is not equivalent to nor dictated by the jurisdiction of a State Party. As rightly noted by Sadat, “delegation theories” regarding the jurisdiction of international courts are not found outside the context of the ICC.⁸ The ICC’s status as an entity with international legal personality, just like the European Court of Human Rights (ECtHR) or the International Court of Justice (ICJ), must mean that the Court is exercising its own jurisdiction pursuant to its States Parties entrusting certain functions to it.

II. Palestine has prescriptive jurisdiction

6. Under customary international law, States have the right to exercise their sovereign powers by prescribing and enforcing laws on the basis of the principles of territoriality, nationality, passive personality, protection and universality.⁹ Hence, as an internationally recognised sovereign State,¹⁰ Palestine has the authority to exercise criminal jurisdiction over foreign nationals for crimes committed on its territory and against its nationals. This internationally recognised legal authority manifests in a

⁶ Rome Statute, Art. 12(1)

⁷ 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, 5 February 2021, para 102 :[I]t would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute’s inherent effects over it. This is further confirmed by the fact that, on the basis of article 124 of the Statute, the only exemption to the jurisdiction of the Court relates to a particular category of crimes, namely war crimes, for a limited period of time, which entails that the Statute is automatically activated in respect of all other matters

⁸ Leila Nadya Sadat, ‘The Conferred Jurisdiction of the International Criminal Court’ (2023) 99:2 Notre Dame Law Review

⁹ See Monique Cormier, ‘Delegation of Jurisdiction: The Concepts’, in *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press, 2020), Section 3.4.2

¹⁰ On 29 November 2012, the General Assembly accorded Palestine non-member observer State status in the United Nations (resolution 67/19). On 10 May 2024, the General Assembly adopted resolution ES-10/23 in which it “[d]etermines that the State of Palestine is qualified for membership in the United Nations in accordance with Article 4 of the Charter of the United Nations”. On 10 June 2024, the Security Council adopted resolution 2735 (2024), whereby it reiterated “its unwavering commitment to the vision of the two-State solution where two democratic States, Israel and Palestine...”.

State's prescriptive jurisdiction, which relates to the ability to engage in international agreements, multilateral treaties — including acceding to the Rome Statute — and to make laws applicable to its territory and the entities and people therein.¹¹ This is distinct from enforcement jurisdiction, which dictates the ability of a State to ensure compliance with its legislation and to punish violations thereof.¹²

7. If one were to disregard the clear and unequivocal wording of Article 12 in order to adopt the view that States Parties delegate jurisdiction to the Court, any such delegation would have to be based on prescriptive jurisdiction. For the ICC to have territorial and national jurisdiction, it must logically derive from the internationally recognised legal authority over a territory and the individuals therein that each State possesses by virtue of its sovereignty.¹³ That is to say, it is not the material ability to exercise enforcement jurisdiction that allows States to delegate jurisdiction.
8. Such an interpretation would prove unworkable in light of the diversity in the criminal laws and legal systems of States Parties to the ICC. Viewing the Court as an agent of these States, acting within the confines of each of their respective legal frameworks and *lex loci*, would imply that a State that is unable to exercise its enforcement jurisdiction over certain parts of its territory or over certain individuals would be barred from both prosecuting international crimes domestically and from resorting to a permanent international court of which it is a State Party.¹⁴ It would also render Article 17, establishing the fundamental principle of complementarity, redundant in circumstances where States are unwilling or unable to prosecute a certain crime (for instance, if the State has no domestic prohibition on the relevant conduct or if there has been a complete collapse of the judicial system) the ICC would also be deprived of jurisdiction due to the same domestic deficiency. Hence, interpreting the jurisdiction of the ICC as merely

¹¹ Carsten 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' (2016) 49:2 Vanderbilt Journal of Transnational Law 443, 450. See also Situation in the State of Palestine, Prosecutor's Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18, 22 January 2020, para. 184

¹² *Ibid*

¹³ For example, in granting the Prosecutor's request for authorisation of an investigation in Georgia, the PTC ruled it had jurisdiction in South Ossetia, despite Russia's military presence in the region which prevented Georgia from exercising its enforcement jurisdiction, on the basis of the principle of territoriality and the prescriptive jurisdiction this imparts on the sovereign State. See Situation in Georgia, Decision on the "Prosecutor's request for authorization of an investigation", ICC-01/15, 27 January 2016, para. 64; See also Monique Cormier, 'Delegation of Jurisdiction: The Concepts', in *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press, 2020), Chapter 3

