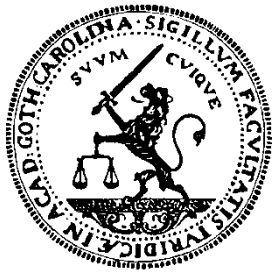


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# Justice and Politics – The ICC's territorial jurisdiction over occupied Palestinian territory

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# Summary

The subject of this thesis concerns the ICC's jurisdiction over the occupied Palestinian territories, a question actualised in recent years due to the Palestinian ICC membership. The thesis is mainly conducted through a traditional legal dogmatic method, the exception being the historical background. The author has chosen to apply a scientific theory for this thesis. The theory adopted is Martti Koskenniemi's theory on the structure of the international legal argument. This theory is applied on the arguments of scholarly contributions and the arguments of the thesis, problematizing the capacity of international law to produce objective, determinate results.

After a historical introduction, the thesis starts with the question of Palestinian statehood, arriving at the conclusion that Palestine should be considered a state for the purposes of the ICC. Secondly, the thesis discusses the extent of the Palestinian territory, arriving at the conclusion that the Palestinian territory should be considered a continuation of the Palestinian self-determination unit, therefore encompassing the occupied Palestinian territories including East Jerusalem. After this, the thesis investigates the impacts of the Oslo accords on the jurisdiction of the ICC, arriving at the conclusion that the Oslo accords does not constitute an obstacle for ICC jurisdiction, but may affect the prospects of an ICC arrest warrant. Finally, the thesis discusses general questions surrounding the crime of illegal transfer under article 8 (2) (b) (viii) of the Rome Statute. The author arrives at the conclusion that the Court has jurisdiction over all crimes of illegal transfer with a nexus to the military occupation, initiated or completed on Palestinian territory. However, analysis show problems with determinacy for the legal arguments featured in the works of scholars as well as arguments featured in the thesis. This problem can possibly be a result of inherent indeterminacy within the legal system, questioning the objectivity of legal adjudication in a political conflict.

# Sammanfattning

Det här examensarbetet rör frågan om den Internationella Brottmålsdomstolens (ICC) jurisdiktion över ockuperat Palestinskt territorium, en fråga aktualiserad under senare år i samband med Palestinas tillträde till Romstadgan. Examensarbetet är huvudsakligen genomfört med rättsdogmatisk metod, med undantag för den historiska bakgrunden. Författaren har valt att tillämpa en vetenskaplig teori i sitt examensarbete. Teorin som valts är Martti Koskenniemis teori om strukturen hos det folkrättsliga argumentet. Teorin tillämpas på såväl de vetenskapliga argumenten hos andra forskare som på de vetenskapliga argumenten i examensarbetet.
Efter en historisk bakgrund, så börjar examensarbetet med att diskutera frågan om Palestinsk statsstatus. Slutsatsen blir att Palestina ska betraktas som en stat för den Internationella Brottmålsdomstolens vidkommande. Därefter diskuteras omfattningen av den Palestinska statens territorium. Slutsatsen blir att den Palestinska statens territorium bör åtnjuta kontinuitet i förhållande till den tidigare territoriella enheten för Palestinskt självbestämmande, och att det Palestinska territoriet därför omfattar det ockuperade Palestinska territoriet inklusive östra Jerusalem. Efter detta diskuteras Osloavtalen och deras effekt på den Internationella Brottmålsdomstolens jurisdiktion. Slutsatsen blir att Osloavtalen inte påverkar den Internationella Brottmålsdomstolens jurisdiktion, men att de kan påverka Domstolens möjligheter att begära arresteringsorder i enlighet med artikel 98 (2) av Romstadgan. Slutligen så diskuteras allmänna frågor gällande tillämpningen av artikel 8 (2) (b) (viii) av Romstadgan gällande illegalt förflyttande. Författaren kommer fram till slutsatsen att Domstolen har jurisdiktion över alla fall av illegalt överflyttande som kan kopplas till Israels militära ockupation, förutsatt att brotten påbörjas eller avslutas på Palestinskt territorium. Analys med hjälp av den vetenskapliga teorin visar dock på att det finns problem med förutsägbarhet både när det gäller argumenten i tidigare vetenskapliga arbeten, såväl som argumenten i detta examensarbete. Detta kan vara symptom på större, strukturella problem inom det folkrättsliga systemet, något som ifrågasätter möjligheten för rättsliga lösningar att uppnå objektiva resultat i politiska tvister.

# Preface

It’s not often you get the chance to write about something you have great interest in. I have always been fascinated by the Israeli-Palestinian conflict, as a factual conflict as well as a symbolic one. It has been tremendously engaging to write on this subject, and I certainly hope that the reader will be as engaged when reading the results.

As the writing of this thesis draws to an end, I would like to extend my gratitude for all the support that I’ve been given.

I would like to thank my supervisor Sverker, for his thoughts and valuable support.
I would also like to thank Letizia at the faculty, for her input on the questions relating to international criminal law.

Finally, I would like to thank my family for being a constant source of happiness.

# Abbreviations

| | |
|---|---|
| AP I | Additional Protocol I |
| AU | African Union |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| IDF | Israeli Defence Forces |
| OTP | the Office of the Prosecutor for the ICC |
| PA | Palestinian Authority |
| PLO | Palestine Liberation Organization |
| SOFA | Status of Forces Agreements |
| SOMA | Status of Mission Agreements |
| SFRY | Socialist Federal Republic of Yugoslavia |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |

# 1 Introduction

## 1.1 Introduction to the subject

The Arab-Israeli conflict is without a doubt one of the most infected matters the international community faces today. A conflict with deep roots, the struggle for Israeli sovereignty or Palestinian self-determination has come to symbolize a wide range of matters on the political agenda. The conflict is interpreted not only as one between Israel and Palestine, but also between Jews and Muslims, between West and East, and between Rich and Poor. Due to these facts, the conflict never seems to be irrelevant, and always on the agenda when discussing Middle East politics. One of the most symbolic parts of the conflict is the Israeli settlements on the occupied West Bank and East Jerusalem, the legality of these settlements closely related to the international status of the territories. The legality of the settlements was recently called into question again when the Security Council adopted resolution 2334 in late 2016. [1]
During later years, the conflict has gained a legal dimension, such as in the case with the ICJ's advisory opinion in *The Wall*[2]. The subsequent non-member observer state status accorded to Palestine by the UN in 2012 and Palestine's accession to the Rome Statute in early 2014[3] follows suit. After the accession to the Rome Statute, the matter has now befallen the International Criminal Court (ICC), the permanent judicial body created in 2002 with jurisdiction over international crimes.[4]
The Courts' jurisdiction is closely related to the questions of Palestinian statehood and territoriality. Palestinian statehood and territoriality are controversial subjects both from a political and a legal perspective, subjects which the Court is expected to adjudicate independently over. When doing this, the Court will be required to decide on complex questions of public international law, a subject traditionally outside the scope of an international criminal tribunal. The Court will simultaneously pass judgment in one of the most politicized conflicts in contemporary times.

