

Israel/Palestine — The ICC's Uncharted Territory

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Abstract

In the wake of the United Nations General Assembly's 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, in principle, challenge the legality of Israeli settlements in the West Bank. This article explores a significant jurisdictional hurdle for such a case. (To focus on jurisdictional issues, the article assumes for the sake of argument the validity of the merits of legal claims against the settlements.) The ICC can only consider situations 'on the territory' of Palestine. Yet the scope of that territory remains undefined. The norm against settlements arises in situations of occupation. However, in the majority view an 'occupation' can arise even in an area that is not the territory of any state. In this respect, ICC jurisdiction is narrower than the corresponding Geneva Convention norm, as it only extends to sovereign state territory. 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, both the General Assembly resolution and the International Court of Justice's Wall Advisory opinion make clear that the borders of Palestine remain undefined. The ICC lacks the power to determine boundaries of states, and certainly of non-member states. Given that Israel is a non-member state, determining the borders of Palestine, even for jurisdictional purposes, would violate the Monetary Gold principle, as it would also determine Israel's borders. 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.

1. Introduction

The United Nations (UN) General Assembly (GA), in a closely watched vote on 29 November 2012, recognized Palestine as a sovereign state by granting

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it ‘non-member observer’ status.¹ Aside from the symbolic significance of the move, it was widely understood that one of its goals and practical significance was to facilitate Palestinian efforts to bring Israeli actions before the International Criminal Court (ICC). Indeed, several powerful Security Council members sought guarantees from the Palestinians not to use their new status as a route to the ICC, and Britain explicitly conditioned an affirmative vote on a such a promise.² While the GA vote does not necessarily open up the ICC to Palestine, in the wake of the resolution’s passage, commentary and media coverage focused on the new possibility of ICC investigations of Israeli military activities against terrorists in Gaza, and even more significantly, the entire existence of Jewish communities in the West Bank, which many regard as a clear violation of international humanitarian law.³

Palestinian leaders, including President Mahmoud Abbas and the foreign minister, repeatedly state their intention to ‘go to the ICC’ over continued Israeli settlement construction. These threats received further momentum from a report of the UN Human Rights Council, which suggested the possibility of ICC jurisdiction over the settlements issue.⁴ Moreover, Palestinian forbearance on ICC membership, and possible subsequent referrals, has been used as a central incentive for Israel to enter negotiations with a promise of making ‘painful concessions’. Yet, all these moves assume that a situation focused on Israeli settlements would be admissible before the Court.

This article discusses a fundamental obstacle to the admissibility of such an investigation. Since Israel is not a state party, the Court could only have jurisdiction if the conduct occurs on the territory of Palestine. Yet even if Palestine is considered a state, its territory is significantly undefined. In particular, the settlements are not ‘on the territory’ of Palestine, although they are on territory which Palestine claims, and which much of the international community believes should be part of Palestine’s territory in the future. Admissibility, however, depends on the present.

If Palestine triggers ICC proceedings, it will be perhaps the most significant ICC case to date, and among the first involving a ‘hostile’ referral by a state against the nationals of a non-member state.⁵ The jurisdictional issues raised

- 1 UN Doc. A/RES/67/19, 29 November 2012. Only the Holy See currently shares the status, though in the past a number of other nations, such as Switzerland and Spain have had it.
- 2 See M. Nichols, ‘Palestinians Say no Rush to Join International Court after U.N. Vote’, *Reuters*, 27 November 2012; C. McGreal, ‘Palestinians Warn: Back UN Statehood Bid or Risk Boosting Hamas’, *The Guardian*, 27 November 2012.
- 3 See e.g. G. Bishart, ‘Why Palestine Should Take Israel to Court in The Hague’, *New York Times*, 29 January 2013; A. Gross, ‘Following UN Vote on Palestine, Israel May Now Find Itself at The Hague’, *Haaretz*, 2 December 2012; C. Hauser, ‘New U.N. Status for Palestinians Could Open Door for Claims of Israeli War Crimes’, *New York Times* A8, 30 November 2012.
- 4 Human Rights Council, *Report of the Independent International Factfinding Mission to Investigate the Implications of the Israeli Settlements*, UN Doc. A/HRC/22/63, 7 February 2013, §§ 17, 104.
- 5 Before the GA vote, scholars had written about ICC jurisdiction over a Israel/Palestine situation, but focused their attention on whether Palestine was a ‘state’ for ICC purposes. See e.g. M.N. Shaw, ‘The Article 12(3) Declaration of the Palestinian Authority, the International Criminal

here have a more general significance. They illustrate how crucial parameters of the Court's jurisdiction remain undefined by the ICC Statute, and have not been determined by subsequent practice: a Palestinian referral would raise the question of whether the Court can adjudicate the territorial scope of member — and non-member states.

This article assumes *arguendo* that Palestine qualifies as an ICC state party. Moreover, because it focuses solely on novel jurisdictional issues,⁶ it also assumes the general validity of the merits arguments against Israel's settlements. Thus, the question here is not whether or not the settlements constitute crimes within the ICC Statute (or other international instruments), but rather whether the Statute gives the Court jurisdiction over such crimes under the circumstances.

2. Palestinian Efforts to Trigger ICC Proceedings

Some background helps explain the Palestinian government's resort to the GA, and the general understanding of the significance of the move. Israel has not ratified the ICC Statute. 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 Article 12(3) of the ICC Statute.⁷ After long consideration, the then Prosecutor, Luis Moreno Ocampo, announced in April 2012 that he would not proceed with an investigation. He concluded that under the Statute only 'states' can accept the Court's jurisdiction. In determining which entities qualify as 'states', the Prosecutor would be guided by determinations of the GA, which did not at the time treat Palestine as a state.⁸ While at first this seemed a setback for Palestinians, it also 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 GA. If the Assembly recognized Palestine, the Prosecutor would feel free to act, despite Palestine not being a member of the UN, or of the ICC, and arguably failing to fit certain traditional statehood criteria.