¹⁴ See Yassir Al-Khudayri, 'Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter' (OpinioJuris, 10 June 2020) <<https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>>; Ahmed Abofoul, 'The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine' (OpinioJuris, 28 July 2020) <<https://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine/>>

reflecting the enforcement jurisdiction of individual States stands in direct contravention of the primary purpose and aim of the Court, to end impunity for international crimes.

9. Even if one were to cast aside the wording of Article 12 and the status of the Court as a supranational institution so as to argue that States Parties delegate their jurisdiction to the ICC, this could only be done on the basis of a State's inherent prescriptive jurisdiction. Rooted in customary international law, Palestine's prescriptive jurisdiction is unaffected by any bilateral or "special" agreements, such as the Oslo Accords.¹⁵ As explained by Stahn, the "general prescriptive jurisdiction in relation to international crimes cannot be contracted out" and instead depends on the objective status of the territory.¹⁶

III. Legal status of the Oslo Accords

10. Despite Judge Kovacs' claims that their international character, substance, language or subsequent domestic application confirms their status as a treaty,¹⁷ the Oslo Accords have been authoritatively characterised as a "special agreement" by the ICC Prosecutor, who correctly considered that they were "concluded between Israel, as the 'Occupying Power', and the PLO, as the legitimate representative of the Palestinian population in the 'Occupied Territory', for the purpose of setting out a series of practical arrangements concerning the administration of the 'Occupied Territory'."¹⁸ The Oslo Accords have also been described as no more than bilateral special agreements by the ICJ in its landmark 2024 Advisory Opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.¹⁹ This characterisation has also been widely supported in scholarship.²⁰
11. Even if one considered the Oslo Accords as an international treaty under Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT),²¹ they no longer have legal

¹⁵ See Section III

¹⁶ Carsten 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' (2016) 49:2 Vanderbilt Journal of Transnational Law 443, 451

¹⁷ Situation in the State of Palestine, Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18, 5 February 2021

¹⁸ Situation in the State of Palestine, Prosecutor's Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18, 22 January 2020, para. 186

¹⁹ ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 July 2024), para. 263; Dissenting opinion of Vice-President Sebutinde, para. 27

²⁰ Anthony Aust, *Modern Treaty Law and Practice* (3rd ed) (CUP 2018), p. 58-9; Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (OUP 2000), p. 59; Yehuda Z. Blum, 'From Camp David to Oslo', *Israel L. Rev.*, 28 (1994), p. 211, 213; Robbie Sabel, *International Law and the Arab-Israeli Conflict* (CUP, 2022), p. 273

²¹ Vienna Convention on the Law of Treaties 1969, Article 2(1)(a)

force. They were intended to be temporary in nature, described as “interim” accords to end on 4 May 1999.²² But more significantly, the International Law Commission has observed that the consent of the parties to abandon a treaty under Article 54(b) VCLT may be implied from their conduct in relation to the treaty.²³ Israel has conducted itself in a manner as if the Accords did not exist, going far beyond their provisions, as confirmed by the ICJ in its 2024 Advisory Opinion.²⁴ As for the State of Palestine, it declared in response to increasing Israeli settlements that the PA would cease to abide by the Accords.²⁵

12. The Oslo Accords’ lack of legal force signifies that not even Article 3 of the VCLT — assuring that “international agreements concluded between States and other subjects of international law” still have legal force — finds application. This is because the rules on treaty termination are customary and subsequently apply to such agreements as well.²⁶
13. As stated by the Prosecutor, the resolution of a State’s potential conflicting obligations with a bilateral agreement limiting the enforcement of the Court’s jurisdiction domestically is not a question that affects the Court’s jurisdiction.²⁷ The Oslo Accords do not fall under Article 21(1)(b) of the ICC Statute: “treaties and the principles and rules of international law” to be applied by the Court,²⁸ despite Judge Kovacs’ argument to the contrary in 2021.²⁹ This aligns with ICC jurisprudence, where only well-established and widely ratified multilateral treaties (such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the European Convention on Human Rights) found application through this provision, and in the appropriate circumstances.³⁰ A bilateral special agreement such as the Oslo Accords, in contrast, finds no application.

