NORTHWESTERN UNIVERSITY SCHOOL OF LAW

LAW AND ECONOMICS SERIES • NO. 13-10

Jurisdiction Over Israeli Settlement Activity in the International Criminal Court

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JURISDICTION OVER ISRAELI SETTLEMENT ACTIVITY IN THE ICC

WORKING DRAFT – COMMENTS WELCOME

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ABSTRACT

In the wake of the U.N. General Assembly's recent recognition of Palestinian statehood, the Palestinian government has made clear its intention to accept the jurisdiction of the International Criminal Court (ICC), where it could challenge the legality of Israeli settlements. This Article explores the previously unexamined jurisdictional hurdles for such a case. (To focus on the jurisdictional issues, the Article assumes for the sake of argument the validity on the merits of the legal claims against the settlements.)

First, the ICC can only consider situations "on the territory" of Palestine. Yet the scope of that territory is undefined. An "occupation" can arise even in an area that is not the territory of any state – but ICC jurisdiction does not extend there. Thus even if Israel is an occupying power throughout the West Bank for the purposes of substantive humanitarian law, this does not establish that settlement activity occurs "on the territory" of Palestine. Moreover, the ICC lacks the power to determine the boundaries of states, and certainly of non-member states. Moreover, the Oslo Accords give Israel exclusive criminal jurisdiction over Israelis in the West Bank. Palestine cannot delegate to the ICC territorial jurisdiction that it does not possess.

Second, the ICC only takes situations of particular "gravity." Yet settlements are not a "grave breach" of the Geneva Conventions. No international criminal tribunal has ever prosecuted non-grave breaches. The ICC's gravity measure involves the number of people killed; for settlements it would be zero. Indeed, the ICC prosecutor triages situations by the numbers of victims; settlements do not appear to have direct individual victims. Finally, the ICC would at most only have jurisdiction over settlement activity from the date of Palestine's acceptance of jurisdiction. Settlement activity in this time frame would not immediately cross the Court's gravity threshold.

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The impact of these issues goes beyond a possible settlements case. The controversy over a referral of Israel, a non-member state, raises important questions about the meaning of the ICC Statute. These have great importance for other non-member states, such as the United States. They also demonstrate the extent to which major aspects of the ICC Statute remain vague and undefined.

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INTRODUCTION

The United Nations General Assembly, in a closely-watched vote on Nov. 29, 2012, recognized Palestine as a full-fledged state by granting it "non-member observer" status.[1] Aside from the symbolic significance of

[1] U.N. Doc. A/RES/67/19. Only the Holy See currently shares the status, though in the

the move, it was widely understood that the principal practical significance is to facilitate Palestinian efforts to bring Israeli actions before the International Criminal Court ("ICC"). Indeed, several powerful Security Council members that did not support the resolution but were sympathetic to it offered to vote in favor if the Palestinians promised not to turn to the ICC.[2] In the wake of the resolution's passage, commentary and media coverage focused on the new possibility of an ICC case involving Israeli military campaigns against terrorists in Gaza, and even more significantly, the entire existence of Jewish settlements in the West Bank, which many have long regarded as violating law of war treaties.[3]

In the months after the statehood resolution, Palestinian leaders, including the President, Mahmoud Abbas, and the foreign minister, repeatedly stated their intention to "go to the ICC" over continued Israeli settlement construction. These threats received further momentum from a report of the U.N. Human Rights Council, which suggested the possibility of ICC jurisdiction over the settlements issue.[4]

This Article shows that there are several fundamental jurisdictional obstacles to such a suit. This Article explores these limitations as well as their implications for other countries and potential suits. In the course of this analysis, it considers novel problems of territorial jurisdiction, temporal jurisdiction, gravity requirements and the rights of non-member states. ICC jurisdiction over Israel is sure to remain a burning legal and diplomatic issue in the coming years, and if Palestine triggers ICC proceedings, it will be perhaps the most significant ICC case to date, and one of the first involving a non-member state. This Article is the first scholarly inquiry into the newly recognized Palestinian state's ability to secure ICC jurisdiction over Israel.[5] Finally, while this Article does not explore the inherently

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past a number of other nations, such as Switzerland and Spain have had it.

[2] See Chris McGreal, *Palestinians warn: back UN statehood bid or risk boosting Hamas*, THE GUARDIAN (Nov. 27, 2013), available at (mentioning the U.S., U.K., and France as among nations wanting to link an affirmative vote to promises of avoiding the ICC).

[3] See, e.g., George Bishart, *Why Palestine Should Take Israel to Court in The Hague*, N.Y. TIMES (Jan. 29, 2013); Aeyal Gross, *Following UN vote on Palestine, Israel may now find itself at The Hague*, Haaretz (Dec. 2, 2012); Christine Hauser, *New U.N. Status for Palestinians Could Open Door for Claims of Israeli War Crimes*, N.Y. TIMES A8 (Nov. 30, 2012).

[4] Human Rights Council, *Report of the independent international factfinding mission to investigate the implications of the Israeli settlements*, par. 17, 104, U.N. Doc. A/HRC/22/63 (Feb. 7, 2103).

[5] Before the GA vote, scholars had written about ICC jurisdiction over Israel/Palestine situation, but focused their attention on whether Palestine was a "state" for ICC purposes, which was clearly the most glaring obstacle to admissibility. As a result, the significant admissibility problems examined here did not receive attention. See, e.g., Malcolm N.

discretionary power of the Prosecutor to not proceed when an investigation "would not serve the interests of justice," it is worth noting that this provision was specifically intended to protect peace and transition agreements of which the Oslo Accords is a paradigmatic example.[6]

The jurisdictional issues raises here have a more general significance. They illustrate how many crucial aspects of the Court's power are left unexplained by the Statute, and have not been determined by subsequent practice. Because most ICC situations thus far have been self-referrals or Security Council referrals - which do not pit one nation against another - many major jurisdictional issues, such as those discussed in this Article, remain fundamentally questions of first impression. In other words, the issues raised by a potential Palestinian highlight the numerous gaps, loopholes and unclear expressions in the Rome Statute. This Article identifies and analyzes numerous novel but broadly significant issues raised by a potential Palestinian referral: thus the discussion here will help inform analysis of ICC jurisdiction in broad range of other cases, including those against the nationals of another non-member state - the U.S.

Some background helps explain the Palestinian government's resort to the General Assembly, and the general understanding of its significance. Israel has never ratified the Rome Statute of ICC. In January 2009, in the wake of a Palestinian-Israel war in Gaza, the Palestinian Justice Minister submitted a Declaration to the ICC accepting the jurisdiction of the ICC under Art. 12(3), which permits non-member nations to give the ICC jurisdiction over particular situations on an ad-hoc basis.[7]

After long consideration, the Prosecutor in April 2012 announced that he would not proceed with an investigation. He concluded that under the Rome Statute only "States" can accept jurisdiction. In determining what entities qualify as "States," the Prosecutor would be guided by determinations of the General Assembly, which did not treat Palestine as a state.[8] While at first this seemed a setback for the Palestinians, it also

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Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 9 J. INT'L. CRIM. JUST. 301 (2011); William Thomas Worster, *The Exercise Of Jurisdiction by the International Criminal Court Over Palestine* 26 AM. U. INT'L L. REV. (2011); Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010),

[6] See Art. 53(1)(c). If the "interests of justice" could defer investigation due to purely internal truth commissions and amnesties, it stands to reason that negotiated and internationally-approved ones like the Oslo Accords would enjoy an even greater presumption of deference. See generally, Daryl Robinson, Serving the Interests of Justice: Amnesties, *Truth Commissions and the International Criminal Court*, 13 EURO. J. INT'L L. 481 (2003).

[7] Sung Un Kim, *ICC lacks jurisdiction to investigate Palestine war crimes claims: prosecutor*, JURIST (April 3, 3012).

[8] The Situation in Palestine, par. 5-8, available at http://www.icc-

offered an opportunity. It suggested that the Office of the Prosecutor (OTP) would not look to objective indicia of statehood, such as the Montevideo Convention factors, but rather accept as binding the political determinations of the G.A. The reasoning of the OTP was at first seen as a setback to Palestinian efforts to gain access to international justice mechanisms. But on closer examination, it was thought to offer an opportunity: if the GA would recognize Palestine, the Prosecutor could feel free to act, despite Palestine's not being a member of the U.N. and arguably not fitting certain traditional statehood criteria.

Having prevailed at the G.A., the newly renamed "State of Palestine" has yet to join the ICC or make a new 12(3) declaration, but its leaders and other supporters now constantly threaten such action. Yet even if Palestine is a State, such an ICC case still faces multiple jurisdictional bars. The ICC is a court of limited jurisdiction, designed to handle only a very few of world's worst crimes, under specific jurisdictional criteria. Indeed, to date the ICC in its 13 years of operation has convicted only one person, completed two cases, and has proceeded with investigations in eight other situations.

Moreover the Court has a new Prosecutor, who is not bound by her predecessor's policy of looking to the G.A. for statehood determinations. Statehood is undefined in the Statute, and the new prosecutor is free to look to make an independent determination based on Montevideo or other criteria, defer to the Security Council, or take some other approach. This Article will assume, arguendo, that the G.A. vote will be enough to overcome the "state" hurdle to jurisdiction. Moreover, because it focuses solely on new jurisdictional obstacles to an ICC case, it also takes for granted, again arguendo, the validity of the merits arguments against Israel's settlements. The point under investigation here is not whether or not the settlements constitute crimes within the Rome Statute (or other international instruments), but rather whether the Statute gives the Court jurisdiction over such crimes under the circumstances. Needless to say, this Article takes no position on the broader propriety of the settlements or the parameters for any diplomatic solution.