This thesis will feature an inquiry into how the problems relating to Palestinian statehood and territoriality should be resolved by the Court in the case of illegal transfer, a war crime actualized by the establishment of

[1] UNSC resolution 2334 of 23 December 2016.
[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, International Court of Justice, 9 July 2004, ICJ reports (2004) 136
[3] UNGA resolution 67/19, of the 29 November 2012, Depositary Notification, C.N.12.2015.TREATIES-XVIII.13, 6 January 2015.
[4] Articles 1 and 5 of the Rome Statute.

Israeli settlements on occupied territory. It will also analyse the arguments and results, assessing how they relate to the capacity of international law to produce objective and determinate legal results.

## 1.2 Purpose of the essay, research questions

When Palestine acceded the Rome Statute in 2015, this introduced several novel questions on the nature of the Courts' jurisdiction. These questions were owed to the fact that the status of Palestine under international law and the extent of the Palestinian territory is subject to heated scholarly debate. Statehood and territorial extent are important questions when examining the Courts' territorial jurisdiction.
The direct purpose of this essay is to investigate whether the International Criminal Court has jurisdiction over potential crimes of illegal transfer committed on occupied Palestinian territory. This author hopes that investigating the jurisdiction of the Court in this particular case will provide new perspectives and insights on matters of statehood and jurisdiction before the ICC, and the relationship between the ICC and third states.

The question of jurisdiction over the occupied territories is also particularly interesting due to the expectations of impartiality on the Court in the context of a highly politicized conflict. The crime of illegal transfer has been chosen as the Israeli settlements on Palestinian territory are mainly located in East Jerusalem and on the West Bank, territory which is interesting from an international legal perspective. While Palestine is the only party asserting sovereignty over the West Bank, the territory is under Israeli occupation, and has never constituted part of the Palestinian entity. As for East Jerusalem, the territory is subject to both Palestinian and Israeli assertions of sovereignty, but has also been the subject of several resolutions by the UN Security Council.
In the contemporary scholarship regarding the ICC's jurisdiction over Palestinian territories, writers have tended to focus on questions of statehood, territoriality, and delegation of jurisdiction. These questions will be the subject of this thesis as well. There is also a wish to conduct a further study of the crime of illegal transfer in order to determine what conduct, if any, fall within the jurisdiction of the Court.

The primary research question can be formulated as follows: Does the International Criminal Court have territorial jurisdiction over potential crimes of illegal transfer committed on occupied Palestinian territory? This is a broad question, which for structural reasons will be divided into secondary research questions.

Statehood is a prerequisite for territoriality according to the Rome Statute. The first secondary research question can therefore be formulated as: Is Palestine to be considered a state in accordance with article 12(2)(a) of the Rome Statute?
The Court is entitled to exercise territorial jurisdiction on the territory of member states, but substantial parts of the territory claimed by the Palestinian state is under Israeli state control. Therefore, the second secondary research question is: Are the occupied Palestinian territories and East Jerusalem a part of the Palestinian state territory for the purposes of applying article 12(2)(a) of the Rome Statute?

The third secondary research question relates to the Oslo accords, and whether they constitute an obstacle to the jurisdiction of the Court regarding crimes of illegal transfer. The third question is: Do the Oslo Accords constitute an obstacle for the jurisdiction of the International Criminal Court regarding application of article 8(2)(b)(viii) of the Rome Statute on the occupied Palestinian territories?

The fourth research question relates directly to general questions surrounding the crime of illegal transfer and the conduct that may fall within the jurisdiction of the Court, providing such jurisdiction exists. This question can be formulated as: Provided the Court has jurisdiction, what conduct would fall under the Courts' jurisdiction in accordance with article 8(2)(b)(viii) of the Rome Statute?

In addition to the more strictly legal analysis of the Courts' jurisdiction on occupied territory, a fifth and final research question will try to adopt a more analytical perspective towards the conflict and its place in international law. Adopting Martti Koskenniemi's theory on the structure of the international legal argument, I will analyze scholarly contributions as well as my own thesis in order to assess the capacity of international law to arrive at a politically neutral result, something which according to Koskenniemi is impossible. The fifth and final research question can therefore be formulated as: How should the results in the thesis be interpreted in the light of Koskenniemi's theory on the structure of the international legal argument?

## 1.3 Delimitations

Some delimitations have been made in order to provide the focus required for the thesis. First of all, this thesis will focus on territorial jurisdiction in accordance with article 12(2)(a) of the Rome Statute. Jurisdiction *ratione personae* in accordance with article 12(2)(b) will not be covered. Although

personal jurisdiction is an interesting subject in the context, the space required for this subject is simply too great.

Secondly, questions of gravity in accordance with article 17(1)(d) have been omitted from the thesis. A gravity assessment is an integral part of the procedure before the Court, but the assessment itself is very dependent on the contents of the individual case. The author has therefore chosen to exclude questions of gravity as this thesis will look at the general problems regarding the Courts' jurisdiction over illegal transfer on the territories.
Thirdly, this thesis focuses on the crime of illegal transfer in accordance with article 8(2)(b)(viii). The other international crimes under the jurisdiction of the International Criminal Court have been omitted due to space concerns.
Due to the delimitations regarding illegal transfer, the thesis has been delimited to focus on crimes taking place on the West Bank and East Jerusalem. The settlements on the Gaza Strip were dismantled in 2005, and it is therefore not relevant to investigate crimes of illegal transfer on this territory. This delimitation does not affect the jurisdictional assessment.

## 1.4 Method

The author has opted for a legal dogmatic method for this thesis, using the sources of international criminal law in order to find the appropriate solution to the posed research questions. This means that the investigation and interpretation of the legal material will be in focus.[5]

This method has been chosen due to the complicated nature of the legal questions. A credible legal analysis requires devotion to the highest degree towards the legal material. A flaw with this approach is that it prevents an examination of the relationship between the political and the legal dimensions of the conflict. The author hopes to mitigate this flaw by including a historical introduction, thereby placing the legal conflict in a political context.
As stated above, part of the thesis consists of a historical account of the Israeli-Palestinian conflict, included as an introduction for the reader into the conflicts' political history. This part will be written using historical accounts, chosen and evaluated according to the criteria of source criticism.

[5] For a more developed account of the legal dogmatic method, see Stefan Zetterström, *Juridiken och dess arbetssätt* (2nd edition, Uppsala, Iustus förlag AB 2012), at 95-99.

## 1.5 Theory and Perspective

### 1.5.1 Theory

As previously stated, part of the purpose with this thesis is to scrutinize the conflicts' place in international law, and whether international law is capable of producing a politically neutral result. To do this, I have chosen to utilise the theory of Martti Koskenniemi on the structure of the international legal argument, as expressed in the book *From Apology to Utopia*.