Court and International Law', 9 *Journal of International Criminal Justice (JICJ)* (2011) 301; W.T. Worster, 'The Exercise of Jurisdiction by the International Criminal Court Over Palestine', 26 *American University International Law Review* (2012) 1153; D. Benoliel and R. Perry, 'Israel, Palestine, and the ICC', 32 *Michigan Journal of International Law* (2010) 73.

6 This article does not claim to exhaust the admissibility and other non-substantive barriers such an investigation would face. See E. Kontorovich, 'When Gravity Fails: ICC Jurisdiction Over Non-Grave Breaches Alone' (draft on file with author).

7 Sung Un Kim, 'ICC Lacks Jurisdiction to Investigate Palestine War Crimes Claims: Prosecutor', *Jurist* blogpost, 3 April 2012.

8 ICC OTP, *The Situation in Palestine*, §§ 5–8, available at <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (visited 23 October 2013).

Having prevailed at the GA, the newly renamed ‘State of Palestine’ is yet to join the ICC, or to make a new declaration under Article 12(3) of the ICC Statute, but its leaders and other supporters constantly threaten such action.⁹ It also bears noting that the Assembly vote does not necessarily establish that Palestine is a state, or a state for ICC purposes. The new prosecutor and judges must still determine whether Palestine meets the criteria for ‘statehood’ within the context of the ICC Statute, and they are not bound by the prior prosecutor’s views in this matter. Statehood is undefined in the Statute, and the new prosecutor is free to look to make an independent determination based on Montevideo or any other criteria, or to other bodies with potential authority over the issue, such as the Assembly of State Parties, or the Security Council.¹⁰

This article focuses on an issue Palestinian officials base much of their complaints and threats around: the admissibility of a Palestinian referral specifically concerning Israeli settlements in the West Bank. Israeli/Jewish migration to the West Bank is widely regarded as violating Article 8(2)(b)(viii) of the ICC Statute, prohibiting ‘the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies’. Prior Palestinian efforts at securing ICC jurisdiction have focused on more classic war crimes involving the use of military force by Israel in Gaza. At first, this shift might not seem like a safer course. Cases involving the use of force have been repeatedly tried in international and national tribunals, have a well-established jurisprudence, and would at first glance seem more attractive to Palestinians.¹¹ 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. First, settlements, unlike use of force crimes, are 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, promoting terrorism, and so forth. But Palestine is not arguably engaged in committing the ‘deport or transfer’ crime. Second, the ICC only has jurisdiction when the home state is ‘unwilling’ to investigate the crime. The

9 See Khaled Abu Toameh, ‘Abbas Threatens to Take Israel to ICC Over El’, *Jerusalem Post*, 11 December 2012; ‘Palestine Threatens to Take Israel to ICC’, *Al Jazeera*, 8 January 2013.

10 One might think that the determination of what counts as a ‘state’ for ICC purposes would more naturally fall to the Security Council than the General Assembly. The ICC Statute creates particular powers and duties for the Security Council; there is no express role for the General Assembly. Thus, the Council is an express part of the ‘ICC system’ in a way the Assembly is not. Moreover, the Council’s particular role is quite relevant — it is the only avenue available to the Court to obtain ‘territorial’ jurisdiction over crimes that do not occur within the territory of a state that has accepted the Court’s jurisdiction.

11 For one, focusing on situations in Gaza, which Israel has declared a hostile entity, might avoid the territorial difficulty discussed below. Moreover, such cases have a long history before international criminal tribunals, while 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.

Palestinians may believe that Israel would be less likely to investigate allegations of 'indirect ... transfer' than other war crimes.¹²

To be sure, a settlement-focused referral could still draw alleged Palestinian crimes into the enquiry. This is because states only refer 'situations' to the ICC, not cases or even crimes. A 'situation' refers to the somewhat broader set of events within which particular crimes occurred.¹³ This prevents countries from claim splitting, referring the alleged crimes of their enemies and not their own. While the scope of a 'situation' is not precisely defined in the statute or the Court's practice, a 'situation' could be understood to include the broader conflict between Israel and the Palestinians, and thus Palestinian rocket fire and bombings.

3. Determining the Territory of Palestine

The ICC operates primarily on the principle of delegated jurisdiction, not universal jurisdiction.¹⁴ Its jurisdiction depends on the consent of member states, and thus it can only prosecute crimes that occur in the territory of consenting states, or that were committed by their nationals (or were referred to it by the Security Council).

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.¹⁵ Such jurisdiction is, however, consistent with national sovereignty because the member state itself has jurisdiction under traditional territorial principles over the non-member nationals and it can delegate this jurisdiction to an international tribunal.

This principle, however, poses an important jurisdictional bar to a Palestinian referral focused on the settlements. Under Article 12 of the Statute, the ICC could only have jurisdiction over Israel for conduct that occurred 'on the territory' of the state of Palestine.¹⁶ Thus exercising jurisdiction requires determining whether the territory on which crimes have been committed is Palestinian territory. The ICC Statute apparently presumes defined, accepted international boundaries (most boundary disputes are quite minor and have thus far been irrelevant to the crimes within the ICC's

12 Israeli courts have heard cases involving settlement growth and construction, often imposing limits derived from international humanitarian law.