Part I explains that because Palestine does not have defined borders, the settlements are not "on the territory" of Palestine as required by Art. 12. Moreover, Palestine has given Israel exclusive criminal jurisdiction over the settlements, which would preclude ICC action under Art. 98. Finally, this part will discuss why the ICC, a court of individual criminal jurisdiction, lacks the competence to determine sovereign borders, especially of non-member states. Part II deals with the jurisdictional requirement of gravity.

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cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

Gravity has typically been measured by the number of people killed, with some reference to other brutalized victims. Never has a crime that does not involve physical violence or victims been found to clear the gravity threshold. Indeed, the Geneva Conventions themselves classify settlement activity as not grave. Part III considers the question of *when* Palestine became a state. It concludes that if Palestine wanted to invoke the Court's jurisdiction, it would have to join or make a new 12(3) declaration; thus the Court's jurisdiction would at most extend only to settlement activity from that point, leaving untouched the nearly 600,000 existing settlers and their communities. Thus the ICC would be in the difficult position of distinguishing new settlement activity from old, and wrestling with thorny questions like "natural growth."

Before proceeding, a few words should be said about the scope of the inquiry - and the likely scope of an ICC investigation. This Article focuses on the jurisdictional issues raised by a Palestinian referral concerning settlements in the West Bank. These are widely regarded as violating Art. 8(2)(b)(viii) of the Rome Statute, which prohibits "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies." Some have mentioned the possibility of a referral or declaration concerning more classic war crimes involving military forces (disproportionate force, for example) of the kind dealt with by the Goldstone Commission. At first, this might seem like a safer course. Such cases have been repeatedly tried in international and national tribunals, and have a well-established jurisprudence. But the rule against "deporting or transferring" one's civilian population into occupied territory would be a case of first impression, and thus pose potentially daunting obstacles.

Yet this Article focuses on jurisdiction over settlements because it is in fact the far more likely and attractive legal avenue for Palestine to pursue. Firstly, settlements, unlike use of force crimes, is an issue that is not bilateral. More typical *jus in bello* issues leave open the possibility of criminal charges against Palestinian leaders for attacks on civilian populations. Only Israel is engaged in potentially committing the "deport or transfer" crime. Second, the ICC only has jurisdiction when the home state is "unwilling" to investigate the crime. The Palestinians may believe that Israel would be less likely to investigate allegations of "indirect… transfer" than other war crimes.[9]

A settlement-focused referral could still draw Palestinian crimes into the

[9] It bears noting that Israel courts have heard cases involving settlement growth and construction, often imposing limits derived from international humanitarian law. It has not, however, engaged in criminal prosecutions in this regard.

inquiry. This is because states only refer "situations" to the ICC, not cases or even crimes. A "situation" refers to the broader geopolitical context of a crime,[10] Countries cannot engage in claim splitting, referring the alleged crimes of their enemies and not their own. While scope of a "situation" is not precisely defined in the statute or the Court's practice. The "situation" could be understood to include the broader conflict between Israel and the Palestinians, of which settlements are but part – and Palestinian violence is another part. Even focusing more narrowly on settlements, many were established for security reasons, to act as a buffer against attacks on Israeli civilians.[11] Indeed, the International Court of Justice discussed the prevention of attacks from the West Bank as a potential justification for Israel's construction of the security wall.[12]

I. DETERMINING THE "TERRITORY" OF PALESTINE

The International Criminal Court operates primarily on the principle of delegated jurisdiction, not universal jurisdiction.[13] Its jurisdiction depends on the consent of states, and thus it can only prosecute crimes that occur in the territory of consenting states, or were committed by their nationals. Thus far, the territorial and nationality jurisdiction has coincided: the ICC has only pursued investigations in situations involving crimes on the territory of member states when the alleged perpetrators are themselves nationals of the member state. The most controversial aspect of the ICC's jurisdiction has always been its application to nationals of non-member states for conduct on the territory of member states.[14] Yet such jurisdiction is consistent with national sovereignty because the member state itself has jurisdiction under traditional territorial principles over the non-member

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[10] See GIDEON BOAS, ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: INTERNATIONAL CRIMINAL PROCEDURE 68 (2011). A "crime" by contrast refers to violations of a particular substantive norm specified in Art. 5, while a "case" refers to charges of one or more crimes against a specific individual. Id.

[11] Indeed, it may be that those settlements in which the government had a noticeable role in "organizing and encouraging" are those with a security rationale, as opposed to relatively remote "ideological" settlements, or close to Green Line non-ideological settlements to which people moved because of typical demographic and economic factors that promote population migration.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, par. 139-142 (2004). While the court denied the self-defense claims on the grounds that the attacks did not come from foreign territory, it did find the self-defense issue relevant to Israel's actions.

[13] Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. J. 618, 621-34 (2003)

[14] Id. at 619-21 (describing American objections to jurisdiction over non-party nationals).

nationals; it can thus delegate its own jurisdiction to an international tribunal.

This poses an important, if novel, jurisdictional bar to a Palestinian referral focused on settlements. Under Art. 12 of the Statute, the ICC could only have jurisdiction over Israel for conduct that occurred "on the territory" of the State of Palestine.[15] Thus exercising jurisdiction requires first determining Palestine's territory. The Rome Statute presumes defined, accepted international boundaries (most boundary disputes are quite minor and have thus far been irrelevant to the crimes within the ICC's jurisdiction). When these assumptions are not satisfied, the Statute provides no guidance for dealing with interstitial "gray areas."[16]

The "territory" of Palestine is not at all established.[17] Similarly, Israel lacks defined borders. In short, the borders of any state or states that have arisen in the territory of the League of Nations Mandate for Palestine remain entirely undefined. Accepting a Palestinian referral would make the scope of the ICC's jurisdiction always indeterminate – non-member nations would be vulnerable to ICC suits simply by neighbors convincing the Court that a certain territory is theirs. Such action would also greatly discourage membership by nations with disputed frontiers. Territorial jurisdiction was envisioned as useful for self-referrals of the kind the ICC has dealt with so far, and clear aggression and invasion of previously recognized sovereign frontiers. The ICC has not been understood as a border-determination body; defining the territory of nations has never been part of the work of past international criminal tribunals.[18] The border demarcation role more naturally falls to the International Court of Justice, and even then only when both parties consent to jurisdiction.

The lack of any clear borders for Palestine may surprise many casual observers, given the General Assembly's recognition of a Palestinian state and the widespread condemnation of Israeli civilian presence in the West Bank as illegal. But as this Part will demonstrate, neither the GA resolution nor the alleged illegality of settlements – assumed to be correct for the purposes of this jurisdictional inquiry - bear on the separate question of

[15] Art. 12(2)(a).

[16] See SCHABAS, INTRODUCTION at 82.

[17] See id. at 88 ("the actual limits of the territory of Palestine are also a matter of dispute"); David Luban, *Submitting to the Law of Nations: Palestine, Israel, and the International Criminal Court*, BOSTON REV. (Dec. 12, 3012) ("The ICC is a special-purpose criminal court, and it would be astounding for it to get out in front of the UN's own court on a fundamental question about the map of the world.")

[18] SCHABAS, INTRODUCTION at 82.

Palestine's (and Israel's) sovereign borders.

A. The Illegality of Settlements and the Question of Borders

The jurisdictional question of borders cannot be resolved by previewing the substantive legality of settlements. The origin of the "settlements" norm is Art. 49(6) of the Fourth Geneva Convention, which provides that the "occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." In the drafting of the Rome Statute, the Arab states successfully proposed modifying the Geneva language to "directly or indirectly deport or transfer." The inclusion of this language was thought to specifically target Israel's settlements, and was the reason it did not join the treaty.

For "transfer" to be a crime, the relevant territory must be occupied. Israel has long argued that the underlying Geneva Convention provisions regarding occupation are limited to the "occupation of the territory of a High Contracting Party."[19] The West Bank was not Jordanian sovereign territory when Israel took it in 1967. Because the territory did not belong to a High Contracting Party when occupied, the argument goes, the rules regarding occupation do not apply.

Yet majority of international lawyers reject this argument, concluding that the Conventions' protections are intended to have broader scope, and apply (at least) to all wars between member states. However, such a conclusion does nothing to establish the "territory" of a Palestinian state. The central difficulty for ICC jurisdiction is that the mere fact of Israeli occupation does not mean the territory falls under Palestinian sovereignty. The dominant interpretation of the Geneva Conventions is that an "occupation" can arise even in an area that is not the territory of *any* state. Thus even if Israel is an occupying power throughout the West Bank for the purposes of substantive humanitarian law, this does not establish that settlement activity occurs "on the territory" of the Palestinian state.

To put it differently, while violations of the anti-transfer norm may not need to take place in the territory of a state to constitute a *violation*, they still must be "on the territory" of a state for the ICC to have *jurisdiction.* This is because the ICC is not a court of general or global jurisdiction; its jurisdiction does not extend to all violations of humanitarian law anywhere in the world. This is consistent with the respective roles of the Geneva

[19] IV Geneva Convention Relative to the Protection of Civilians Art. 2, par. 2 (1949).