²² Declaration of Principles on Interim Self-Government Arrangements or short Declaration of Principles (Oslo I), Articles I, II, V

²³ Yearbook of the International Law Commission (1966), Vol. II, 237. See also Marcelo Kohen, ‘Desuetude and Obsolescence’, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011), 350–359

²⁴ ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, paras. 66, 102, 140, 263

²⁵ UN General Assembly resolution A/70/PV.19 (30 September 2015), p. 30

²⁶ Anthony Aust, ‘Treaties: Termination’, *Max Planck Encyclopedias of International Law* (June 2006), para. 18

²⁷ Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine ICC-01/18, 22 January 2020, para. 185.

²⁸ Rome Statute of the International Criminal Court 1998 (as amended 2010), Article 21(1)(b)

²⁹ Situation in Palestine, Judge Péter Kovács’ Partly Dissenting Opinion, ICC-01/18, 5 February 2021, para. 284-285

³⁰ Situation in Democratic Republic of Congo, *Prosecutor v Lubanga*, Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06, 30 August 2011, para. 41; Redacted Decision on the request by DRC-DOI-WWWW-0019 for special protective measures relating to his asylum application, ICC-01/04-01/06, 5 August 2011, para. 60. The VCLT has also found application via this provision – see, for example: Decision concerning the ‘Application to the Presidency pursuant to regulation 216 of the Regulations of the Registry for judicial review of the Registrar’s

IV. The relevant provisions of the Oslo Accords violate international law

14. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 (Oslo II) refers to the “legitimate” rights of the Palestinian people throughout the text.³¹ Article XIX demands respect for these rights, by requiring that the powers and responsibilities provided by the agreement be exercised “with due regard to internationally-accepted norms and principles of human rights and the rule of law”. This is arguably reaffirmed in Article XXXI(6), stating “[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions”.
15. As the ICJ, the UN General Assembly, and the Human Rights Council have now recognised on numerous occasions,³² the fundamental right of the Palestinian people to self-determination is one of such “legitimate” and “existing” rights. Enshrined in Article 1(2) of the UN Charter, self-determination is regarded as a peremptory norm of customary international law in cases of foreign occupation,³³ with *erga omnes* status,³⁴ making it the obligation of the international community as a whole to promote its realisation and respect its exercise.³⁵ Israel, as a State Party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, is also bound by Common Article 1 which imposes the very same obligation.

decision notified on 7 February 2014’, ICC-RoR216-01/14, 28 February 2014, para. 23, fn. 63; Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04, 13 July 2006, para. 39. However, it is the *lex generalis* and the Fourth Geneva Convention the *lex specialis* in the present context – see paragraph 23 below

³¹ See Oslo II, Preamble, Arts. II(2), III(1)(3), XXII(2)

³² See Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion (19 July 2024), para. 102; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 118; UNGA Res. 78/192 (19 December 2023) A/RES/78/192; UNGA Res. 58/163 (22 December 2003) A/RES/58/163; UNGA Res. 3236 (XXIX) (22 November 1974); UNGA Resolution 2649 (XXV) (30 November 1970); HRC Res. 37/34 (13 April 2018), A/HRC/RES/37/34, para. 1; HRC Res. 34/29 (12 April 2017), A/HRC/RES/34/29, para. 1

³³ ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 July 2024), para. 233

³⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 88; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29

³⁵ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 88; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences on the Separation of the Chago Archipelago from Mauritius in 1965*, Advisory Opinion (25 February 2019), para. 180. See further Situation in the State of Palestine, Prosecutor’s Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ICC-01/18, 22 January 2020, para. 148