13 See G. Boas et al., *International Criminal Law Practitioner Library: Volume 3: International Criminal Procedure* (Cambridge University Press, 2011), at 68. A 'crime' in contrast refers to violations of a particular substantive norm specified in Art. 5 ICCSt., while a 'case' refers to charges of one or more crimes against a specific individual. *Ibid.*

14 D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *JICJ* (2003) 618, at 621–634.

15 *Ibid.*, at 619–621 (describing American objections to jurisdiction over non-party nationals).

16 Art. 12(2)(a) ICCSt.

jurisdiction). When these assumptions are not satisfied, the Statute provides no guidance for dealing with interstitial ‘gray areas.’¹⁷

The extent of the ‘territory’ of Palestine is not established.¹⁸ This is not surprising; many new nations are born into territorial dispute that leaves significant portions of their frontiers undefined.¹⁹ Conversely, Israel lacks defined borders in the relevant area (although its frontiers with Egypt and Jordan were established in peace treaties with those countries).²⁰ In short, the borders of any state or states that have arisen in the territory of the League of Nations Mandate for Palestine remain undefined, except to the extent they depend on the Mandatory borders.

Accepting a Palestinian referral would introduce significant indeterminacy into the ICC’s jurisdiction. Non-member nations would be vulnerable to ICC suits simply by neighbours convincing the Court that a certain territory is theirs. ICC jurisdiction over crimes allegedly committed by the nationals of non-member states could be conferred on the basis of a decision of the GA. This obviously contradicts the balance struck by the Statute, which gives the Security Council the sole power to give the Court jurisdiction over nationals of non-member states without their consent.

Such action would also greatly discourage membership by nations with disputed frontiers. Territorial jurisdiction as a basis for ICC jurisdiction over non-member nationals seems more designed for ‘self-referrals’ or *proprio motu* prosecutions, in cases of clear foreign intervention, aggression or invasion of previously recognized sovereign frontiers, than for situations occurring in contested territories. The ICC has not been understood as a border-determination body, nor has defining the territory of nations ever been part of the work of past international criminal tribunals.²¹ Its structure and mechanisms are designed to facilitate determining the guilt of individuals, not the frontiers of nations. The border demarcation role more naturally falls to the International Court of Justice, and even then only when both parties consent to jurisdiction.

17 See W. Schabas, *An Introduction to the International Criminal Court* (4th edn., Cambridge University Press, 2011), at 82.

18 See *ibid.*, at 88 (‘the actual limits of the territory of Palestine are also a matter of dispute’); D. Luban, ‘Submitting to the Law of Nations: Palestine, Israel, and the International Criminal Court’, *Boston Review*, 12 December 2012 (‘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.’); I. Scobbie, A. Margalit and S. Hibbin, ‘Recognizing Palestinian Statehood’, *Yale Journal of International Affairs Online* post, 25 August 2011.

19 Recent examples include South Sudan, Eritrea and Moldova. A paradigmatic and persistent case is India/Pakistan.

20 Tellingly, the Egyptian and Jordanian peace treaties refer to the ‘internationally recognized boundary’ as being that of ‘mandated Palestine’ and its neighbours. See e.g. Peace Treaty between Israel and Egypt (1979), Art. 1(1); Treaty of Peace between the Hashemite Kingdom of Jordan and the State of Israel (1994), Art. 3(1) (‘the international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate’). Thus, the Mandate is treated as the relevant source of ‘international recognition’ for boundaries.

21 Schabas, *supra* note 17, at 82.

The lack of established borders for Palestine may surprise many casual observers, given the GA's recognition of a Palestinian state and the widespread condemnation of Israeli civilian presence in the West Bank as illegal. But neither the Assembly resolution nor the alleged illegality of settlements — assumed to be correct for the purposes of this jurisdictional inquiry — bear on the separate question of Palestine's (and Israel's) sovereign borders.

The presumed illegality of Israeli settlements does not establish that they were committed in the territory of the state of Palestine. The origin of the 'settlements' norm is Article 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 chief 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'.²² The West Bank was not Jordanian sovereign territory when Israel took it in 1967. Since the territory did not belong to a High Contracting Party when occupied, the argument goes, the rules regarding occupation do not apply.

Yet many, and perhaps most, 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 — and for decades international lawyers have been saying this is precisely the situation in the West Bank. 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 a state of Palestine.

In other words, while conduct may not need to take place in the territory of a state to constitute a *violation* of the underlying norm, 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 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

22 Geneva Convention Relative to the Protection of Civilians IV Art. 2, § 2 (1949).

limited and particular jurisdiction, gaps in jurisdictional coverage are purposeful and inherent.²³

The lack of clear territorial jurisdiction would be particularly troubling in cases against non-member nationals 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 offence is needed (though custody of the defendant may be required). For such crimes, an alternative theory of the ICC's jurisdiction is that it exercises also delegated universal jurisdiction, not merely delegated territorial jurisdiction.²⁴ To the extent crimes within the Court's jurisdiction are universally cognizable, concerns about non-member nationals are somewhat attenuated.²⁵ Yet not all crimes within the ICC Statute are universal.²⁶ Perhaps the most salient exceptions are aggression²⁷ 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 practice whatsoever of universal jurisdiction being applied to the offence (even though there have been several universal jurisdiction proceedings against Israel).²⁸

4. The GA and the International Court of Justice 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 UN bodies, it might also choose to take borders as a factual determination that could be made by UN organs. Even assuming the dubious validity of this approach,²⁹ 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 (ICJ) condemnation of the construction of Israel's security fence, contained any express or implied borders determinations.