Conventions and the ICC. The Geneva Conventions, which have near universal adherence, are interpreted broadly because of a desire to not have gaps in coverage. With the ICC, which has a limited and particular jurisdiction, gaps in jurisdictional coverage are purposeful and inherent.[20]

The lack of clear territorial jurisdiction would be particularly troubling because the underlying crime is not one of universal jurisdiction. Any and all nations have jurisdiction of universal jurisdiction crimes; no territorial connection with the offense is needed (though custody of the defendant may be required). An alternative theory of the ICC's jurisdiction is that it exercises even delegated universal jurisdiction, not merely delegated territorial jurisdiction.[21] This account is not the dominant one, but certainly to the extent crimes within the Court's jurisdiction are universally cognizable, concerns about non-member nationals are somewhat attenuated.[22] Yet not all crimes within the ICC's charter are universal.[23] Perhaps the most salient exceptions are aggression[24] and non-grave breaches of the Geneva Conventions, of which "transfer" is one. Not only does the Geneva regime not make "transfer" universally cognizable, there is no subsequent precedent of universal jurisdiction being applied to the offense.[25]

B. GA & ICJ Have Not Determined Palestine's Borders

One might think that just as the ICC would not determine statehood by itself but rather rely on the decisions of other U.N. agencies, it might also choose to take borders as a factual determination that could be made by the political branches. Even assuming the dubious validity of this approach,[26]

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[20] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 82 (2011) (observing in regard to areas without an established sovereign that "some territories are necessarily beyond the reach of the Court," and jurisdiction could only be secured by the nationality of offender).

[21] See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROB. 12, 25-26 (2001) (.

[22] See Akande, *Nationals of Non-Parties, supra*, at 626-27.

[23] See Morris, *supra* at 28 & n.72 (using child soldiers as example of ICC crime not subject to UJ).

[24] See Akande, *Aggresion,* at 26.

[25] Additional Protocol I to the Geneva Conventions treats an expanded version of the "transfer" norm as a "grave breach." Some argue the Optional Protocol has acquired customary status – despite not being ratified by major powers such as the U.S., India, Pakistan, Turkey, and of course, Israel – but there is no evident state practice to support such a custom.

[26] The occurrence of conduct on the territory of a member state is a jurisdictional fact and thus one the Court must convince itself of.

neither of the two prominent (but non-legally binding) international statements on Palestinian rights purported to determine borders. Despite their condemnation of Israeli settlements, neither the GA resolution acknowledging Palestinian statehood, nor the earlier International Court of Justice condemnation of the construction of Israel's security fence, contained any express or implied borders determinations.

The General Assembly resolution of Nov. 2012 does not answer the question of Palestine's borders, and does not even address it. The resolution merely "decides" to accord Palestine non-member status in the GA; it decides nothing about borders.[27] Even the non-operative provisions are unclear as to borders. On one hand Par. 1 refers to "Palestinian territory occupied since 1967." This appears to be more of a claim about indigenous rights than a determination of national borders, as there was no Palestinian state or entity in 1967. On the other hand, Par. 4 expresses hope for the eventual "achievement" of a "*contiguous* Palestinian state living side by side in peace and security with Israel *on the basis of the pre-1967 borders*," suggesting that the Israel-Jordanian armistice line is not the operative or ultimate border. Moreover, it suggests that the Palestinian state does not yet have these borders (as it is certainly not contiguous).[28] The "on the basis" language has traditionally referred to adjustments in the 1949 Armistice Lines to include most Israeli settlements within Israel's borders The Resolution also calls for a diplomatic process to "resolve the outstanding core issues" such as the fate of "Jerusalem, settlements, borders."[29] This makes clear that borders are an "outstanding" issue: the Assembly did not see its resolution as determining any of the territorial questions that must be central to an ICC investigation of settlements.

Even if the GA resolution did express a view on Palestine's borders, it is not binding or authoritative. The General Assembly has an internal bureaucratic power to determine its membership. That determination may or may not be the required trigger for "statehood" for ICC purposes – even that is unclear.[30] But determining the territory of states goes beyond any recognized powers of the GA.

Similarly, the ICJ opinion recognized the difference between the

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[27] See *Status of Palestine in the United Nations*, U.N. Doc. A/67/L.28, par. 2 (Nov. 12, 2012).

[28] Id. (emphasis added).

[29] Id. at 5.

[30] See Dapo Akande, *ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine. Is He Right?*

existence of occupation (which does not require the occupied territory to be sovereign) and borders, which delimit the territories of two separate sovereigns.[31] The Court self-consciously avoided any resolution of "permanent status" issues such as borders.[32] It also made clear that the 1949 Armistice Lines, while in its view triggering the applicability of Geneva Conventions and other principles, do not constitute an international boundary.[33] Indeed, the Court specifically criticized the route of the wall because it could "*prejudge* the *future* frontier between Israel and Palestine."[34] Thus in the view of Court, there was no recognized frontier between the two entities. If the Green Line was the recognized "frontier," the Wall would not prejudge it, but rather simply infringe on it.

C. Oslo Accords and Delegated Jurisdiction

The ICC's jurisdiction over nationals of non-member states is perhaps the most controversial part of its mission. Not surprisingly, it has yet to exercise such jurisdiction in a referral by a member state.[35] Scholars have repeatedly noted that the Court's jurisdiction is not universal, even for universal crimes. Rather, it is based on a delegation of territorial jurisdiction by the member state. States certainly have jurisdiction over acts by aliens in their territory; and they can transfer such jurisdiction to an international tribunal. As Antonio Cassese puts it, "the Rome Statute authorizes the ICC to substitute itself for a consenting state, which would thus waive its right to exercise its criminal jurisdiction."[36] Thus a Palestinian referral would simply be delegating to the Court some part of the territorial jurisdiction it enjoyed as sovereign state.

For such delegated jurisdiction to work, i) the member state must actually have territorial sovereignty over the areas in question, as discussed

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[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ 2004).

[32] Id., par. 52-54; see also Separate Op. of J. Higgins, par. 17.

[33] Thus the Court recognizes that the Mandate created international "territorial boundaries," while the 1949 Armistice Agreement did not. Id. at par. 71-72. The Court's repeated references to "Occupied Palestinian Territory", a term taken from the language of the G.A. request for an opinion, do not involve any determination that the territory "belongs" to the Arab population. Rather, it is that portion of Mandatory Palestine that Israel forcibly occupied in 1967, after ousting the Jordanian occupation. Par. 73.

[34] *Consequences of Construction*, Par. 121 (emphasis added).

[35] It has begun a preliminary investigation into Russian actions in Georgia, but has not yet made definitive admissibility decisions pending the resolution of complementarity issues.

[36] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 140, 160 (1999).

above, and ii) not have previously delegated or ceded such jurisdiction. In other words, a state cannot delegate what it does not have. The difficulties with the first criterion were discussed in Part I.A. This section will discuss the second problem – a prior inconsistent delegation.

1. Exclusive Israeli Territorial Jurisdiction

U.N. recognition of the State of Palestine has not abrogated the Oslo Accords, which both parties continue to treat as binding.[37] Under the Oslo Accords Israel exercises full territorial control of a section of the West Bank known as Area C. Within Area C, Israel is given, by agreement with the Palestinian authority, complete criminal jurisdiction.[38] All Jewish settlements in the West Bank lie in Area C. Territorial delegated jurisdiction depends on the nation actually having jurisdiction over the territory. It would be difficult to conclude that Palestine can delegate jurisdiction over the settlements when all criminal jurisdiction in this area has already been assigned to Israel by Palestinian agreement in the Oslo Accords.[39] Moreover, the lack of Palestinian jurisdiction over the territory of the settlements makes it harder to argue that this area currently forms part of the "territory" of the State of Palestine.[40]

To be sure, the territorial jurisdiction conferred on the court upon accession is not limited to areas where the country currently exercises control, as William Schabas points out in his massive Commentary on the Court.[41] He gives the example of Cyprus, which acceded after the Turkish invasion: this still gives the ICC jurisdiction over "Northern Cyprus." But this only applies to territory that at one point was clearly within the sovereignty of the acceding state; there is no dispute about Northern

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[37] Emily L. Hauser, *Abbas Threatens To Dismantle PA—Again*, (Dec 28, 2012), available at http://www.thedailybeast.com/articles/2012/12/28/abbas-threatens-to-dismantle-pa-again.html, Avi Issacharoff, *Palestinians may cancel Oslo Accords with Israel, says top negotiator*, Haaretz, (Sept. 18, 2012), available at http://www.haaretz.com/news/diplomacy-defense/palestinians-may-cancel-oslo-accords-with-israel-says-top-negotiator-1.465491. Similarly, when in the wake of the GA statehood vote Israel temporarily suspended transferring certain tax revenues it collected on behalf of Palestinian authorities, as provide in a supplement to the Oslo accords, the Palestinian authorities denounced it as a violation.

[38] GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

[39] See Shaw, *supra.*

[40] See Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. Int'l Crim. Just. 329, 339-42 (2010).

[41] WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 285 (2010).

Cyprus's status before the invasion. The territory here was never under the sovereignty of Palestine. Instructively, Schabas gives the Syrian Golan as another example of territory that would fall within ICC jurisdiction if the occupied country accedes – but not the West Bank. This is because when Israel occupied the Golan, it was clearly Syrian sovereign territory: adjudicating Israel's presence in the Golan would not require a border determination.[42] The West Bank, on the other hand, was not sovereign Palestinian (nor Jordanian) territory in 1967.