16. The status of Oslo II as a mere bilateral agreement and the classification of the right to self-determination as *jus cogens* is important to note in the present context, as the Prosecutor rightly pointed out that the ability to engage in international relations is just one aspect of this right.³⁶ This has already been acknowledged by UN General Assembly Resolution 67/19, which explicitly recognised Palestine’s capacity to accede to treaties on the basis of the ‘all States’ or ‘any State’ formula.³⁷ On this basis, the State of Palestine proceeded to accede to the Rome Statute of the ICC and various other multilateral treaties, “many of them under the auspices of the United Nations, and others with national governments as depositaries”.³⁸
17. Therefore, to now find that the State of Palestine is in fact prohibited from exercising its inalienable right to self-determination by refusing to recognise its acceptance, or even delegation, of jurisdiction to the Court would be to reverse decades of UN Resolutions and authoritative jurisprudence affirming its unconditional authority to do so.³⁹ A reversal such as this would amount to a clear breach of the well-established hierarchy of norms, in which *jus cogens* rights enjoy the apex position.
18. Oslo II may equally not be interpreted as justifying any derogation from other absolute obligations established by international law. Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1951 (Genocide Convention) imposes an *erga omnes* obligation on its States Parties “prevent and to punish”, while the duty of every State Party to the Rome Statute to investigate and prosecute core crimes is also expressly laid out in its preamble which recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.
19. The same *erga omnes* obligation can also be found in international humanitarian law. International criminal tribunals have already made clear that “the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity”,⁴⁰ a concept encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”, and Article 1 of Protocol Additional to the Geneva Conventions of 12

³⁶ Situation in the State of Palestine, Prosecutor’s Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ICC-01/18, 22 January 2020, para. 187

³⁷ UNGA Res. 67/19 (4 December 2012) A/RES/67/19; UNGA Res. 67/19 Memorandum (21 December 2012) para. 15

³⁸ Situation in the State of Palestine, Prosecutor’s Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ICC-01/18, 22 January 2020, para. 184

³⁹ *Supra* fn32

⁴⁰ *Prosecutor v Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, para. 517

August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) which demands the same.

20. Unlike synallagmatic obligations of a State vis-à-vis another State, the dual *erga omnes* obligations enshrined in these provisions are owed to the international community as a whole as all States can be held to have a legal interest in their protection.⁴¹
21. With this in mind, Articles 7, 8 and 47 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949 (Fourth Geneva Convention) prohibit any “special agreements” or agreements concluded between the authorities of the occupied territories and the Occupying Power from adversely affecting the situation of “protected persons” or depriving them of their rights and benefits under the Convention.⁴² This has been asserted by both the ECtHR in *Al-Skeini* and the ICJ in its recent 2024 Advisory Opinion.⁴³
22. The classifications of agreements in Articles 2 and 3 of the VCLT notwithstanding, the Oslo Accords are best characterised as special agreements under the Fourth Geneva Convention, which provides the law applicable in armed conflict and occupation,⁴⁴ and therefore takes precedence as the *lex specialis derogat generali*.⁴⁵ This was confirmed by the ICJ in its recent Advisory Opinion, which stated that the Fourth Geneva Convention is clearly the relevant treaty to be applied by the Court in the present circumstances.⁴⁶

⁴¹ *Prosecutor v Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, paras. 517, 519; ICJ, *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, I.C.J. Reports 1970, p. 3, paras. 32-34. See further Tihomir Kamenov, ‘The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts’ in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law* (Martinus Nijhoff Publishers 1989), p. 193-194

⁴² That Palestinians in the Occupied Territory constitute “protected persons” under Article 4 of the Fourth Geneva Convention is indisputable, with the illegality of Israel’s prolonged occupation now explicitly recognised by the ICJ in its recent Advisory Opinion. See ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 July 2024), para. 102

⁴³ See *Al-Skeini and others v United Kingdom* (2011) 53 EHRR 18, para. 89; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (19 July 2024), para. 102

⁴⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (2004), para. 101; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 96

⁴⁵ Translating into “Special law derogates from general law”, this principle means that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. See International Law Commission, A/CN.4/L.702, p. 8. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996 p. 13-14, para 25

⁴⁶ ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 96: “Israel’s powers and duties in the Occupied Palestinian Territory are governed by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and by customary international law”. See also UNGA Res. 67/19 (4 December 2012) A/RES/67/19, Preamble (7)