According to Koskenniemi, international law is constantly trying to separate itself from international politics. To do this, international law aspires to uphold concreteness as well as normativity. Demands of concreteness stem from the aspiration that international law shall be a reflection of state will and behaviour, distanced from morality. Demands of normativity stem from the aspiration that international law shall bind regardless of state will or behaviour, justly applied for all states. Concreteness without normativity would render international law a descriptive instrument, without the capacity to bind non-consenters. Normativity without concreteness would render international law a moral instrument without a basis in the factual behaviour of states. Therefore, international law requires both in order to remain an independent instrument. These demands are an expression of the liberal theory of politics, where law is on one hand seen as a reflection of individual will, and on the other hand seen as capable of creating a capacity to bind regardless of the will of the individual. [6]
Koskenniemi argues that when a legal argument is made, it can refer either to demands of concreteness or to demands of normativity. A legal solution is either preferable for reasons of fact, or for reasons of normativity. However, concreteness and normativity are conflicting perspectives. A normative argument can always be criticised for its lack of concreteness and its absence of factual basis, just as a concrete argument can be criticised for its lack of normativity and its descriptive nature. Normativity and concreteness are in a dialectical relationship: opposed, yet dependent on each other for producing viable legal results. This creates an inherent indeterminacy in the international legal system, forcing legal scholars to emphasise either concreteness or normativity. The indeterminacy of international law forces the legal scholar to make a political choice.

In order to produce a notion of impartiality, legal scholars regularly present their position as motivated both by reasons of concreteness as well as

[6] Martti Koskenniemi, *From Apology to Utopia* (Helsinki, Finland, Finnish Lawyers' Publishing Company 1989), at 2-3, 5-6.

normativity. This is an illusion, as the inherent conflict between concrete and normative remain under the surface.[7]

An advantage with using Koskenniemi's theory is its focus on deconstructing the international legal argument, allowing the author to critically assess other scholarly writings as well as the results of the thesis. Its focus on the capability of international law to create independent legal results is also appropriate for placing the Palestinian ICC dispute in an international political context.

To provide a critique of Koskenniemi's theory, it could be accused of overemphasising the structural problems of international law as an explanation of indeterminate results. It is far from controversial that international law is flexible and capable of producing conflicts. Koskenniemi traces the political nature of legal results to the flexibility and indeterminacy of international law, but does not assess the relationship between results and structure. International law is a system without distinct authorities, separating it from national legal systems where the legal system is integrated with the states' monopoly on the use of physical force. It is also an area of law which is regarded as founded on the will of the sovereigns. It follows from this that the area of international law is an area with a multitude of sovereign wills without a distinct authority. The flexible structure of international law could be seen as a result of the needs of a legal system without authoritative capacity, accommodating to a community of sovereign wills.

Secondly, Koskenniemi's theory is premised on a conception of justice where the aim of a perfect legal system is to produce determinate, independent legal results in practical situations.[8] This is in turn a conception derived from the same liberal theory of politics that Koskenniemi argues is flawed.[9] Koskenniemi's critique of international law can therefore be considered more of a critique of the liberal theory of politics by pointing out that its concept of justice is unattainable through the flawed liberal justice system. The author of this thesis shares Koskenniemi's opinion on the unsatisfying presuppositions of international law. Objective justice can be criticised for its idealistic tendencies, as it is founded on the existence of an immaterial concept of justice, a notion that can be considered problematic for its lack of scientific value.

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[7] Koskenniemi, *ibid* at 42-49; Susan Marks, *International Law on the Left* (Cambridge, Cambridge University Press 2008), at 41-42.

[8] Koskenniemi, *ibid* at 44.

[9] For an example of this conception, see Montesquieu, *The Spirit of the Laws* (London, George Bell and Sons 1914), at 81. Available online at: (http://eds.b.ebscohost.com/eds/detail/detail?vid=6&sid=40dc7fd8-768e-4147-bc54-b8c8f0e99e2a%40sessionmgr105&hid=121&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=cat02271a&AN=atoz.ebs324852e) last visited 27/12 2016.

However, Koskenniemi's findings do not constitute proof that a functional international legal system is impossible, should one hold that the purpose of international law differs from the classical liberal conception. A critical approach to the purpose of law could for an example focus on the need for flexibility and indeterminacy in the legal system in order to assure the suppressive effects needed for upholding state function, or the compromises needed in the power play of inter-state relations.

However, it is the authors opinion that Koskenniemi's theory on the indeterminacy of international law raises valid points, and that it is an appropriate perspective for the purpose of this thesis. The author will mainly focus on the parts of Koskenniemis' theory that concern sovereignty and territoriality, as these subjects are in focus in the other parts of the thesis.

### 1.5.2 Perspective

The historical introduction will be written from a materialist historical perspective. Historical materialism is a perspective that focuses on factual circumstances, especially economical events and social struggle, to explain how ideas are created and how history moves forward. This perspective operates differently than historical idealism, where ideas and individuals are believed to be cause of the factual circumstances and the course of history.[10]

This approach has been chosen due to the author's academic preferences, as the author holds that interpreting history through factual and economic circumstances is more empirically testable than explaining the course of history through abstract ideas.
However, this approach can be said to conflict with the character of the legal dogmatic method. A strict legal analysis contradicts the rationale of the historical materialistic perspective, as it fails to present the factual circumstances behind the making and application of law. In the end however, the benefits of choosing the historical materialist perspective outweighed the created conflict between the historical introduction and the legal analysis.

## 1.6 Material

### 1.6.1 Sources

A wide range of sources have been chosen for this thesis. The primary source being the Rome Statute, the choice of legal materials will to the

[10] Ellen Meiksins Wood, *Democracy Against Capitalism – Renewing Historical Materialism* (Cambridge, Cambridge University Press 1995), at 19-22.

largest extent possible follow article 21, which concerns applicable law. Applicable is in the first place the Rome Statute and its instruments, which are subject to the provisions of interpretation in the Vienna Convention on the Law of Treaties. In second place, the Court shall apply applicable treaties and the principles and rules of international law, and in the third place general principles of law derived from national legal systems. Furthermore, the Court may turn to its previous case law and the contents of human rights when applying and interpreting the Rome Statute. The case law of the Court also show that resolutions and reports from the United Nations are relevant for its decisions.
When ascertaining the meaning of the relevant provisions, the principles and rules of international law, and the general principles of law, the author will turn to preparatory works, judiciary findings of the ICJ, and judiciary findings of other Courts.
The author will also be using literature and articles for presenting the views of the scholarship on the area. The doctrine will be used as a source of law when the legal material fails to offer a conclusive answer to a question.

As for the historical introduction, the material used will mainly consist of other scholarly contributions in the form of literature. When available, multiple sources have been chosen.

### 1.6.2 Source criticism

I have chosen to be restrictive in my use of scholarly contributions, as there are strong opinions and interests tied to the subject, in the historical as well as the legal field. One example is Ilan Pappe, the writer of *A Modern History of Palestine*, who is politically involved in the conflict. Another example is Professor Eugene Kontorovich, the writer of two articles used in this thesis, living on the illegal settlement Neve Daniel on the West Bank. [11] Political opinions and personal interests can exist without influencing the professional works of academics. The author has therefore chosen to include these authors in the thesis, trying to mitigate potential impartiality through choosing primary sources when available and using several sources where appropriate.
Some of the sources have been deemed so controversial that they have been used sparingly, or have been left out altogether. Reports of Non-Governmental Groups have been left out. The Human Rights Council can also be accused of partiality on the subject, as it has been accused of laying

[11] Chris Arnot Interviews the Israeli Historian Ilan Pappe who has Defended the Palestinians | Education | The Guardian, available at https://www.theguardian.com/education/2009/jan/20/interview-ilan-pappe-historian, last visited 8 december 2016; Center for Jewish Community Studies (CJCS) | Center for Jewish Community Studies, available at http://www.cjcs.net/, last visited 8 December 2016.

a disproportionate focus on violations of international law conducted by Israel. The reports of the Council has been included nonetheless, as they are believed to feature a higher degree of impartiality than the Councils' proceedings.
Part of writing on a controversial subject is also being aware of personal opinions that could risk affecting the contents and the results of the thesis. It is difficult to lack an opinion on one of the most controversial conflicts of our time. The author has tried to mitigate these problems through constant awareness regarding the separation of personal opinion from legal analysis, and close scrutiny of the material used in the thesis.