2. Exclusive Israel Nationality Jurisdiction & Art. 98 Agreements

Along with giving Israel exclusive jurisdiction over criminal issues Area C, under the Oslo Accords, the Palestinian authorities gave Israel exclusive criminal jurisdiction over all Israelis both in the Palestinian-controlled and Israeli-controlled areas of the West Bank.[43] The Palestinian government is excluded from all adjudicative jurisdiction over Israelis, and is even limited in its enforcement jurisdiction:

> The Palestinian authorities shall not arrest Israelis or place them in custody. However, when an Israeli commits a crime against a person or property in the Territory, the Palestinian Police, upon arrival at the scene of the offense shall, if necessary, until the arrival of the Israeli military forces, detain the suspect in place while ensuring his protection and the protection of those involved. . ..[44]

Israel's exclusive jurisdiction over Israelis in the West Bank, confirmed by the Oslo Accords, further undermines any notion of delegated jurisdiction. Moreover, this aspect of the Oslo Accord is analogous to Art. 98 agreements. Art. 98(2) of the Rome Statute provides that a member state need not surrender suspects to the ICC when it would conflict with other international commitments of the sending state. The U.S. has used Art. 98(2) very aggressively, signing over one hundred such agreements specifically contemplating preventing the exercise of ICC jurisdiction over U.S. nationals. Indeed, Art. 98 has been a staple of the U.S. approach to "living with" the ICC.

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[42] There was a dispute over the border between Israel and Syria even before 1967, as Syria had in 1949 occupied a strip of territory on the eastern shore of the Sea of Galilee. But the civilian presence in the Golan lies in territory that was previously undisputedly Syrian.

[43] Interim Agreement: article XVII.1.a, article XVII.2.c, article XVII.4 (1995).

[44] Interim Agreement Annex IV, Art. II(c). See also, Interim Agreement, article XII.1 and Annex IV of the Interim Agreement, article II.7.

The propriety of such Art. 98 agreements is a matter of ongoing dispute. Many commentators argue that Art. 98 applies only to agreements that pre-date the sending state's ICC membership, or to specific kinds of immunity agreements, like Status of Forces Agreements – and not to ones designed specifically to avoid the ICC. Israel's immunity agreement with Palestine satisfies both narrow approaches to Art. 98. Of course, Art. 98 goes to the surrender of suspects, not admissibility. But it would seem unwise for the Court to proceed with a case where it cannot legally demand the surrender of people from either of the states involved.

D. Monetary Gold *Principle*

Adjudication by international tribunals, including the ICC, depends fundamentally on state consent. As a result, the ICJ held in the influential *Monetary Gold* case that it could not determine the legal rights and duties of a state that was not party to the case and that had not given its consent.[45] Thus where the decision of a case necessarily requires the adjudication of the legal interests of a non-consenting state, the Court cannot exercise jurisdiction. This principle extends beyond the ICJ; other international tribunals have treated the principle as part of the general international law applicable to international tribunals:

> [T]he consent principle applies to the ICC as it does to other international Tribunals. Were the ICC to make judicial determinations on the legal responsibilities of nonconsenting States with respect to the use of force and aggression, this would violate the *Monetary Gold* principle.[46]

Not all or even most ICC cases involving nationals of non-member states would implicate the *Monetary Gold* rule. The ICC determines the legal responsibilities of individuals; states are not parties at all. While state responsibility may result from the fact of an official committing a crime, the ICC itself will typically not need to make prior judgments about state responsibility to convict a defendant.[47] Yet sometimes the ICC's jurisdiction would run afoul of the state-consent principle. Dapo Akande has suggested that prosecuting non-member nationals for aggression would be such a situation, since for an individual to be guilty requires a prior determination that the state is an aggressor.[48] This would also be the case

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[45] *Italy v. France, United Kingdom, and United States*, ICJ Rep. (1954) at 19.

[46] See Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, Oxford Institute for Ethics, Law and Armed Conflict Working Ppaer, at 26 (May 2010).

[47] Akande, *Nationals of Non-Parties, supra*, at 637.

[48] See Akande, *Prosecuting Aggression*, *supra*, at 26, 35.

where underlying international borders between a member and its non-member neighbor are undetermined. To exercise jurisdiction, the Court necessarily must decide on the borders of Palestine, which simultaneously determines the borders of Israel, a non-member. In order to reach the issue of individual liability, the Court must first draw the borders of a non-consenting state - as clear a violation of the *Monetary Gold* principle as one could imagine.

E. Line-Drawing

The ICC could not address settlements without determining the borders of Israel and Palestine. This would involve the Court in many thorny delineation issues, each with massive geopolitical implications. The Israel-Jordanian Armistice line (known colloquially as the Green Line), while a focal point for political negotiations, does not serve as a border. Indeed, the very terms of the instrument delineating the 1949 armistice line makes clear that it has no bearing on "territorial settlements or boundary lines."

Tithe proverbial peace deal whose parameters "everyone knows" involves Israel leaving much of the West Bank, yet retaining many settlement blocs. Yet this is not typically framed as involving a cession already sovereign Palestinian territory (and certainly such a framing would reduce the likelihood of a deal's acceptance by the Palestinians). Similarly, one reason Israel has not annexed the West Bank is to retain domestic political flexibility on withdrawal.

One might suggest that the lack of defined borders does not mean that Palestinian territory is entirely undefined. For Palestine to be a state, it must have some defined territory – and this might include Ramallah, Jenin, and other major population centers. Thus one might think the line-drawing problems insignificant, and the lack of a clear border a technical point that should not defeat jurisdiction. Yet the great majority of alleged "deportation or transfer" violations take place into communities within a few miles of the Green Line. The most contentious locations – Jerusalem and the E1 area of Maaleh Adumim – are often within a kilometer or less of the Armistice Line. (Moreover, all Israeli settlements are within territory, designated "Area C" in Palestinian-Israeli agreements, where Israel has been given exclusive control pending a final negotiated deal.)

Again, the 1949 Israel-Jordanian Armistice line is not a border and has

never been designated as such by U.N. agencies.[49] Yet if the ICC was tempted to use this well-known line as a proxy border, it would find itself embroiled in numerous exceedingly thorny line-drawing problems that arise from the fact that the Green Line did not act or function as a border.

1. No-man's Land.

The simplest illustration of the Green Line's non-suitability for boundary determinations is the existence of significant pockets of no-man's land, especially near important locations.[50] The DMZs lie in central and strategic areas, including the relatively large Latrun salient on which the main Jerusalem-Tel Aviv highway lies, and several key areas in Jerusalem.[51] There, the Armistice Line is not a line at all, but rather two parallel lines, 1-3 kilometers apart, with a "no man's land" between them.[52] Such zones make sense for armistice lines, to keep two opposing armies disengaged. Indeed, many of the most controversial "settlements" in the Jerusalem municipality lie in the narrow strip of no-man's land, rather than on Jordanian-occupied territory. This includes many of those most loudly decried by the international community as fatal to a two state solution.[53].

Palestine considers all of the no-man's lands and DMZ to be part of its territory, and calls the Israeli presence in these areas illegal settlements on their territory, and they are generally described as such in popular

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[49] Israel-Jordan Armistice Agreement, U.N. Doc. S/1302/Rev.1Art. VI (8)-(9) (April 3, 1949); see also Art. II(2) (noting that "the provisions of this Agreement being dictated exclusively by military considerations" and thus does not "prejudice the ultimate peaceful settlement of the Palestine question").

[50] RAPHAEL ISRAELI, JERUSALEM DIVIDED: THE ARMISTICE REGIME, 1947-1967 (2002) 61-63.

[51] See ISRAELI MINISTRY OF FOREIGN AFFAIRS, ISRAEL'S STORY IN MAPS: ISRAEL'S CHANGING BORDERS at 16, 19; DAVID NEWMAN. BOUNDARIES IN FLUX: THE GREEN LINE BOUNDARY BETWEEN ISRAEL AND THE WEST BANK – PAST, PRESENT & FUTURE 15-16 (1995).

[52] Each line was drawn on a map in an informal meeting by an Israeli and Jordanian officer respectively, to illustrate the positions of their forces. See Michael Dumper, The Politics of Jerusalem Since 1967 31-33.

[53] These include at least parts of the Ramot and Ramat Shlomo neighborhoods in northern Jerusalem. See Piggy Cidor, *Political Construction*?, JERUSALEM POST 8 (April 30, 2010). Israel's construction plans prompted a famous flap with Vice President Biden in 2010, and Palestine's threat's to turn to the ICC after the statehood resolution. See Harriet Sherwood, *UN security council's EU members to condemn Israeli settlements expansion*, THE GUARDIAN (Dec. 19, 2012); Ethan Bronner, *As Biden Visits, Israel Unveils Plan for New Settlements*, NY TIMES A4 (March 10, 2010).

accounts.[54] Yet as a legal matter, it would be exceedingly difficult to conclude that "no man's land" - which under the armistice agreement was left unpopulated - is included in "the territory of Palestine."[55] On the other hand, if the ICC found that it had no jurisdiction over these areas, it would give a virtual carte blanche to Israel construction in these areas, which from a diplomatic perspective would have the same effect as settlement in "Palestinian" territory. Thus if the ICC takes Palestine's territory to be that territory formerly occupied by Jordan, it effectively immunizes Israeli settlements in sensitive areas.