23. The vastly unequal relationship between Israel, the Occupying Power, and the political representatives in the Occupied Palestinian Territory mandates a strict application of the principle of non-renunciation of rights laid out in the wording of Articles 7, 8 and 47. Based on these provisions, any interpretation of Oslo II which prevents the State of Palestine from exercising its obligation under Article 146 to create effective penal sanctions and search for persons involved in the commission of grave breaches of the Geneva Conventions would disregard both the well-established hierarchy of norms in international law and the multiple provisions of the Convention which prohibit any deprivation of the rights contained therein, and even impose positive obligations on States to ensure their respect by the international community.
24. Thus, in signing Oslo II, Palestine neither renounced its right to self-determination nor any of its other rights under international law. The *jus cogens* norms and *erga omnes* obligations reflected in the Rome Statute, as well as those pursuant to the Fourth Geneva Convention and Genocide Convention, make any agreement or competing legal obligations not of the same rank effectively null and void. Palestine, as an Occupied Territory, legally cannot relinquish these rights and duties on the basis of a temporary agreement concluded with Israel, its Occupying Power.

CONCLUSION

25. As the observations in the present *amicus curiae* demonstrate, the question as to whether Palestine has the capacity to delegate jurisdiction is not a matter governed by bilateral agreements — nor is it relevant to the Court, as States Parties agree to accept its jurisdiction pursuant to Article 12. Further, Palestine’s prescriptive jurisdiction was unaffected, as acknowledged by Article XXXI(6) of Oslo II. Classed as a bilateral “special agreement” under the Fourth Geneva Convention (the applicable legal framework to the illegally Occupied Palestinian Territory), Oslo II violates peremptory norms of international law and stands in contravention of the *erga omnes* obligations applicable to both Israel and Palestine.⁴⁷ As a consequence, the Accords are also rendered legally invalid. On these grounds alone, the PTC must definitively settle this matter so the proceedings can finally advance in an expeditious manner.

⁴⁷ Even Judges Tomka, Abraham and Aurescu, who disagree with the majority’s opinion on the relevance placed on Oslo II, acknowledge that the status of the Oslo Accords means that it cannot detract from obligations applicable in the Occupied Palestinian Territory. See ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion - Dissent of Judges Tomka, Abraham and Aurescu (19 July 2024), para. 58.

26. However, it is also important to note that the duration of the Oslo Accords ended in 1999. Since then, both sides — through their words and conduct — have expressed their unwillingness to be bound by their terms. Just last month, Israel’s Knesset overwhelmingly rejected the establishment of a Palestinian State.⁴⁸ Aware of this contextual background, refusing to grant arrest warrants due to the Accords for those most responsible for maintaining an apartheid, settler-colonial regime that is currently carrying out a genocide against Palestinians would be entirely without merit. Moreover, it would shield Israeli leaders from accountability, thereby supporting long-standing claims of political interference at the ICC as it handles the Situation in the State of Palestine unlike all others.
27. What we are witnessing is unprecedented, in every sense of the word. As thousands continue to be massacred in Gaza, the West Bank, including East Jerusalem, is subjected to increased settler violence, raids, and land grabs. If the Court cannot proceed in a situation where: there are no legally valid grounds to bar jurisdiction; there is an abundance of highly probative evidence on the commission of international crimes by Netanyahu and Gallant — as well as numerous other high-ranking Israeli officials for whom the Prosecutor should immediately seek arrest warrants —; and where some of the worst atrocities in living memory continue to be committed despite international outcry, numerous UN resolutions, and even three ICJ Orders on provisional measures, there is little hope for international criminal justice.
28. Finally, we support the recommendation that the PTC “propose that the Prosecutor add charges of genocide and of the crime against humanity of apartheid to the arrest warrants directed at the two Israeli leaders”.⁴⁹

Respectfully submitted,



Professor Michael Lynk



Professor Richard Falk

Dated this 06/08/2024

⁴⁸ See Noa Shpigel, ‘With Gantz’s Backing, Israel’s Parliament Passes Resolution Opposing Palestinian Statehood’ (*Haaretz*, 18 July 2024) <<https://www.haaretz.com/israel-news/2024-07-18/ty-article/knesset-passes-resolution-against-establishment-of-palestinian-state/00000190-c2c6-d13a-ad92-caffa4b90000>>

⁴⁹ Situation in the State of Palestine, Amicus curiae observations of Prof. William Schabas pursuant to Rule 103, ICC-01/18, 30 July 2024, para. 27