23 Schabas, *supra* note 17, at 82, 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.

24 See M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 *Law and Contemporary Problems* (2001) 12, 25–26.

25 See Akande, *supra* note 14, at 626–627.

26 See Morris, *supra* note 24, 28 and note 72 (using child soldiers as example of ICC crime not subject to universal jurisdiction).

27 See Akande, *supra* note 14, at 26.

28 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 United States, India, Pakistan, Turkey and of course, Israel — but there is no evident state practice to support such a custom.

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

The 2012 Assembly resolution does not answer the question of Palestine's borders, nor does it address it. The resolution merely 'decides' to accord Palestine non-member status in the GA; it decides nothing about borders.³⁰ Even the non-operative provisions are unclear as to borders. On the one hand, paragraph 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, paragraph 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).³¹ 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'.³² 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 Assembly resolution did express a view on Palestine's borders, it is not binding on the ICC. (Indeed, it remains unclear if its membership decision is dispositive of 'statehood' for ICC purposes.³³) Determining the territory of states goes beyond any recognized powers of the GA. Indeed, both Security Council and GA votes on membership of new states in the Organization never express a view on their borders, even when these are in substantial dispute.³⁴

One might say that the mere recognition of Palestine as a state presumes it having *some* borders. But this presumes that the Assembly's recognition was based on the declarative, objective, Montevideo Convention definition of statehood,³⁵ instead of a constitutive, normative theory. In the latter context, no satisfaction of Montevideo criteria can be assumed from the vote.

Even on objective terms, where the control of territory is a defining aspect of statehood, the recognition that an entity is a state does not say anything about what those borders are; sometimes the issue will be undisputed, at other times, there may be significant disputes. To put it differently, even if the statehood vote determined that Palestine had some 'core' defined territory, it

30 See *Status of Palestine in the United Nations*, UN Doc. A/67/L.28, 12 November 2012, § 2.

31 *Ibid.* (emphasis added).

32 *Ibid.*, at 5.

33 See D. Akande, 'ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine. Is He Right?' *EJIL:Talk!* Blog of the European Journal of International Law, 5 April 2012.

34 See UN Doc. S/RES/702 (1991), 6 August 1991.

35 Several commentators have suggested that the GA action might reflect a recognition of a new kind of 'pre-state' status that would not require satisfying Montevideo requirements. See e.g. J.H.W. Weiler, 'Differentiated Statehood? "Pre-States"? Palestine@the UN', *EJIL:Talk!* Blog of the European Journal of International Law, 3 April 2013. Prior membership decisions have also clearly not been based on Montevideo principles, particularly in decolonization contexts.

does not tell us what that territory is. This creates a particular difficulty for a settlements-focused referral, because by definition these are in the most-contested territory, in the sense that multiple agreements and declarations have stated that final border delimitations will involve adjustments specifically to accommodate settlements.

Similarly, the ICJ advisory opinion recognized the difference between the existence of occupation (which does not require the occupied territory to be sovereign) and borders, which delimit the territories of two separate sovereigns.³⁶ The Court self-consciously avoided any resolution of ‘permanent status’ issues such as borders.³⁷ 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.³⁸ Indeed, the Court specifically criticized the route of the wall because it could ‘prejudge the future frontier between Israel and Palestine.’³⁹ 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 prejudice it, but rather simply infringe on it. Thus if the GA resolution and ICJ advisory opinion show anything, it is that the border between Israel and Palestine remains in substantial dispute; as will be seen below, the challenged settlement activity lies entirely within the zone of greatest dispute.

5. 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.⁴⁰ 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

36 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004.

37 *Ibid.*, §§ 52–54; see also separate opinion of Justice Higgins, § 17.

38 Thus, the Court recognizes that the Mandate created international ‘territorial boundaries’, while the 1949 Armistice Agreement did not. *Ibid.*, §§ 71–72. The Court’s repeated references to ‘Occupied Palestinian Territory’, a term taken from the language of the GA 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 (§ 73).

39 *Legal Consequences of the Construction*, *supra* note 36, § 121 (emphasis added).

40 *Italy v. France, United Kingdom, and United States*, ICJ Report (1954), at 19.

States with respect to the use of force and aggression, this would violate the *Monetary Gold* principle.⁴¹

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.⁴² 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.⁴³ This would also be the case where underlying international borders between a member and its non-member neighbour 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.

6. 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.⁴⁴ States certainly have jurisdiction over acts by aliens in their territory. 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.'⁴⁵ 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 above,

41 See D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', Oxford Institute for Ethics, Law and Armed Conflict Working Paper, May 2010, at 26.

42 Akande, *supra* note 14, at 637.

43 See Akande, *Prosecuting Aggression*, *supra* note 41, at 26, 35.

44 It has begun a preliminary investigation, based on information received under Art. 15(1) rather than a state party referral, into Russian actions in Georgia, but has not yet made definitive admissibility decisions pending the resolution of complementarity issues. Similarly, in July 2013, the OTP began a preliminary examination into 'the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia' — otherwise known as the Gaza Flotilla incident of 2010. This situation, referred to by Comoros, is thus far the only such action by a state party against non-party nationals.

45 A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* (1999) 140, 160.

and (ii) not have previously delegated or ceded such jurisdiction. In other words, a state cannot delegate what it does not have.