2. West Jerusalem & Mt. Scopus.

The 1949 Armistice Agreement included the area around the Hebrew University on Mount Scopus as an Israeli enclave within Jordanian held territory. The area extends well beyond the university,[56] and a linked demilitarized zone ran along the Mount of Olives ridge. The Mt. Scopus enclave also contained what is now large Arab neighborhood that peace plans tend to incorporate in a Palestinian Jerusalem.[57] Despite its not being under Jordanian control before 1967, Israel has chosen to largely not allow Jewish building in this Arab neighborhood, and any Israeli presence there would surely be denounced as "settlement."

It would be hard to contend that the Mount Scopus area is part of Palestinian territory.[58] Yet an ICC determination that it was not could remove any inhibition Israel felt about allowing Jewish settlement there.

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[54] http://peacenow.org.il/eng/content/beit-orot-tsawane. The European Union has also classified towns in the central no-man's land as settlements. Barak Ravid, *Israeli officials bemoan EU's marking of parts of Modi'in as settlement*, Haaretz.com, (Aug. 14, 2012).

[55] David Makovsky, *Mapping Mideast Peace*, NY Times (Sept. 11, 2012), available at http://www.nytimes.com/interactive/2011/09/12/opinion/mapping-mideast-peace.html#nytg-optionsBox (treating No-Man's Land as different from the rest of the West Bank for purposes of proposed territorial parameters for peace deal because it was "not sovereign soil").

[56] See Israel-Jordan Agreement on demilitarization of Mt. Scopus Area (July 7, 1948), U.N. Doc. S/3015 (May 23 1953), Art. 1-2 (describing area under "United Nations protection" as including "Hadassah Hospital, Hebrew University, Augusta Victoria [hospital] and the Arab village of Issawyia", as well as delineating an adjacent "no-man's-land"

[57] ISRAELI, JERUSALEM DIVIDED at 66, 71-73 (describing conflict between Israeli presence on Mt. Scopus and Issawiya residents).

[58] After the Armistice, Jordan did contend Mt. Scopus was Jordanian territory to which Israel was merely entitled access, and even proposed that "these points be decided by a competent judicial tribunal" such as the ICJ. See MAAN ABU NOWAR, THE JORDANIAN-ISRAELI WAR 1948-1951: A HISTORY OF THE HASHEMITE KINGDOM OF JORDAN (2003) 387-89.

The consequences of such settlement would no doubt be seen as similar counterproductive to development of the nearby E1 area, on the other side of the Green Line. In short, turning the settlements issue into a criminal case would only encourage Israel to turn its residential construction plans in the Jerusalem area to these areas rather than the entirely Jewish neighborhoods where they currently build.

Yet there would be no way the ICC could avoid determining the status of these territories. If it found jurisdiction over settlements in no-man's land and demilitarized zones, it would effectively be awarding these territories to Palestine. If it found no jurisdiction, it would essentially award them to Israel, or at least immunize Israel from legal sanction for settlement in these areas. Given that the no man's lands in the southeast Jerusalem are of significant size, but largely undeveloped by Israel, if Israel were to open these areas to settlement, the international community would certainly condemn it.

One might argue that the no-man's lands and Jerusalem problems are peripheral; the ICC could at least take jurisdiction of settlement elsewhere. Yet these are significant not simply because of the territorial disputes they raise, but because they illustrate that the Armistice Line was not a border, and cannot be assumed to be the border of the Palestinian state. All references to it serving a baseline for boundary discussions refer to a peaceful settlement of all issues, including refugees, suggesting the border issue cannot be decided by itself.

3. Western Jerusalem.

Just as Palestine has no clear borders, Israel has no clear borders. Before 1967, few nations recognized Israel's sovereignty over territory beyond that suggested for Jewish sovereignty by the 1947 G.A. Partition proposal. That seems to have changed in the ensuing decades, with most nations apparently recognizing Israel sovereignty largely within the 1949 Armistice Lines. Yet there remains a major exception to this. The General Assembly and the Security Council have all denounced or declared invalid Israel's control even of Western Jerusalem. No nation in the world officially recognizes Western (pre-1967) Jerusalem as Israeli territory. Thus if the ICC adopts the "Armistice Line" position in a demarcation, it would be endorsing a position on Israel's presence in Western Jerusalem that no government has been willing to take, even Israel's greatest allies.[59] If it takes the position,

[59] Cf. Zivotofsky v. Clinton, 566 U.S. __ (2012) (holding that law requiring printing "Israel" as country of birth on passports of those born in Jerusalem, against wishes of

following every nation of the world, that Western Jerusalem is not Israeli because it was intended to be part of an extraterritorial *Corpus Separatum* for Jerusalem, than by the same token Eastern Jerusalem could not be Palestinian sovereign territory – and thus settlements there fall outside ICC jurisdiction. This highlights the extraordinary complexity and unintended collateral consequences of any border delineation effort, and how far it lies from the ICC's mandate.

It may be objected that if undefined territory bars admissibility, it would exclude many nations from ICC jurisdiction Border disputes are particularly common for newly formed states. A large portion of the world's nations are involved in territorial disputes, but most are peripheral.[60] The largest portion of the world's territorial disputes by far is in Asia[61] – which also has by far the lowest ICC membership of any region in the world.

However, it is a requirement of statehood to have some defined territory. The difficulty with the admissibility of the Israeli settlements issue the 100% overlap between the location of the alleged crime and the most disputed portions of the territory (Area C, and the actual settlement sites themselves). Moreover, recognition of Palestinian statehood by the G.A. may have been an exceptional move not based on Montevideo criteria, in which case the problem here would have broad application.

II. GRAVITY & SEVERITY

Under the Rome Statute, a case is inadmissible when it "is not of sufficient gravity to justify further action by the Court."[62] The concept of gravity is one of the great mysterious aspects of the Statute. Neither the statute, nor the *travaux preparatoires* explain what considerations are relevant to gravity. The question is necessarily a difficult one, because the crimes within the Court's jurisdiction are by definition "the most serious crimes of concern to the international community as a whole."[63] Thus the gravity requirement may further limit jurisdiction to the worst violations of the worst crimes. Thus far the Court has focused almost exclusively on what would be characterized as mass atrocities by any standard, and thus the

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President, does not raise a non-justiciable political question).

[60] KRISTA EILEEN WIEGAND, ENDURING TERRITORIAL DISPUTES: STRATEGIES OF BARGAINING, COERCIVE DIPLOMACY, AND SETTLEMENT 86-89 (2011) (finding 71 currentterritorial disputes in the world, including 40% of the world's nations, but with only 21 of them involving inhabited territory, and a full 40% concerning uninhabited islands)

[61] Id. at 90.

[62] Art. 17(1)(d).

[63] Art. 5(1).

definition of gravity has remained ambiguous.

Yet there are several explicit sources of guidance about the general criteria for evaluating gravity. First, the Prosecutor has formulated express criteria of gravity to guide its otherwise very discretionary determinations. Second, the Statute mentions gravity in two other relevant contexts that can inform the admissibility criteria. Finally, general principles of law and international criminal law establish some framework considerations. Under all these tests, the settlements appear to fail to meet the standard. At the very least, admitting a settlements case would require setting an extremely low and flexible gravity bar.

A. The Prosecutor's Quantitative Test

The Prosecutor has said that the primary criterion is the "number of victims," particularly the number of slain.[64] Generally, this approach measures gravity by the number of victims of violence, including injured, raped, and tortured.[65] Thus the Prosecutor has refused to proceed with a case involving twelve unlawful killings by British soldiers in Iraq because it was "of a different order" from the typical case that involves at least thousands of slain or injured. Other qualitative factors also come into play, such as the systematic nature of the crime, but this does not appear to supplant objective quantitative gravity. Notably, all of the gravity determinations involve aggregating bodily violence and coercion. Never has a crime that does not result in death or serious physical injury, implemented through large-scale violence, been held to satisfy the gravity criteria.

Proceeding with a settlements investigation would constitute a massive departure from the OTP's past practice. As one commentator describes it:

> [T]he number of victims is the only factor that has played a significant role in the OTP's situational gravity determinations – an emphasis that it has defended on three different grounds. First, the OPT argues that its limited investigative resources require prioritizing situations involving mass atrocity. Second, the OTP believes that the international community is more likely to view investigations of situations involving large numbers of victims as legitimate. And third, the OTP points out that the number of victims tends to be reliably reported, making it a relatively objective factor.[66]

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[64] Luis Moreno-Ocampo, *Integrating the Work of the ICC into Local Justice Initiatives*, 21 Am. U. Int'l L. Rev. 497, 4988 (2006).

[65] See ICC OTP, Draft Policy Paper on Preliminary Examinations at 13-14 (Oct. 4, 2010).