## 1.7 Previous research

As stated above, there have been several contributions on the subject of ICC jurisdiction over the Palestinian territories. An example of more recent contributions include *How the International Criminal Court Threatens Treaty Norms* by Michael A. Newton. This article features a discussion on the effects of the Oslo Accords on the ICC's jurisdiction, where the author argues that the provisions of the Oslo accords prevents Palestine from delegating territorial jurisdiction to the ICC. Another example is *Palestine, Uti Possidetis, and the Borders of Israel* by Abraham Bell and Eugene Kontorovich. In this article, the authors argue that the rule of *uti possidetis juris* should be applied when determining Israel's territory, therefore creating continuity between the borders of Israel and the historical boundaries of the Palestinian mandate. A final example is *Israel, Palestine, and the ICC – Territory Uncharted but Not Unknown* by Yaël Ronen, where the author argues that Palestinian territory should be determined in accordance with the right to Palestinian self-determination.

Contemporary research has mainly been focused on matters of territoriality and delegation of jurisdiction. The author wishes to further the study on these subjects, and make a contribution to the scholarly debate.
Furthermore, some questions regarding territoriality and jurisdiction have not been dealt with in-depth earlier. One example is how the Court should proceed when interpreting the meaning of "State" in article 12(2)(a) of the Rome Statute. Another example is the question of the Courts' jurisdiction over East Jerusalem.
The author has also chosen to integrate Koskenniemi's theoretical theory in the thesis, a theory that has not previously been applied to the featured questions.

## 1.8 Structure

The second chapter of the thesis will feature a historical background to the political conflict. The account will be chronological, starting at the end of the First World War and ending with the contemporary Palestinian accession to the Rome Statute.
The third chapter of the thesis will feature questions of statehood and territoriality, as the Court usually deals with jurisdictional questions such as territoriality and statehood at a preliminary stage.[12] Beginning with questions of statehood, the author will try to answer the first research question, whether Palestine is a member state in accordance with article 12(2)(a) of the Rome Statute. After this, there will be an analysis of the legal arguments and the legal findings. The next subject is the second research question regarding the territorial extent of Palestine. This question will be investigated in regards to the West Bank, and then in regards to East Jerusalem. In addition to this, application of the *Monetary Gold* rule will be discussed. Finally, the results on territoriality will be critically assessed and analysed.
The fourth chapter will focus on whether the Oslo Accords constitute an obstacle for the Courts' jurisdiction over crimes of illegal transfer. This part will feature an inquiry on whether the accords have a binding effect on the Palestinian entity, and what consequences such binding effects have on the jurisdiction of the ICC. A final discussion will regard the application of article 98(2) of the Rome Statute regarding warrants of arrest and binding agreements with third states. The part will end with an analysis of the arguments and the results.
The fifth chapter will focus on general questions surrounding the crime of illegal transfer under article 8(2)(b)(viii) of the Rome Statute. The analysis of illegal transfer is a non-jurisdictional research question, and is therefore placed last. The part features a closer look at the contextual element, the localisation of conduct in accordance with article 12(2)(a), and an analysis of what the prohibited conduct is. Interpretation of article 12(2)(a) is a jurisdictional question, but the author felt that application of the article in regards to prohibited conduct made it more appropriate to discuss in this part. After this, there will be an analysis of the arguments and the results.

After answering the research questions, the final part of the thesis will consist of summarising and assessing the results achieved.

[12] Judgment pursuant to article 74 of the Statute, *Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, para. 9; Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia* (ICC-01/15), Pre-Trial Chamber I, 27 January 2016, para. 6

# 2 From Balfour to the ICC – Palestine 1917-2016

## 2.1 Introduction

In order to understand properly the question of ICC jurisdiction over the Israeli settlements, one must firstly attain an understanding of Palestine and the underlying conflicts history. This is appropriate due to the nature of international criminal law; international crimes require the establishing of a criminal act and the required *mens rea*, but also the establishment of a contextual element with *mens rea*. A contextual approach to the individual acts can therefore be motivated due to the structure of international criminal law.[13]
A historical background may also have an instrumental value in creating a frame of reference for the reader, seeing the question of ICC jurisdiction in a broader political context. An understanding of history and the political affiliations of state parties is also instrumental for understanding the political volatility surrounding the legal questions, a matter that will be further problematized in the analysis.

The historical account takes the early 20th century and the fall of the Ottoman Empire as its starting point, a time that for all intents and purposes marks the inception of the Arab-Israeli conflict.

## 2.2 Palestine Before the Six-Day War (1917-1967)

### 2.2.1 Palestine as a Part of the Ottoman Empire

The historical Palestinian territory refers to a strip of land situated by the south eastern coast of the Mediterranean. It stretches from the border of Lebanon to the north and the border of the Egyptian Sinai in the south, from the Mediterranean in the west and the Jordan River to the east. Jerusalem, the former capital of the Hebrew Kingdom, rests on a hilly area in the centre of the territory.[14]

[13] General introduction (7) of the ICC Elements of Crimes. See also article 8 (2) (b) (viii) of the ICC Elements of Crimes.
[14] James L. Gelvin, *The Israel-Palestine Conflict: One Hundred Years of War* ( 3rd edition, Cambridge, Cambridge University Press 2014), at 1,3-4; Jilian Schwedler (ed.),

From the 16th century until the end of the First World War, Palestine formed a part of the Ottoman Empire, an empire that spanned over significant parts of the Middle East. The holy city of Jerusalem had a high symbolic value for the Ottoman elite, and Palestine's citizens gained economic advantages from supplying religious pilgrimages between the three holy cities of Islam. At the beginning of the 20th century, however, most of the citizens were peasants living in the rural areas of Palestine. The overwhelming majority of the population were Muslims, but the country was simultaneously experiencing a steady increase of Jewish immigrants, influenced by Zionist ideals.[15]

Zionism is a political ideology, centred on the idea of establishing a national home for the Jewish people. In Europe, the end of the 19th century saw a surge of nationalism, which for the Jewish community expressed itself in the form of Zionism. Palestine was considered a prime candidate in the search for a national home, envisioned as "a land without people for the people without land" with historical connotations to the historical Hebrew Kingdom. Zionism became especially popular in Eastern Europe, which could be explained by the fact that the Jewish population in these areas suffered hardship in the form of segregation, poverty and pogroms, severely detrimental for their conditions of life.[16]

During the First World War, the Ottoman Empire stood on the side of the Axis powers. As British forces in Egypt advanced on Palestine, talks were held between Great Britain and senior Arab leaders. Great Britain promised support of Arab independence in return for a rebellion against the Ottoman Empire. This led to the Arab Revolt of 1916. A joint British-Arab effort then pushed the Ottoman army of the Palestinian and Syrian territories with the Ottoman Empire subsequently surrendering in late 1918, later collapsing as a consequence of the war.[17]

### 2.2.2 Palestine as a British mandate

The promise of Arab independence was however not the only one made by Great Britain during the war. Britain had also declared its support for Palestine as a national home for the Jewish people through the Balfour Declaration of 1917. Furthermore, Britain and a number of other European countries had agreed to divide the remnants of the Ottoman Empire between

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*Understanding the Contemporary Middle East* (4th edition, London, Lynne Rienner Publishers, 2013) at 42.