The GA's recognition of the state of Palestine has not abrogated the Oslo Accords, which both parties continue to treat as binding.⁴⁶ Under the Oslo Accords Israel exercises full territorial control of a section of the West Bank known as Area C. Within Area C, Israel exercises by agreement with the Palestinian authority, complete criminal jurisdiction.⁴⁷ All Jewish settlements in the West Bank lie in Area C. Territorial delegated jurisdiction depends on the nation actually having legal 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 in the Oslo Accords.⁴⁸ Moreover, the lack of *de jure* 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.⁴⁹

To be sure, the territorial jurisdiction that would be conferred on the ICC upon accession is not necessarily limited to areas where the country currently exercises control, as William Schabas argues in his Commentary on the Court.⁵⁰ He gives the example of Cyprus, which acceded after the Turkish invasion: this still gives the ICC jurisdiction over 'Northern Cyprus'.⁵¹ (Despite the extensive Turkish settlement enterprise in occupied Cyprus, where Turkish settlers now outnumber protected persons, neither Cyprus nor the Prosecutor or

46 E.L. Hauser, 'Abbas Threatens To Dismantle PA—Again', *The Daily Beast* blogpost, 28 December 2012; A. Issacharoff, 'Palestinians May Cancel Oslo Accords with Israel, Says Top Negotiator', *Haaretz*, 18 September 2012. For example, when in the wake of the GA statehood vote Israel temporarily suspended transferring certain tax revenues it collected on behalf of Palestinian authorities, as provided in a supplement to the Oslo Accords, the Palestinian authorities denounced it as a violation.

47 See generally, G.R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press, 2000). While the Oslo Accords were signed with the Palestine Liberation Organization, the Palestinian Authority (PA) has always conducted itself and been treated by the international community as a party to the agreement. The PA officially changed its name to the State of Palestine after the UN vote, and thus the latter is clearly the successor of the former.

48 See Shaw, *supra* note 5.

49 See Y. Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen', 8 *JICJ* (2010) 329, 339–342.

50 W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), 285.

51 Schabas lumps together two rather different examples alongside the Northern Cyprus one — jurisdiction over British Sovereign Base areas as a result of Cypriot membership, and Guantanamo Naval Base in the hypothetical event of Cuban accession. It is less obvious that nations can, by joining the ICC, grant it jurisdiction over territory that it at no time controlled. The lack of the need for territorial control is obvious from the inclusion of crimes of aggression and occupation in the Statute. The lack of the need for *any* historic control would turn the ICC into an instrument for addressing lingering 'colonial' injustices, like territorial reservations put into agreements transferring power to new states (like Cuba and Cyprus). Of course, the Oslo agreements arguably represent a similar situation.

other groups have shown any interest in bringing the matter to the ICC.)⁵² 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 Cyprus's status before the invasion. In contrast, Area C of the West Bank was never under the sovereignty, to say nothing of the actual control, of Palestine. Instructively, Schabas gives the Golan Heights — but not the West Bank — as another example of territory that would fall within ICC jurisdiction if the occupied state would join the treaty. 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.⁵³ The West Bank, on the other hand, was not sovereign Palestinian (or Jordanian) territory in 1967.

Along with Israeli exclusive jurisdiction over criminal issues Area C, under the Oslo Accords, the Palestinian authorities agreed to exclusive Israeli criminal jurisdiction over all Israeli nationals both in the Palestinian-controlled and Israeli-controlled areas of the West Bank.⁵⁴ In Oslo, the Palestinian government excluded itself 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 Israeli military forces, detain the suspect in place while ensuring his protection and the protection of those involved.⁵⁵

The Oslo Accords raise another, less bright-line issue: the inherently discretionary power of the Prosecutor to not proceed when an investigation 'would not serve the interests of justice.'⁵⁶ Of course, to many, the settlements represent one of the greatest injustices in the world, but the language in the ICC Statute has a particular meaning. They allow the Prosecutor to avoid taking action to protect ongoing peace processes, or their results.⁵⁷

The Oslo Accords (and its subsequent reaffirmations in the Road Map, and the Annapolis Conference) establish the fundamental assumptions and momentum of the Israeli–Palestinian peace process, and create the framework for the gradual establishment of a Palestinian entity in the West Bank. Within the context of Oslo, a Palestinian government has been created which controls the vast majority of the Palestinian population, enjoys direct foreign relations with most countries in the world, and, of course, has recently been welcomed

52 See L. Harding, 'Cyprus Remains Bitterly Divided as Turkish North Buries Former Leader', *The Guardian*, 20 January 2012.

53 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.

54 Interim Agreement: art. XVII.1.a, art. XVII.2.c, art. XVII.4 (1995).

55 Interim Agreement Annex IV, Art. II(c). See also, Interim Agreement, art. XII.1 and Annex IV of the Interim Agreement, art. II.7.

56 See Art. 53(1)(c) ICCSt.

57 Schabas, *supra* note 17, at 235.

as a sovereign state by the GA. All of these developments are a direct consequence of Oslo. On the other side of the coin, Oslo established the principle of negotiated final borders and the interim maintenance of settlements. Israeli jurisdiction over settlements is as much a part of the peace process as Palestinian control of Ramallah and Jenin, even if it is not the expected ‘final status’.