[66] Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in CARSTEN STAHN & LARISSA VAN DEN HERIK (EDS.), FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL

Aside from the quantitative scale of a particular crime, there is an implicit hierarchy of types of crime in international criminal law,[67] which reflects broader trends throughout criminal law. Crimes involving murder are the most serious, followed by sexual violence, and those involving torture or extreme physical or psychological suffering. Somewhere after these may fall crimes involving deprivation of liberty or endangerment, such as the forcible conscription or use of child soldiers. Crimes against property "rank at the low end of the gravity spectrum."[68] The Court's docket this far has focused only at the high end of this spectrum, with all investigated situations involving "hundreds or thousands of the gravest forms of crimes (such as murder or sexual violence)."[69]

The settlements crime is of different nature. It is not one of murder or direct physical violence. Indeed, it is not even a property crime in the conventional sense (though its commission may involve property crimes, it need not do so). It falls entirely outside the murder – property crime continuum, protecting more intangible interests.[70] Indeed, it could be said the crime has no individual victims; if anything, it guards the protected population's "separate existence *as a race.*"[71] The Palestinians have flourished as a people with a distinct identity since the establishment of the settlements. Their population has grown dramatically in parallel with settlement growth, tripling since 1967. And while historians argue whether Palestinian national identity antedates the Six Day War,[72] it is clear that the subsequent decades have resulted in a crystallization and unprecedented invigoration of Palestinian nationhood.[73]

JUSTICE (2009).

[67] Though the statutes of international criminal tribunals do not make any explicit distinction in the severity of the various crimes within their jurisdiction, the sentencing practice of the ICTY and ICTR does reveal an implicit hierarchy with genocide at the top and war crimes at the bottom. Presumably, non-grave breaches would be at the bottom of the bottom.

[68] See Margaret de Guzman, *Gravity and the Legitimacy of the International Criminal Court*32 Ford. Int'l L. J. 1400, 1452 (2009).

[69] ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 160 (2007).

[70] Id. at 308 (noting the transfer prohibition does "not originate in classic concerns of … protection of persons and property affiliated with the 'other side'" and protects different values from those of all other war crimes).

[71] See ICRC Commentary.

[72] Compare, RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS 18 (2009), with EPHRAIM KARSH, PALESTINE BETRAYED (2011).

[73] *Palestine*, ENCYCLOPEDIA BRITANNICA ("[A]fter 1948—and even more so after 1967—for Palestinians themselves the term came to signify not only a place of origin but, more importantly, a sense of a shared past and future in the form of a Palestinian state.")

If the Palestinian authorities join the Court or accept ad hoc jurisdiction, the Court would only be able to consider Israeli civilian migration into the occupied territories from the date of the acceptance, or at best, the date of its recognition as state by the GA.[74] Thus the "gravity" question would not encompass the entire Jewish civilian presence the disputed territories, or what critics call the "settlement enterprise." The only "deportation or transfer" that would count towards the gravity of the crime would be those subsequent to the effective date of jurisdiction.[75] This makes both a quantitative and qualitative impact. How many Jewish civilians need to move to constitute an offense on par with others the Prosecutor has proceeded with? The prosecutor would have to establish some quantitative threshold.

To be sure, some commentators have argued for a broader inquiry, one which might take into account the "social alarm" caused by an alleged crime. This refers to the level of concern of the international community.[76] The explicit purpose of such qualitative factors is to make it easier to take jurisdiction of crimes committed by Western nations – and certainly Israel's settlements would be perhaps the easiest case under a social alarm test. Indeed, it may be the most socially alarming crime there is. Yet the subjective nature of such an inquiry has been sharply criticized by other commentators,[77] and it would indeed further open to ICC to charges of politicized prosecution, of being driven by a kind of international mob mentality. Finally, in one case where the Pre-Trial Chamber cited "social alarm" as a gravity factor,[78] the Appeals Chamber reversed, holding that "it is not a consideration that is necessarily appropriate for the determination of admissibility."[79]

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[74] See Part III, discussing temporal jurisdiction.

[75] Some have argued that transfer may constitute a continuing crime. However, the *actus reus* is clearly the actual transfer, and the Rome Statute does not allow for liability for acts prior to its going into effect. The notion of a continuing offense is belied by the failure to require any removal of settlers in any of the several international peace plan dealing with such situations elsewhere, such as Cyprus, Morocco, and East Timor.

[76] See Heller, supra.

[77] See, e.g., Mark Osiel, *How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of Situational Gravity*, Hague Justice Portal at 4-5 (2009); Mohamed M. El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L. FORUM 35, 45 (2008)

[78] The Pre-Trial Chamber did not seem to refer the overall level of international concern about the particular situation; rather, they meant the type of conduct (child soldiers) was a worldwide phenomenon that thus caused general concern. While "transfer" takes place in other countries as well, it does not seem to create the same social concern outside of the Israel/Arab conflict.

[79] *Prosecutor v. Lubanga*, Judgment on Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for a Warrant of

B. Victimless Crime?

Leaving aside absence of dead or wounded, a secondary measure of gravity is the number of victims. This raises the question of how one calculates "victims" of a settlement. For all international crimes, the international legal order is in a sense a victim, and for crimes against particular groups, that group is in an abstract sense a victim. This more general aspect of injury is what gives the crimes an international public character. But this is not what is meant by "victims" in the ICC context. While an injury may be collective, it must also be "personal" to create a victim.[80]

The ICC statute specifically identifies "victims" as a distinct legal status that comes with various defined rights within the ICC system, such as participation in the proceedings and restitution.[81] The Rules of the Procedure and Evidence provide the definition of "victim" as "natural persons who have suffered harm as a result of any crime within the jurisdiction of the Court."[82] This definition has two major elements: a notion of "harm," with a demonstrable "causal link" to the crime. "Harm," as interpreted by the PTC in light of international human rights instruments and standards means encompasses both physical, property and psychological injuries (such as that caused by seeing family members be tortured or witnessing other violent events).[83] But the alleged injury must be "personal" one as opposed to purely collective. The casual link requires that the harm must have is the "consequence and result" of the commission of the crime.[84]

"Deportation or transfer" of the occupying power's civilians poses an obvious challenge for the classic conception of victim. It is not done *to* particular protected persons or their property.[85] Indeed, commentators acknowledge that 49(6) protects a different sort of interest from other protections for the person and property of protected persons. As the Commentaries make clear, Art. 49(6) protects the occupied people as a

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Arrest, Article 58," ICC-01/04, para. 72 (July 13, 2006).

[80] Appeals Chamber, Lubango, Par. 34-35 (July 11, 2008), Decision on Victim's Participation.

[81] Elisabeth Baumgartner, *Aspects of victim participation in the proceedings of the International Criminal Court*, 90 Int. Rev. Red Cross 409 (2008).

[82] Rule 85(a).

[83] Baumgartner at 421.

[84] Fourth Decision on Victims' Participation, Par. 74-78 (Dec. 12, 2008). http://www2.icc-cpi.int/iccdocs/JUDSUMM/JSV_ICC_0105_0108_320.pdf.

[85] Any particular "transfer" may involve an expropriation of property, which could be a separate offense, but it certainly need not do so.

"population" or as "separate… race." Such interests are entirely collective, and not personal.[86] Taking the case of residential construction within existing Jewish neighborhoods, or without expropriation from Palestinian private owners, it would be difficult to demonstrate economic harm to particular Palestinians.[87] Indeed, it would be hard to demonstrate that the protected persons would have known about the new "transfers" to established population centers if it were not for news accounts. Again, this is not to say the "deportation or transfer" does not injure the "protected persons;" rather, it does not injure them in the personal and identifiable way that creates individual (and thus quantifiable) "victims."

Moreover, the vast majority of "settlement activity" over which the Palestinians complain takes place both within a mile or so of the "Green Line," and in large Israeli communities. Thus there is no danger of a change in the demographic character of the occupied territory from these alleged "transfers." While the conventional view is that the anti-transfer norm is not limited to efforts at changing the demographic character of an area, surely the underlying purpose of the norm is an important factor for the fuzzier gravity determination.

Indeed, the purpose for much of the construction in Jerusalem is manifestly to reduce high density and housing prices by building in direct continuity with non-occupied territories. Again, I assume here that this does not preclude international wrongfulness, but it may be quite relevant to the issue of gravity.

C. Gravity Elsewhere in the Statute

While the statute does not define "gravity" for purposes of admissibility, it does use the same term in two other contexts. These apparently refer to the same concept, and should be read to inform the Art. 17(1) determination. First, in the definition of war crimes, it borrows the Geneva Convention's distinction between grave and non-grave breaches. Second, gravity is a factor in sentencing. Thus aggravating factors in sentencing can help inform the initial jurisdictional determination.

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[86] In some circumstances, individual Palestinians could claim economic harm from settlement construction, such as difficulty of access to agricultural lands. Yet for settlement growth within their existing municipal boundaries, or in densely Jewish "settlement blocs," it would be hard to demonstrate that an increase in their population has any direct effect upon individual Palestinians (regardless of the more general affect on "prospects for peace")

[87] To the extent that an allegation of expropriation or economic harm is involved, that aspect of the alleged crime could be inadmissible on complementarity grounds, as Israeli courts routinely entertain and grant relief to Palestinians claiming infringement of their property rights.

1. Grave breaches.

The Statute's definition of war crimes continues the Geneva Convention's distinction between "grave breaches" and other, less severe violations.[88] Non-grave breaches have traditionally been thought less objectively atrocious, certainly of less international concern: the Convention's extradite-or-punish rule does not apply to non-grave breaches. Art. 49(6), the deport-or-transfer provision, is not a grave breach, and is not treated as such by the Rome Statute.[89] This obviously does not mean non-grave breaches fail the Art. 17(1) test of gravity; otherwise there would be no point including them as crimes. However, it does mean that these offenses are already at the low end of the gravity spectrum, which combined with the lack of physical violence and direct victims should be decisive.