[15] Gelvin, *ibid*, at 18, 21.

[16] Gelvin, *ibid*, at 38-40, 46; Schwedler (ed.) *supra* note 14, at 61.

[17] Schwedler (ed.), *ibid* at 60-61.

them through the Sykes-Picot Agreement of 1916, with Great Britain ruling over the Palestinian territories. Palestine was therefore a territory that Palestinian nationalists, Zionists, and the British government all felt they had a legitimate claim to. [18]

After post-war negotiations at the League of Nations, Palestine was provisionally placed under British jurisdiction as a mandate. The mandate system gave Great Britain total control over the Palestinian administration and economic system, and the possibility of severing state territory. Subsequently, Great Britain divided Palestine along the Jordan River creating a separate administration called Trans-Jordan. In an attempt to fulfil the promises of the Balfour Declaration, the British co-operated with a Zionist organisation called the Jewish Agency, furthering the purpose of establishing a Jewish national home in Palestine. [19]

The indigenous Arab population viewed both Zionism and the British administration with hostility. The industrialisation of the community combined with The Great Depression had hit the peasant community hard, and the British administration had done little to dampen the effects. Real estate value skyrocketed with the result being many peasants choosing to sell their land to Zionist settlers, leaving many Palestinians landless. As a result, tensions grew higher between all parties.[20]

### 2.2.3 The 1948 War and post-war Palestine

Discussions on a future partition of Palestine became more prevalent in the late 1930s. Both Great Britain and, to some extent, the Zionist representatives were in favour, while the Arabs were against. In 1947 the conflict reached the newly founded United Nations, who proposed a partition plan where the territory was divided between an Arab and a Jewish state, with Jerusalem enjoying international status. The plan was never implemented.

The British withdrew their forces in May 1948, with the Zionists declaring independence for the state of Israel shortly after. War was a fact; the neighbouring Arab countries invaded Palestine, only to ultimately be repelled by Israel. The Israeli forces then proceeded with mass expulsion of Arabs on the controlled territories, the displacement further invigorated by atrocities conducted in Deir Yassin and Dawayima. The war resulted in dire consequences for Arab Palestinians, with approximately 750 000 people displaced and more than 500 villages destroyed or depopulated. At the end of the war, Israel controlled 77 % of the mandate territory, compared to the 57 % accorded to the Jewish state by the non-implemented UN partition

[18] Schwedler (ed.), *ibid* at 61.
[19] Gelvin, *supra* note 14, at 86-89
[20] Gelvin, *ibid*, at 103, 105-106.

plan. As for the rest of Palestine, Jordan had occupied the West Bank and East Jerusalem, and Egypt had occupied the Gaza strip. [21]

Many of the displaced Arab Palestinians ended up in UN refugee camps on the West Bank, the Gaza strip, and in the neighbouring countries. The UNGA adopted resolution 194 establishing a right of return for the displaced Palestinians, but the resolution met with resistance from Israel and its neighbouring countries, who interpreted the resolution differently. As of 2016, this resolution remains unfulfilled, with the UN camps housing one and a half million Palestinian refugees.[22]
In the camps followed a life of poverty. Palestinians were denied citizenship, employment, proper infrastructure, living out their lives in ramshackle housing. This led to the camps experiencing an influx of Palestinian nationalism. Armed resistance started to take form in Fedayeen militias, guerrillas performing armed raids on the Israeli border regions. It was also under these circumstances that modern day Palestinian organisations were born, such as Fatah in 1954, PFLP in the mid-1960s and most notably the Palestinian Liberation Organisation (PLO) in 1964. The PLO was, and is, a platform for co-operation between Palestinian nationalist organisations. The tensions between Israel and its neighbouring countries remained high throughout the post-war period, with prevalent border skirmishes. The situation would come to culminate with the six-day war in June 1967. [23]

## 2.3 From the Six-Day War to Present Day

### 2.3.1 The Six-Day War and its Aftermath

In April 1967, Israel and Syria were engaged in a border conflict. With the purpose of easing Israeli pressure on Syria, Egyptian forces entered the Sinai Peninsula in May. Fearing an imminent invasion, the Israelis struck first and were successful in wiping out large parts of the Syrian and the Egyptian air force, thereby establishing the military advantage that won them the war. Israel swiftly occupied major land areas belonging to the neighbouring Arab countries. These areas included East Jerusalem, the West Bank and the Gaza strip, but also the Syrian Golan Heights and the Egyptian

[21] Ilan Pappe, *A History of Modern Palestine* (2nd edition, Cambridge, Cambridge University Press, 2006) at 128-129; Gelvin, *ibid*, at 118-120, 124-125, 127-128, 139; Schwedler, *supra* note 14, at 188-189
[22] See Palestine Refugees | UNWRA available at http://www.unrwa.org/palestine-refugees (visited 15 October 2016). This number also includes refugees displaced in the Six Day War.
[23] UNGA resolution 194, 11 December 1948; Gelvin *supra* note 14, at 140, 142, 177-178; Pappe, *supra* note 21, at 143-144, 147-148, 160, 164, 166-167.

Sinai Peninsula. The UNSC responded with resolution 242, calling for an Israeli withdrawal from the occupied territories and urging all parties to recognise the territorial sovereignty enjoyed by states in the area.
The war strengthened the Israeli bargaining position towards the neighbouring states; from being a conflict centred on the question of the continued existence of Israel, the conflict now came to regard the question of the occupied territories, paving the way for future deals regarding "land-for-peace". In the 1973 Yom-Kippur war, the Arab states attempted to recapture the territories lost in 1967, but were ultimately unsuccessful.[24]
As for the West Bank and the Gaza Strip, the Israelis integrated the economy of the occupied territories with their own national economic system, which led to dependency on Israeli goods and services. Simultaneously, Israeli settlements started to appear on the occupied lands. A settlement is the term used for describing Israeli communities placed on the territories occupied in 1967. Settlements vary in size, ranging from single households to small cities. The original settlements were placed on the Israeli-Jordanian border after the six-day war and were intentioned to fill a military function as a defensive line, but settlements have gradually become instruments of establishing Israeli foothold on the occupied territories. As of 2014, there were approximately 350 000 settlers on the West Bank and 200 000 settlers in East Jerusalem.[25]
For the Palestinians, the 1967 war was yet another disaster. The PLO dismissed the validity of resolution 242. This was due to the resolutions lack of acknowledgment of Palestinian territorial sovereignty, seeing as the resolution only urged territorial recognition among states. Support of the PLO grew after the war both in Palestine and in the international community, with the organisation becoming a representative of the Palestinian people at the UN in 1974.
After the Six-Day War, the United States would assume the position of Israel's strongest ally, a relationship that remains very strong even today. The Americans originally viewed Israel as a strategic partner in the region, due to the diplomatic relations between the USSR and a number of the Arab states. The partnership has remained after the Cold War as a means of advancing American interest in the region. In furtherance of this partnership, the United States have made wide use of its veto power in the UNSC to block resolutions aimed at Israeli interests.[26]