The South Sudan/Sudan border dispute offers a good illustration of the effects of Oslo on the determinacy of Palestine’s borders. In Sudan, a pre-independence arrangement adopted in 2005 called for a modification of the prior relevant colonial boundary line by an agreed mechanism between Sudan and the southern region, in particular with reference to a certain area. That process was never accomplished, but as a consequence of the 2005 agreement, the border between the two states remains undetermined. As a result of the 2005 agreement ‘there can be no automatic presumption of the reestablishment of the [colonial era] 1956 boundary’.⁵⁸ Sovereignty over this area is unclear; as a consequence, the ICC would not have jurisdiction over crimes occurring in this area were only one of the Sudans to join the treaty. This is quite analogous to the Oslo Accords and subsequent agreements, which determined that the 1949 Armistice Line would be modified, in particular with regard to settlements. Thus even if the 1949 Armistice Lines were a ‘boundary arrangement’ that created presumptive borders for a new state — which they were not — subsequent developments prevent their being presumptive borders, just as the Armistice Lines are said to prevent the presumptive reestablishment of Mandate boundaries.

7. The Thin OTP Practice

The ICC has only vaguely addressed territorial issues thus far. The OTP has opened a preliminary examination regarding the shelling of a Republic of Korea (South Korea) island by the Democratic People’s Republic of Korea (North Korea).⁵⁹ While South Korea is a state party, the borders of the Korea’s are highly contested. Indeed, South Korea claims sovereignty over the entire Korean peninsula.⁶⁰ The island in question is in a maritime zone that North Korea has been particularly contesting.

The OTP briefly explained its conclusion that the island was in the territory of a state party.⁶¹ It found that both Koreas had ‘acknowledged and respected’

58 See J. Vidmar, ‘South Sudan and the International Legal Framework Governing the Emergence of new States’, 47 *Texas Journal of International Law* (2012) 541, 558.

59 ICC OTP, *Report on Preliminary Examination Activities*, 13 December 2011, at 10.

60 See Constitution of Republic of Korea, Art. 3 (1987) (‘The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.’). North Korea makes similar claims, but is not a state party.

61 ICC OTP, *supra* note 59. The OTP’s two-sentence explanation is not a binding ruling of any kind, and simply reflects the Prosecutor’s general approach to such questions. Nor does the two-sentence explanation offer a systematic methodology for analysing such issues.

the post-Korean War maritime demarcation line as a 'practical' boundary: neither exercise any jurisdiction across it. Moreover, both Koreas validated the line in a series of agreements in 1991 and 1992 — only after which North Korea proclaimed a modification.⁶² There are a few notable features of this approach. First, the OTP makes no reference to the international community's views of the territorial borders, even though it would buttress the Prosecutor's conclusion. Rather, the OTP looked only to the agreements of the relevant nations. Second, the OTP did not apparently attempt to determine 'true' sovereign title (each Korea's claim to the entire peninsula); rather it looked to 'practical' jurisdiction. Its decision solely followed the lines of actual control.

There is no comparable agreement between Israel and Palestine. The 1949 Armistice Agreements were not with Palestine, but rather with two different countries, Egypt and Jordan; Palestine is not the successor state of either. The validity of that demarcation has been undermined, rather than 'reaffirmed', by peace treaties with those countries. Moreover, Israel has exercised 'practical' control of the relevant areas for over 40 years, unlike the Koreas, where control has remained along the same lines since the end of Armistice Agreement.

More importantly, the Prosecutor relied not just on the Armistice Line, but also on subsequent developments, such as the Non-Aggression Agreement of 1991. Article 11 provides that 'The South-North demarcation line and areas for non-aggression shall be identical with the [DMZ of 1953] and the areas that have been under the jurisdiction of each side until the present time.'⁶³ The Israel/Palestine counterpart of this would be the Oslo Agreement, which instead of saying frontiers will be 'identical' with the Armistice Lines with Jordan and Egypt, specifically contemplates substantial modifications, related to the settlements in particular. Moreover, Oslo recognizes the settlements as 'under the jurisdiction' of Israel, rather than Palestine. In short, the agreement between the relevant parties as well as the practical control and jurisdiction on which the OTP relied in its South Korean preliminary examination both cut the other way for Palestine.

8. Difficulties of Using the 1949 Armistice Line(s)

The ICC cannot 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

62 ICC OTP, *supra* note 59, at 11.

63 See Agreement on Reconciliation, Non-aggression and Exchanges Between the South and North (1992).

instrument delineating the 1949 armistice line makes clear that it has no bearing on ‘territorial settlements or boundary lines.’⁶⁴

The 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 ceding 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. One might think that the line-drawing problems are insignificant; the lack of a clear border is a technical point that should not defeat jurisdiction. 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 does not and has never functioned as a border. The great majority of alleged ‘deportation or transfer’ violations take place among communities within a few miles of the Green Line. The most contentious locations — eastern Jerusalem and the El area of Maaleh Adumim — are often within a kilometre 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.)⁶⁵

A. *No-man’s Land and DMZs*

The simplest illustration of the Green Line’s non-suitability for boundary determinations is the existence of significant pockets of no-man’s land and demilitarized zones (DMZs), especially near important locations.⁶⁶ These special areas lie in central and strategic areas, including the thick and centrally located Latrun salient through which the main Jerusalem–Tel Aviv highway runs, and several key areas in Jerusalem.⁶⁷ There, the Armistice Line is not a line at all, but rather two parallel lines, 1–3 kilometres apart, with a ‘no man’s land’ between them.⁶⁸ Such zones make sense for armistice lines, to keep two

64 Israel–Jordan Armistice Agreement, UN Doc. S/1302/Rev.1 Art. VI (8)–(9), 3 April 1949; see also Art. II(2) (noting that ‘the provisions of this Agreement being dictated exclusively by military considerations’ does not ‘prejudice the ultimate peaceful settlement of the Palestine question’).

65 See e.g. The Wye River Memorandum, 23 October 1998. The Israeli civilian presence in Hebron (area ‘H2’) falls under a separate agreement. Protocol Concerning the Redeployment in Hebron, 17 January 1997.