2. Sentences

The gravity of the crime is not just a factor for admissibility, it is a sentencing consideration.[90] Thus, gravity is a spectrum, at one point on which jurisdiction is satisfied, with sentences increasing as one proceeds further on the spectrum. But sentencing considerations can help show the nature of the spectrum. To put it differently, if sentencing considerations suggest the gravity of the crime – in proportion to other crimes - requires a sentence of zero years, then the crime should be thought to fail the admissibility test.

Only one defendant has been sentences thus far, Thomas Lubanga, but the Court's sentencing decision can help illustrate the relevant factors. In explaining its sentence, the Court noted several factors that contributed to the "gravity" of the crime of conscripting child soldiers (as young as 8) for active participation in hostilities. First, the crime involves physically coercing the subject. By definition, the purported crime "deportation or transfer" into occupied territory is not forcible, in contrast to the explicitly forcible transfer of protected persons within occupied territory which constitutes a grave breach. Moreover, conscription put the young children in grave danger of violent death or injury. Finally, the court noted that the conscription was geographically "widespread" in the conflict. Again, Israeli "settlements" occupy less than 2% of the maximum claimed territory of Palestine, and the vast majority of the settlers live in extreme proximity to the Green line. It is not clear that this would constitute "widespread,"

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[88] See Art. 8(a) & (b) (distinguishing "grave breaches" from "other serious violations").

[89] Art. 8(2)(b)(viii).

[90] See Art. 78(1). The statute does not specify the components of gravity in the sentencing context.

especially if future settlement activity was focused on the settlement blocs, which almost by definition are not "widespread."

D. The Paradox of Gravity

Perhaps the gravity argument proves too much. If settlements, because of their lack of death, violence, and absence of individual victims, do not constitute a particularly "grave" crime, it would effectively read the Article 8(b)(vii) out of the Statute. No deportation or transfer would ever qualify because they by definition do not involve killing or other physical violence, and lack direct victims. Presumably, under some circumstances the crime should be cognizable. The first response would be to note that while making the provision nugatory is theoretically problematic, reading it to have a narrow application is entirely consistent with the practice of international criminal tribunals. Never has anyone been prosecuted for this offense; thus such crimes are obviously treated as less important that more typical war crimes.

More substantively, one might, as one Judge of the Appeals Chamber has suggested, characterize a crime as sufficiently becomes grave when it threatens the policies behind its criminalization.[91] For violent crimes, it is obviously protecting the life or body of the victim. Yet for transfer, a more inchoate crime, the injury to be prevented is, according to the official commentary was preventing a worsening of the "native population's" economic conditions and threatening its "separate existence… as a race."[92] This might be the case where the transferred population constitutes a majority in the occupied territory. Such "demographic busting" transfers are in fact not uncommon – examples might include Northern Cyrus, East Timor, the Western Sahara, and, more controversially, the Baltics and Tibet.[93] Yet settlers make up only 15% of the percentage of the population of Palestinian territory (and zero percent of the territory of Gaza and Areas A & B). And as noted above, the Palestinian's "existence as a race" – a term that sounds somewhat anachronistic now - has only become stronger since the beginning of Israeli settlement.[94] The economic injury is even more

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[91] *Situational Gravity in the Democratic Republic of Congo* (ICC-o1/04), Separate and partially dissenting opinion of Judge Pikis par. 40 (July 13, 2006) (suggesting a very low gravity threshold, but noting that crime may fail to satisfy the gravity criteria when its commission does not threaten the "objects of the law criminalizing the conduct").

[92] IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 281 (1958).

[93] There is no doubt that China has carried out a massive program of resettlement to weaken Tibetan ethnicity; the question is whether Tibet is occupied territory.

[94] See text at nn. 86-89, *supra*.

clearly absent; the Palestinian territories have seen considerable economic growth since 1967, outpacing neighboring many states and certainly their prior rate of growth.[95]

Second, one might also suggest that stand-alone claims of 8(b)(viii) violations might indeed be quite unusual and difficult to make. Transfer of an occupying power's population into a territory is often, and perhaps usually, accompanied with a concomitant expulsion of protected persons (as in Cyprus, Georgia, Nagorno-Karabakh, and elsewhere). Thus other violations of the Geneva Art. 49 norm might be relevant to the gravity of violations of subsection 6. In the *Lubanga* sentencing, the Court made it clear that particular crimes were magnified in their gravity by their commission alongside other crimes, or as a means of committing other crimes. Indeed, the fact that the novel crime of transfer into occupied territory was made part of Art. 49 suggests the drafters understood these as being two sides of a common process.[96]

E. Relative Gravity

The gravity of Israel's settlements can also be considered in relation to the magnitude of other arguable "deportation or transfer" violations elsewhere in the world. Indeed, there are at least two ICC member states currently suffering from occupation and potential violations of "deportation and transfer" by non-member states – Cyprus and Georgia, occupied in part by Turkey and Russia, respectively. Turkish settlement in Cyprus is apparently of great magnitude.

First, how does one measure the scale of "transfer?" There is no precedent on this question, but the policies behind the norm suggest that the number of transferees relative to the size of the target population would be the right measure, rather the absolute number. Otherwise, if 1000 people are transferred into a territory of 500, it would be considered *de minimis*,

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[95] See INTERNATIONAL MONETARY FUND, THE WEST BANK AND GAZA: ECONOMIC PERFORMANCE, PROSPECTS, AND POLICIES: ACHIEVING PROSPERITY AND CONFRONTING DEMOGRAPHIC CHALLENGES 20-23 (2001) (finding average 6% per annum GDP growth in Gaza and West Bank under Israeli control); ARIE ARNON, ET. AL. THE PALESTINIAN ECONOMY: BETWEEN IMPOSED INTEGRATION AND VOLUNTARY SEPARATION 20-23 (1997) (noting that in first three decades after Six Day War, Palestinian economy grew faster than Israel's).

[96] This differs from Oppenheim's argument that a violation of 49(6) only occurs when the transfer displaces protected persons, which has been widely criticized. See Hebert Hansell memo. Oppenheim's legal conclusion was premised on the factual observation that Art. 49 violations tend to go together. One need not agree with the legal conclusion that 49(6) violations cannot exist *simplicter* to recognize that the fact that they often arise alongside Art. 49(1) violations means that the gravity argument suggested here would not effectively read the settlements crime out of the ICC.

whereas if 1 million were transferred into a territory of 100 million, it would be a big deal.

Turkish settlers constitute an absolute majority in Northern Cyprus (and by many accounts the prior Turkish population is not so happy about the new arrivals). By contrast, Israeli civilians in the West Bank (not including Gaza) are under 20% of the total population, if you include E. Jerusalem (and follow Palestinian population figures). Throw in Gaza, and the percentage drops considerably.

The total population of the island of Cyprus is 1.1 million. Turkish settlers constitute over 13% of the population of the island. In the unlikely event of reunification, the Greeks see this as a bitter pill. Population statistics for the Palestinians are also greatly in the dispute, but if one estimates the total population between the river and sea at 11 million, the Jews across the Green Line would be about 5% of the total. Given that Israel has had more time to cement its hold, and its settlers do not need to be transported across a body of water, one might conclude this a much less intensive and invasive "deportation or transfer."

In the same vein, in Northern Cyprus, the influx of settlers has been accompanied by the collapse of the local population, i.e. significant net emigration. That exacerbates the demographic effect of transfer, and is part of the classic "move in, kick out" model where 49(6) violations helped effectuate de facto 49(1) breaches. In the West Bank, by contrast, the population of protected persons has grown rapidly under occupation.

It would be difficult (though surely not impossible) for the ICC to take jurisdiction of a suit involving Israeli settlements, without opening the door for an easy and direct Cypriot referral of Turkey (and in that situation, there are no trick problems of territoriality, with the land in question clearly falling under Cyprus's sovereignty before the Turkish invasion). Moreover, aside from alleged transfers in ICC member state territory, one might consider the Moroccan conduct in occupied Western Sahara, where again, an absolute majority of the current inhabitants are Moroccan settlers who have come since the take-over of the territory in 1975.[97] This may be of particular relevance to the ICC, as Western Sahara is now also considering emulating the Palestinian turn to the G.A. for non-member state status.[98] All of these examples suggest that if there is a gravity scale of settlement, Israel's policies do not put it at the top of the world's violators.

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[97] See, generally, Jacob Mundy, *Moroccan Settlers in Western Sahara: Colonists or Fifth Column?* 15 ARAB WORLD GEOGRAPHER 95 (2012).

[98] Reda Shannouf, *Western Sahara May Also Request UN Observer Status*, Al-Monitor, available at http://www.al-monitor.com/pulse/politics/2012/12/western-sahara-un-observer-status.html#ixzz2Lx5hb3Lx.