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[24] Gelvin, *ibid*, 174-175, 186-188; Pappe, *ibid*, at 184-185; UNSC resolution 242 of 22 November 1967; Schwedler, *supra* note 14, at 190-191
[25] Gelvin, *ibid*, at 186-193; OCHA fact sheet, "East Jerusalem: Key Humanitarian Concerns" August 2014; OCHA fact sheet, "Area C of the West Bank: Key Humanitarian Concerns" August 2014
[26] Charles D. Smith, *Palestine and the Arab-Israeli Conflict* , (5th edition, Boston USA, *Bedford/St. Martin's,* 2004) at 270-273, 510-513. As for UNSC resolutions vetoed by the United States, see UNSC draft resolution S/2011/24 of 18 February 2011; UNSC draft

### 2.3.2 Calls for Palestinian Self-Determination

The PLO moved from Jordan to Lebanon in the early 1970s due to a civil war with the Jordanian government. From the south of Lebanon, the PLO continued with its cross-border activities directed at Israel, unhindered by the Lebanese government. This eventually prompted an Israeli invasion in 1982 with the stated purpose of pushing the PLO away from the Israeli-Lebanese border. The war became highly controversial, partly because of the shelling of Beirut and the Sabra and Shatila massacre, a massacre claiming the lives of at least 800 Palestinian refugees. Despite its controversy, the Israeli effort succeeded in forcing the PLO to retreat from Lebanon, the effect being that the PLO headquarters relocated to Tunisia instead. Strife among the PLO members escalated, and Fatah found itself separated from the Palestinian struggle and the former allies in the organisation.[27]

On the Gaza strip and the West Bank, the situation escalated rapidly after the Lebanon war. Israeli regulations and policies had resulted in an economical and agricultural disaster for the Palestinian population, and the number of settlers on the occupied territories now numbered 68 000. In 1987, the death of four Palestinians in a traffic accident sparked a civil uprising that came to be known as the first Intifada. The Palestinian population engaged in acts of civil disobedience and large-scale protests, but also in resistance directed at the Israeli Military. The first Intifada would also see the birth of a new actor on the Palestinian territories in the form of Hamas. Hamas is an autonomous organisation founded on Islamist principles, as opposed to the PLO that is secular in nature. Hamas became infamous because of the use of suicide bombings by the organisation, a tactic formerly unused in the conflict.

Realising the significance of the Intifada, the PLO entered into co-operation with the leadership of the uprising. In 1988, at the height of the Intifada, the PLO proclaimed Palestinian statehood. The proclamation led to a UN resolution "acknowledging" the Palestinian declaration, but the legal effects of the proclamation and the following resolution have been disputed.[28]

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resolution S/2006/508 of 13 July 2006; UNSC draft resolution S/2003/980 of 14 October 2003; UNSC draft resolution S/1997/199 of 7 March 1997, among others.

[27] UNGA resolution 3237 of 22 November 1974; Schwedler (ed.), *supra* note 14, at 190-191, 194-196; Gelvin, *supra* note 14, at 177-178, 216.

[28] Schwedler (ed.), *ibid*, at 194-196; Gelvin, *ibid*, at 214-218, 222-224; Chantal Meloni (ed.), Gianni Tognoni (ed.), *Is There A Court for Gaza? A Test Bench for International Justice* (The Hague, Netherlands, *T.M.C Asser Press*, 2012) at 432-433, 476-477.

### 2.3.3 The Oslo Accords

The fall of the Soviet Union in 1991 and the following shift in the political landscape led to a further deterioration of the PLOs situation. The PLO was now operating out of Tunis, 1 500 miles away from Palestine. The organisation saw its position on the territories threatened by Hamas, and had through the collapse of the Soviet Union just lost its most significant diplomatic ally. In Israel, the general notion after the Intifada was that control over the occupied territories was becoming a burden. This made both the PLO and the Israeli government open to discussing terms of peace between the parties. [29]

The resulting product was the Oslo Accords, entered into 1993 and 1995 respectively. Through these agreements, the PLO acknowledged the state of Israel, and Israel acknowledged the PLO as a representative for the Palestinian people. Israel did however not acknowledge Palestinian statehood. The more practical aspects of the accords detailed a transitional Israeli withdrawal from limited parts of the Gaza Strip and the West Bank, as well as the creation of a Palestinian Authority tasked with handling judicial matters and law enforcement on the territories under Palestinian control, but the Authority would have no authority over Israeli citizens.[30] A complete Israeli withdrawal was planned to be the subject of a final status agreement between the parties within 5 years of the original accords, but as of today, no such agreement has taken form.

In the wake of the Oslo Accords, dissent started to grow. Conservative parts of Israeli society accused the government of giving the Palestinians more than they deserved when agreeing to Israeli withdrawal. This was also was the reason for the assassination of Yitzhak Rabin in November 1995, the former prime minister, incumbent during the signing of the Oslo Accords. The following election resulted in a government with a much more critical view on the accords. In Palestinian society, opposition grew; Hamas had been opposed to the accords from the start, and the general notion was that the stalled negotiations would result in a permanent Israeli presence on the rest of the Palestinian territories. That Israel continued with its settlement policy by expropriating Palestinian land and adding new settlements did not mitigate these concerns. [31]

### 2.3.4 The PLO-Hamas Split Administration

By the turn of the millennium, Israeli and Palestinian expectations for peace were at an all-time low. In the end of 2000 Ariel Sharon, the leader of the

[29] Gelvin, *supra* note 14, at 216, 231-232.
[30] For details on the Oslo Accords' allocation of territory, see supplement A.
[31] Gelvin, *ibid*, at 234-240; Schwedler (ed.), *supra* note 14, at 198-199

Israeli Likud party, visited one of the holy Muslim sites in Jerusalem, sparking what was to be known as the second Intifada. Unlike the first Intifada, that was largely a popular resistance movement, the second Intifada was marked by its closer connection to the armed Palestinian militias on the occupied territories. The use of suicide bombings by Hamas and other factions had a significant psychological effect on the Israeli population. The Israeli military responded with force, clashing with protesters on the West Bank. Further invigorated by American support in "the war on terror", Israel carried out large-scale incursions into the West Bank, wiping out the majority of the PA's security forces. Around the same time, the Israeli authorities ordered the construction of a wall between Israel and Palestine, located on the occupied Palestinian territories and built such as to cut off Palestinian communities from each other. The International Court of Justice declared the wall illegal in 2003, to no effect. [32]

After the war, both the PA and the Palestinian economy were in ruins. As a result, the support of radical groups such as Hamas and the Al-Aqsa Brigades grew further. When the PLO leader Yasser Arafat passed away of natural causes in 2004 this led to an escalation of the already teeming conflict between Fatah and Hamas. In 2006, Hamas obtained a majority of the seats in the Palestinian parliament. Fearing resistance from Fatah's security forces on the West Bank, Hamas chose to break off its co-operation with the PA and took control over the Gaza Strip. The Palestinians now had two separate administrations, with only the PA willing to engage in a dialogue with the Israeli authorities; Israel had withdrawn all settlers from the Gaza Strip in 2005. The Hamas takeover also resulted in an Israeli blockade against the Gaza Strip. As of 2010, 80 % of the citizens in Gaza were dependent on food aid. [33]

From the Gaza Strip, Hamas now began a campaign of indiscriminate rocket strikes against Israeli cities. These rocket attacks have in return prompted military action by Israel, invading the Gaza strip in 2009, 2012, and 2014. Usage of heavy ordnance by the Israeli Defence Force in the densely populated Gaza Strip have resulted in high civilian casualties. Approximately 80 % of Palestinian casualties in the 2009 Gaza War and 65 % of the casualties in the 2014 Gaza War consisted of civilians according to the UN:s fact-finding missions.