66 R. Israeli, *Jerusalem Divided: The Armistice Regime, 1947–1967* (Frank Cass, 2002), at 61–63.

67 See Israeli Ministry of Foreign Affairs, *Israel’s Story in Maps: Israel’s Changing Borders* (2008), 16, 19; D. Newman, *Boundaries in Flux: The Green Line Boundary Between Israel and the West Bank – Past, Present & Future* (International Boundaries Research Unit, Durham, 1995), at 15–16.

68 Each line was drawn on a map in an informal meeting by an Israeli and a Jordanian officer respectively, to illustrate the positions of their forces. See M. Dumper, *The Politics of Jerusalem Since 1967* (Columbia University Press, 2013), at 31–33.

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 decry by the international community as fatal to a two-state solution.⁶⁹

Palestine considers all of the no-man's lands and DMZs to be part of its territory, and calls the Israeli presence in these areas illegal settlements, and they are generally described as such in popular accounts.⁷⁰ Yet as a legal and semantic matter, it would be exceedingly difficult to conclude that 'no man's land' — which under an armistice agreement was left unpopulated — is to be included in 'the territory of Palestine'.⁷¹ On the other hand, if the ICC found that it had no jurisdiction over these areas, it would give a virtual *carte blanche* to Israeli construction in these areas, which from a diplomatic perspective would have the same effect as establishing settlements in 'Palestinian' territory. Thus if the ICC takes Palestine's territory to be that territory formerly occupied by Jordan and Egypt, it would immunize Israeli settlements in sensitive areas. On the other hand, including those areas of no man's land becomes equally problematic.⁷²

B. West Jerusalem and Mount 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 extended well beyond the university,⁷³ and a linked demilitarized zone runs along the Mount of Olives ridge. The Mount Scopus enclave also contained what is now a large Arab neighbourhood that peace plans tend to

69 These include, in at least some maps, parts of the Ramot and Ramat Shlomo neighbourhoods in northern Jerusalem. See P. Cidor, 'Political Construction?' *Jerusalem Post*, 30 April 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 H. Sherwood, 'UN Security Council's EU Members to Condemn Israeli Settlements Expansion', *The Guardian*, 19 December 2012; E. Bronner, 'As Biden Visits, Israel Unveils Plan for New Settlements', *New York Times* A4, 10 March 2010.

70 See <http://peacenow.org.il/eng/content/beit-orot-tsawane> (visited 21 October 2013). The European Union has also classified towns in the central no-man's land as settlements. B. Ravid, 'Israeli Officials Bemoan EU's Marking of Parts of Modi'in as Settlement', *Haaretz*, 14 August 2012.

71 D. Makovsky, 'Mapping Mideast Peace', *New York Times*, 11 September 2012 (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').

72 Finding the DMZs to be part of Palestine could have far-flung implications. South Korea is divided from North Korea by a similarly thick DMZ, where Northern armed attacks occasionally occur. Can South Korea, as a state party, refer situations involving North Korean attacks in the DMZ itself?

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

incorporate in a Palestinian Jerusalem.⁷⁴ Despite its not being under Jordanian control before 1967, Israel has chosen to largely not allow Jewish building in this Arab neighbourhood, 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.⁷⁵ Yet an ICC determination that it was not could remove any inhibition Israel felt about allowing Jewish settlement there. The consequences of such settlement would no doubt be seen as similar counterproductive to development of the nearby El area, on the other side of the Green Line. In short, turning the settlements issue into a criminal case would only encourage Israel to shift its residential construction plans in the Jerusalem area to these areas rather than the entirely Jewish neighbourhoods where they currently build.

Yet there would be no way the ICC could avoid determining the status of these territories. If it found it has jurisdiction over settlements in no-man’s land and DMZs, it would effectively be awarding these territories to Palestine. If it found no jurisdiction, it would essentially award them to Israel, or at least immunizing Israel from legal sanction for settlement in these areas.

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

C. *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 GA 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 GA and the Security Council have all denounced or declared invalid Israel’s control 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

74 Israeli, *supra* note 66, at 71–73 (describing conflict between Israeli presence on Mt. Scopus and Issawiya residents).

75 After the Armistice, Jordan contended 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* (Ithaca Press, 2002), at 387–389.

government has been willing to take, not even Israel's greatest allies.⁷⁶ If it takes the position, 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 would fall outside ICC jurisdiction. This highlights the extraordinary complexity and unintended collateral consequences of any border delineation effort, and how far it lies outside the ICC's mandate.

Objections might be raised that if undefined territory bars admissibility, it would exclude many matters from ICC jurisdiction.⁷⁷ While many nations are involved in territorial disputes, most are minor, peripheral and non-militarized.⁷⁸ The largest portion of the world's territorial disputes by far are in Asia⁷⁹ — which also has the lowest ICC membership of any region in the world.

There is no reason to think that the existence of territorial disputes, generally speaking, would significantly limit the Court's jurisdiction over crimes in the Statute. First, when both disputants are ICC member states, the territorial dispute would not affect jurisdiction, as either way the conduct would be in the territory of a member state. The issue could only arise for referrals of non-members by members, which have been almost unheard of and will become only more so as more nations ratify the Statute. Even if none of the nations involved have accepted jurisdiction, Security Council referral remains an option. Indeed, because the Security Council route does not involve direct state consent, the relevant provision does not mention 'territory' of a state, as Article 12(2)(a) does. Thus, Security Council referrals can encompass disputed or non-sovereign territory (and stateless vessels). This further suggests that crimes in territory with uncertain sovereignty are best left to Security Council referral.