III. THE TEMPORALITY OF PALESTINE

In addition to geographic limits, the Court can only deal with crimes committed with in its temporal jurisdiction, which runs from when the treaty went into effect for the relevant member state.[99] The prospectivity requirement is consistent with and complementary to the Court's not exercising universal jurisdiction, and with the principle of *nulla crimen son lege*.[100] Yet some have argued that there is a loophole by which the Court can exercise jurisdiction over Palestine retroactively, perhaps even backdated to the establishment of the Court in 2002.[101]

There are two ways a state can accept the Court's jurisdiction: by becoming a member, which is a blanket acceptance, or by making a "declaration" pursuant to Art. 12(3) to "accept the exercise of jurisdiction by the Court with respect to the crime in question." The declaration provision interacts with the temporal jurisdiction provision of Art. 11, which provides that "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, *unless that State has made a declaration under article 12, paragraph 3*."[102] The language of the provision can be read to exempt 12(3) declarations from the general prospectivity rule.[103]

However, a stronger and more natural reading holds that Art. 11(b) addresses temporal jurisdiction, dealing with the most common situation – that of member states. Indeed, the only purpose of 11(2) is to define temporal jurisdiction for member states that join subsequent to the Statute's entry into force. For those, it states the basic rule: jurisdiction that runs from the entry into force for the state. However, there is one exception for the rule of prospectivity for member states – signaled with the word "unless." "Unless" does not introduce a new rule of temporal jurisdiction for 12(3) declarations; rather, it explains the effect of declaration on subsequent membership. It makes clear that where there has been a prior 12(3) declaration by the new member state, jurisdiction can be tolled back to the

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[99] Art. 11.

[100] See Art. 22(1) ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."); see also, Art. 24(1) (barring criminal responsibility for crimes prior to Statute's entry into force.).

[101] See, e.g. David J. Schaeffer, *How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction*, 2 J. Int'l Crim. Just. 26, 32 (2004); Kevin Jon Heller, *Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively*, OpinioJuris (Nov. 29, 2012).

[102] Art. 11(2) (emphasis added).

[103] See SCHABAS, INTRODUCTION, *supra* , at 73

declaration, at least with respect to the relevant crimes. Thus the membership subsumes and supersedes the prior declaration, in a manner entirely consistent with *nulla crimen sine lege*. Indeed, were it not for this "unless" language in 12(3), one might have thought that the acceptance of membership destroys jurisdiction created by a prior declaration.

Thus 11(2) says nothing about the temporal jurisdiction created by from a declaration, but entirely about the jurisdiction arising from membership, which can be backdated to a prior declaration. This makes clear why the reference to declaration says "unless" but does not provide a clear alternative temporal jurisdiction rule for 12(3). Indeed, 11(2) inconsistent with the notion of retrospective 12(3) declarations, as it reaffirms that jurisdiction depends entirely on acceptance of jurisdiction at the time of the relevant conduct.[104] Such a view is consistent with the policy of encouraging states to become full members. Allowing retrospective jurisdiction *over non-nationals* through declarations would allow states to opportunistically invoke the jurisdiction of the Court at their convenience, without assuming the broader obligations of membership. Given the strong policy of the Statute for full assumption of obligations,[105] providing more flexibility for piece-meal acceptance of jurisdiction would seem inconsistent. The clear policy of the Statute, reflected in numerous articles, is prospectivity on state-by-state level (as opposed to global prospectivity from the coming into force of the statute) and any departure from that would need clear textual and policy expression. Indeed, the prospectivity policy is so strong that nation's can only withdraw on a year's notice – to protect settled expectations of other states, and such withdraw is not allowed to have any retrospective legal effect.

Further support for the prospective view of declarations comes from the chapeau of Art. 12(2), which provides that the Court may "exercise its jurisdiction if … [the relevant States] are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3." The chapeau equates membership with declaration for jurisdictional purposes, suggesting an equivalent, prospective, jurisdiction *ratione temporis*. Moreover, the chapeau is in the past tense – it speaks of states that "have" made a declaration at the time the conduct occurred. If declarations are prospective, it should say "have or will."

The origin and purpose of 12(3) also do not support retrospectivity. Declarations are made about "the crime in question," a phrase that has been understood to refer to a particular "situation" rather than a "crime" in the

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[104] See SCHABAS, INTRODUCTION at 87.

[105] See Art. 120 (prohibiting reservations). One might also note that the "transitional provision" for member states is purely prospective, and limited to particular classes of crimes.

sense of the offenses specified in Art. 5.[106] The language was taken from an early draft that envisioned the Court's jurisdiction to always be ad hoc; when a "situation" would arise, the states involved could give the Court power to deal with crimes occurring in that ongoing situation. Yet nothing about this suggests that the Court can consider prior conduct in that situation, any more than if a state accepts full membership in the middle of a "situation." Rather, it encourages States that involved in "situations" to promptly issue declarations.

To be sure, the Pre-Trial Chambers has apparently allowed some retrospective effect with regard to Cote d'Ivoire, the only 12(3) case it has had so far. Yet the decision is far from conclusive of the issue. The country had filed a declaration in 2003, and subsequently renewed it in 2010 and 2011. The Prosecutor's application to the PTC described the time frame under investigation as being "since 28 Nov. 2010" until "the filing of this Application" in 2011.[107] The PTC's ruling concluded that the Court has jurisdiction of all crimes since 2002 on the basis of multiple, updated declarations. Thus it authorized six months of retrospective jurisdiction based on the 2003 declaration.[108] Yet the opinion had no discussion or explanation of the retroactive application, which also appears to be dicta, since it predates the period for which the Prosecutor sought an investigation.

In early 2009, the Palestinian government filed a declaration with the ICC, purporting to accept its jurisdiction over all crimes retroactive to 2002, as well as prospectively. Art. 12(3) only allows states to file declarations. Since Palestine was apparently not a state in 2009 for ICJ purpose (to say nothing of 2002), the 2009 Declaration was invalid. Thus to create jurisdiction, the Palestinians would have to make a new declaration, which itself could only be retrospective to when it became a state.

When did Palestine become a state? To be sure, the G.A. vote does not mean Palestinian statehood was established on that day; indeed, it presumably existed before the vote, as the G.A. can only recognize existing

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[106] See SCHABAS, COMMENTARY, at 289 (explaining that provision contemplated situation where prosecutor would initiate investigation, and then non-member country would consent via declaration).

[107] Situation in the Republic of Cote d'Ivoire, *Request for authorisation of an investigation pursuant to article 15*, Par. 40 & 42, ICC-02/11-3 (June 23, 2011).

[108] One might think that if the Court authorized jurisdiction over crimes up until the date of the prosecutor's application, this would leave slightly under two months between the last acceptance of jurisdiction by Cote d'Ivoire on May 3 and the Application on June 23. However, nothing in the PTC's ruling makes clear which of these closely spaced dates constitutes the endpoint of jurisdiction. Moreover, the Application only referred to events up to early April 2011. See Application, Par. 14.

states. Yet if the OTP is determined to be guided by G.A. determinations on statehood issues, it would look to the G.A. resolution as the relevant "birthday," though conception may have taken place earlier. Indeed, in his speech at the G.A., President Abbas spoke of the resolution as a "birth certificate" for Palestine. Moreover, the actions of the Palestinian authorities in the wake of the G.A. vote suggest it was an inflection point.[109] At the least, in the non-retrospective view of declarations, they could only accept jurisdiction from that date.

To summarize, if Palestine files either a declaration or accepts membership, the Court's jurisdiction will only run from that date; it would not have jurisdiction over settlements as a whole. This raises the question of marginal gravity. While previous Israeli governments may have witnessed rapid growth of the Jewish population in the West Bank, current growth is a trickle. Thus any average Israeli government (which lasts around 2 years) may only coincide with the construction of anywhere from one to three thousand housing units in the West Bank. This raises even harder questions for gravity - does the "transfer" of a few thousand people satisfy the gravity requirements?

CONCLUSION

Discussions of an ICC referral concerning Israel neglect the exceptional nature of such an investigation. The Court has never approved a referral by state parties against non-member states; it has never heard cases involving non-grave breaches of the Geneva Conventions (or any crime not involving mass atrocity; and has never deal with the "anti-transfer" norm (nor has any international criminal tribunal); and it has never adjudicated matters where underlying territorial borders were uncertain. Taking jurisdiction under any one of these circumstances would be a major move for the Court, with significant implications for all other nations. Accepting jurisdiction under the combination of these circumstances would be a massive extension of the Court's authority.

There may be circumstances in which such bold moves are legally warranted or even mandated. However, in the case of Israel, the Court lacks jurisdiction over the alleged war crimes involved in the future growth and maintenance of a civilian Jewish population in the West Bank. The relevant conduct does not arise on Palestinian territory or satisfy the gravity criteria

[109] For example, all state insignia were relabeled from "Palestinian Authority" to "State of Palestine." They did not need the General Assembly's nod to change their stationary, and thus their decision to do suggests they did not previously regard themselves as a state.

of the Court. Moreover, agreements between Israel and the Palestinian government preclude ICC jurisdiction.

Potential proceedings against Israel also highlight the extent to which many fundamental parts of the ICC Statute remain vague or undefined. The ICC has little case law to narrow the meaning of the relevant terms (such as "territory," "gravity," "interests of justice" and "*nullum crimen sine lege*"). Thus it is conceivable that, unconstrained by precedent, the ICC would aggressively define all the relevant terms and dismiss all uncertainties in order to accept such a referral. But given the numerous objections to such jurisdiction, and the unprecedented nature of such a case in international criminal law, accepting the referral in the face of all objections would raise serious concerns about the impartiality of the Court, especially on the part of other non-member state. An aggressive, activist conception of jurisdiction could only deter already balking states from joining the Court, and thus frustrate the fundamental goal of the ICC.