During these conflicts, members of the IDF have violated international law by deliberately killing civilians and in some instances using civilians as human shields. The Palestinian militias have also violated international law by placing heavy weaponry near densely populated areas, thereby endangering the lives of the civilian population. The militias have also

[32] Schwedler (ed.), *ibid*, at 194-195, 198-201

[33] Schwedler (ed.), *ibid*, at 201; Pappe, *supra* note 21, at 290-291; Gelvin, *supra* note 14, at 246

violated international law through the deliberate killings of Israeli civilians.[34]

### 2.3.5 The Legalization of the Conflict

The present day developments have resulted in a shift in the political conflict. As the prospects of a negotiated settlement between Israel and Palestine diminished and the civil dissatisfaction with the PA increased during the Arab Spring, the Palestinian leadership turned to the international community to strengthen its position.

This has taken its form in a diplomatic campaign for Palestinian statehood, an attempt at indirectly transforming the conflict to one of international law. Israel and the United States have in turn accused the campaign of endangering the peace process. In 2011, Palestine was admitted as a full member of UNESCO, and in 2012, resolution 67/19 by the UN General Assembly upgraded the Palestinian member status to that of non-member observer state. The General Assembly also adopted the use of the designation "state of Palestine" for all official UN documents, and affirmed the right to self-determination for the Palestinian people on the territories occupied in 1967. It is uncertain if this resolution constituted recognition of Palestinian statehood, but it paved the way for a Palestinian accession of the Rome Statute in 2015, giving the International Criminal Court jurisdiction over international crimes committed on Palestinian territory. Israel, however, is not a state party the Rome Statute.

This was not the first Palestinian attempt to grant the ICC jurisdiction over the occupied Palestinian territories. In 2009, Palestine lodged a declaration under article 12(3) of the Rome Statute in an attempt to give the ICC jurisdiction over crimes committed on Palestinian territory since 2002. The Prosecutor regarded the declaration as invalid due to Palestine's previous status at the UN. When Palestine acceded the Rome Statute in January 2015, another declaration under article 12(3) was lodged. The purpose of the declaration is somewhat unclear, but it could have been to avoid the delay in entry into force prescribed by article 126 (2) of the Rome Statute. As a result of the declaration, the Prosecutor has been conducting a preliminary investigation on the Palestinian territories since January 2015.[35]

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[34] *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009, paras. 352-363,446-449, 798-801, 1090-1106; *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, A/HRC/29/52, 24 June 2015, paras. 20-31,61-64.

[35] Gelvin, *supra* note 14, at 260-264; UNGA resolution 67/19 of 29 November 2012; General Conference admits Palestine as UNESCO Member | United Nations Educational, Scientific and Cultural Organization, available at http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/#.WAIYFfmLTcs (visited at 15 October 2016); Examination of Preliminary Examination Activities 2015,

## 2.4 Summary

The history of Palestine and the Arab-Israeli conflict is a complicated one, but as one studies its one-hundred year old history, patterns will unquestionably emerge. The financial and military advantages of Israel have resulted in the successively expanding territorial control for the Israeli state. This has taken its form both through military conquest, and through the practice of building Israeli civilian settlements on occupied territory. The Palestinian population have as a result experienced a significant territorial and economic recession since the early 20th century. All attempts at brokering peace have so far been thwarted.

Throughout the conflict, there has also been absence of international action. The UN has criticized Israel for the occupation of the West Bank and East Jerusalem, for the settlement policy, for its excessive use of military action, without further effect. A partial explanation for this could be found in the use of veto powers in the Security Council. Only through a gradual move towards statehood has Palestine and the Palestinians been able to take steps towards securing basic human rights and freedoms.

The disputed question of statehood has in turn complicated matters for the International Criminal Court.

If the Court accepts Palestine as a state for the purposes of the Rome statute, how should the Court proceed when determining the extent of Palestinian territory? How should the Court handle the fact that over 500 000 Israeli settlers and significant Israeli economic interests are currently situated on the occupied territories? Should the Court treat the Oslo accords as a restriction on its jurisdiction? Moreover, how could the investigation of crimes of illegal transfer on the territories be affected by the cross-border situation? The following chapter of the thesis will focus on these questions, among others.

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ICC Office of the Prosecutor, 12 November 2015, at paras. 45, 72-75; Examination of Preliminary Examination Activities 2013, ICC Office of the Prosecutor, November 2013, at paras. 234-238; Yaël Ronen, "Israel, Palestine and the ICC - Territory Uncharted but Not Unknown", 12 *Journal of International Criminal Justice* 2014, 7-25, at 8-9.

# 3 The Courts' Jurisdiction Over the Occupied Palestinian Territories

## 3.1 The question of Palestinian statehood

Article 12 of the Rome Statute contains the preconditions for the Courts exercise of jurisdiction, and therefore serves as an appropriate starting point. Since the Rome statute is an international treaty, interpretation of its provisions are subjected to articles 31-33 of the Vienna Convention on the Law of Treaties.[36] The application of the treaty has been confirmed in the Courts' case law.[37]
As for the standard of proof required when determining the Courts jurisdiction, Pre-Trial Chamber II of the ICC has endorsed a standard of proof requiring "a degree of certainty" regarding jurisdiction, but it is unclear if the other chambers endorse this standard. Pre-Trial chamber I has previously avoided the question in the *Mbarushimana* case.[38]
Art. 12 (1) states that:

> *"A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5."*[39]

Article 12 (1) can be read as requiring statehood for the presence of jurisdiction. As statehood requires at least control over some extent of territory, this question is best discussed before moving on to examining the Courts' territorial jurisdiction.[40]

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[36] United Nations, Vienna Convention on the Law of Treaties (Hereafter referred to as VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[37] Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Thomas Lubanga Dyilo*, (ICC-01/04-168), Appeals Chamber, 13 July 2006, para. 6.
[38] Article 12, 13 and 21 (1) (b) of the Rome Statute; A. Cassese (ed.), P. Gaeta (ed.), John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II (Oxford, Oxford University Press 2002), at 1070-1072; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Jean-Pierre Bemba Gombo*, (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, paras. 22-26; Decision on the "Defence Challenge to the Jurisdiction of the Court", *Callixte Mbarushimana*, (ICC-01/04-01/10-451), Pre-Trial Chamber I, 26 October 2011, para. 5; Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court*( Cambridge, Cambridge University Press 2014), at 264-266.
[39] Article 12(1) of the Rome Statute.
[40] James Crawford, *The Creation of States in International Law* (Oxford, Clarendon 2007), at 47-50

According to article 125(3) of the Rome Statute, the statute is open to accession by all states. Since Palestine acceded the Rome Statute in January 2015, this could be interpreted as a confirmation of Palestinian statehood for the purposes for the ICC; the OTP has previously stated that UNGA resolution 67/19 was of direct relevance for the question of jurisdiction.[41] However, there is nothing preventing the Court from giving a negative answer regarding the question of Palestinian statehood, since the Palestinian accession to the Rome Statute was a factual question and not a legal one. The legal question regarding Palestinian statehood is yet to be determined.