Moreover, only in few cases would crimes within the Court's jurisdiction be geographically strictly limited to the disputed territory — the use of force tends to expand geographically, and not be neatly boxed in. The difficulty with the admissibility of the Israeli settlements issue is 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. Finally, the instant dispute is not merely one over 'territorial control',⁸⁰ which could perhaps be pretextual or fabricated, but one over an increasingly rare situation

76 Cf. *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (holding that law requiring printing 'Israel' as country of birth on passports of those born in Jerusalem, against the wishes of the President, does not raise a non-justiciable political question).

77 A. Zimmerman, 'Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)', 11 *JICJ* (2013) 303.

78 K.E. Wiegand, *Enduring Territorial Disputes: Strategies of Bargaining, Coercive Diplomacy, and Settlement* (University of Georgia Press, 2011), at 86–89 (finding 71 current territorial 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).

79 *Ibid.*, at 90.

80 See Zimmerman, *supra* note 77.

where there is no pre-existing internationally recognized boundary or clear-cut sovereignty, unlike disputes regarding other occupied territories such as Northern Cyprus and Abkhazia.

Indeed, the rarity of such referrals thus far or on the horizon demonstrates the lack of danger the state-territory requirement poses to the ICC's functioning and mission. On the other hand, the unanticipated consequences of allowing for territorial jurisdiction despite uncertain territorial sovereignty are far-reaching. Finding ICC jurisdiction based essentially on a majority vote in the GA would encourage numerous entities to seek 'statehood' there, and follow it up with an ICC referral. Immediately after the Palestine vote at the GA, the Sawahiri Arab Democratic Republic announced they would seek a similar vote.⁸¹ If they succeeded, would they then be able to bring a range of ICC matters against Morocco involving purely Moroccan-administered Western Sahara before the Court?

Consider other situations where these principles may be applied. Moldova is a UN member state, although its eastern region, Transdniestria, has been under Russian control ever since a brief war leading up to Moldova's independence. There is no dispute that the area is within Moldova's sovereign boundary; can it refer a case involving Russian settlement activity to the ICC?⁸² Serbia is an ICC state party and a full UN member. Can Serbia refer crimes occurring in Kosovo — or the majority Serb regions of Kosovo — to the Court? This example shows that the mere fact that the UN recognizes a state does not mean it also determines its borders, especially for purposes of the ICC's Article 12 territorial jurisdiction requirement.

Further, beyond claims against Palestinian officials for sponsoring attacks directed against Israeli civilians, finding Israeli-administered communities to be in the territory of 'Palestine' could have an unexpected consequence — facilitating an ICC investigation into Iranian officials' incitement to genocide. There have been a variety of demands for an international criminal response to the calls for Israel's destruction by Ahmadinejad and others. A major obstacle to ICC action is that neither Iran nor Israel are parties to the Rome Statute. As an inchoate crime, incitement to genocide poses particular problems for territorial jurisdiction, but one might plausibly argue that the target of the incitement also falls within the locus of the crime.⁸³ Crucially, Iranian leaders have not directed their rhetoric towards the State of Israel, whose existence they do not acknowledge, but towards the 'Zionist' regime, the 'fake' or 'false regime', and to 'Palestine'.⁸⁴ The language does not make territorial

81 R. Shannouf, 'Western Sahara May Also Request UN Observer Status', *AL Monitor* blogpost, 4 December 2012.

82 Since the beginning of the Russian occupation, the ethnic Russian share of the population has grown at the expense of the Romanian share.

83 See K.J. Heller, 'Would the ICC Have Jurisdiction over Ahmadinejad's Statements?' *Opinio Juris* blogpost, 25 August 2006.

84 J. Teitlbaum, *What Iranian Leaders Really Say About Doing Away With Israel: A Refutation of the Campaign to Excuse Ahmadinejad's Incitement to Genocide* (Jerusalem Center for Public Affairs, 2008).

distinctions among Zionist occupation regimes, and the political goal to destroy the Zionist regime would seem to apply at least as much to that regime's presence in the West Bank. Thus if Palestine were a state party, any other state party could refer the incitement, if one accepts the 'target' theory for the locus of incitement.

9. Conclusion

Discussions of an ICC referral concerning Israel routinely mention political sensitivity. But drama aside, such a situation would also be legally exceptional. The Court has never approved a referral by state parties of non-member states; has never heard cases involving non-grave breaches of the Geneva Conventions (or any crime not involving mass atrocity); has never dealt with the 'anti-transfer' norm (nor has any other international criminal tribunal); and never determined rights in territorial disputes. Taking a situation under any one of these circumstances would be a major move for the Court, with significant implications for all other nations. Accepting a situation under a *combination* of these circumstances would be a massive extension of the Court's authority.

Not all instances of international crime can find redress through the ICC system. This was a conscious choice in the Statute's design, to make the institution more acceptable to the sensibilities of sovereign states. If the ICC begins investigating matters not lying within the clearly established borders of state parties without benefit of a Security Council referral, it will win the enmity of all non-state parties, and ultimately be less able to fulfil its mandate. It is impossible to say whether this is the sort of situation that would warrant an abstention from prosecuting in the 'interest of justice' because of the vagueness of the standard, and its exceptional nature, as well as a lack of previous precedent,⁸⁵ but at the very least one must note that there are so many unsolved legal problems that it would make any determination by the Court an extremely difficult manoeuvre in uncharted territory.

85 ICC OTP, *Policy Paper on the Interests of Justice*, September 2007, available online at <http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestssofjustice.pdf> (visited 21 October 2013).