Article 31 (1) of the VCLT states that:
*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[42]

The ordinary meaning of the word "state" in article 12 (2) (a) seems to suggest that statehood is a precondition to territorial jurisdiction. Statehood has traditionally been seen as a declarative question based on the requirements in article 1 of the Montevideo Convention, requiring a) a permanent population, b) a defined territory, c) government, and d) the capacity to enter into agreement with other states. However, it has been claimed that other factors, such as a recognised right to self-determination can lower the threshold for statehood required according to the Montevideo criteria.[43]
Even if Palestine would fail to meet these criteria, the object and purpose of the Rome Statute could be said to allow for jurisdiction on the territory of quasi-states. Exempting non self-governing territories from the Courts' jurisdiction could have a detrimental effect on the ICC's functions, as this would prevent the Court from exercising jurisdiction on the territory of ICC members who are not self-governing. The Court has previously opted for a teleological approach in order to assure the operability of the statute in the *Bemba Gombo* case.[44]
It could be argued that Palestine sufficiently fulfils the Montevideo criteria, and that there is no need for arguing along the lines of Palestine being a quasi-state. The Palestinian people is an internationally recognized people

[41] Examination of Preliminary Examination Activities 2015, ICC Office of the Prosecutor, 12 November 2015, at para. 45; Examination of Preliminary Examination Activities 2013, ICC Office of the Prosecutor, November 2013, at paras. 234-237.
[42] Article 31 (1), VCLT, *supra* note 36.
[43] Article 12(2)(a) of the Rome Statute; Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 League of Nations Treaty Series 19; 49 Stat 3097; Duncan French (ed.), *Statehood and Self-Determination* (Cambridge, Cambridge University Press 2013), at 190, 195-202; Crawford, *supra* note 40, at 438-439.
[44] Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, Jean-Pierre Bemba Gombo, (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, paras. 34-36.

with ties to the Palestinian territories, territories where the Palestinian Authority exercises control over at least some defined areas, namely the "A" areas described in the Oslo accords. Previous concerns regarding the Palestinian Authority's effectiveness as a government resulted in a two-year state-building programme between 2009 and 2011, strengthening the institutional structure of the PA. Furthermore, the Palestinian Authority have several diplomatic missions in foreign states, having entered into diplomatic relations with others. A reasonably strong case can therefore be made regarding Palestine's fulfilment of these criteria.[45]

Another possible approach could be to let international recognition of statehood be decisive. This approach can be founded on recent case law regarding Georgia. In this case, Pre-Trial Chamber I was required to make a determination on South Ossetian independence in order to assess the extent of the ICC's territorial jurisdiction. In the Prosecutors' request for authorization, emphasis was put on the lack of recognition of South Ossetia as an independent state, and its status in the United Nations. The Prosecutor also referred to resolutions of the General Assembly stating that South Ossetia was to be considered a part of Georgia. The Court agreed with the arguments of the Prosecutor in these regards, and determined that the territory of South Ossetia was a part of Georgian state territory for the purposes of the ICC.[46]

The Prosecutor's approach to statehood in the case of Palestine bears many similarities with how the Prosecutor viewed the question of South Ossetian independence. According to the Prosecutor, UNGA resolution 67/19 and the observer state status of Palestine provided the basis for the Palestinian accession to the Rome Statute and the Palestinian declaration under article 12(3), both requiring statehood. It must be said however, that the OTP holds that these conclusions are without prejudice to the Courts' jurisdiction. [47]

However, if the Court would opt for an approach to statehood similar to the one used in Georgia, a likely result would probably be Palestinian statehood for ICC purposes. This follows from the Palestinian status at the UN and the resolutions of the General Assembly.[48]

[45] French, *supra* note 43, at 195-202.
[46] Decision on the Prosecutor's request, *supra* note 12, para. 6; Request for authorisation of an investigation pursuant to article 15, *Situation in Georgia* (ICC-01/15), Office of the Prosecutor, 13 October 2015, para. 54.
[47] Preliminary Examination Activities 2015, *supra* note 41, paras. 48-54.
[48] UNGA Resolution 67/19, of the 29 November 2012.

Regardless of the favoured approach, both methods would probably result in Palestine being considered a state for the purposes of the ICC, something also reflecting the dominant view among states and scholars. [49]

### 3.1.1 Analysis

Adopting the theory of Koskenniemi, approaches to Palestinian statehood should be inferred from the dual nature of international law. A concrete, or factual, approach to statehood would emphasise the factual circumstances surrounding the Palestinian entity, such as the exercise of authority and concentration of power. This is similar to the declaratory theory of statehood. The independence from elements of recognition makes this a problematic approach. Without requirements of recognition, statehood will be determined by the Palestinian entity itself. This method can be interpreted as political and apologetic. Legal criteria designed to mitigate apologetic results (such as the Montevideo Convention) are required, introducing a normative, legal element in the factual approach. These criteria are applied in the present case.[50]
A normative approach to Palestinian statehood would emphasise law as a primary source. Representing the legal order are the existing states, determining the content of statehood through recognition of new states. This is similar to the constitutive theory of statehood. A normative method is represented by the analysis of the recognition-based method used by the Court in the case of South Ossetia. The normative approach can however be regarded as political and utopian (that is, removed from facts), as nothing prevents the existing states from granting an ineffective entity, or denying an effective entity, statehood for political purposes.[51]

A declaratory theory sees Palestinian statehood as a consequence of factual circumstances, as opposed to the constitutive theory, which sees Palestinian statehood as a consequence of law in the form of international recognition. Both positions are inadequate in themselves, as they are always open to criticism from the opposing position. A completely factual approach in this case could be criticised for its disregard towards rights of Palestinian self-determination and the international recognition of the Palestinian state. On the other hand, a normative approach could be criticised for its removal from the factual exercise of power by the Palestinian entity.

The factual and the normative approach is in a locked relationship, one position opposed yet simultaneously co-dependent on the other. According

[49] Ronen, *supra* note 35, at 8-9.
[50] Martti Koskenniemi, *supra* note 6, at 236-239.
[51] *Ibid*, at 239-242.

to Koskenniemi, this inherent friction in the system results in legal practitioners being unable to choose one method over the other. Disputes must be solved by evading conflict between the methods. [52]

Contemporary doctrine regarding statehood does not immediately appear shaped by the conflict between concreteness and normativity, as many authors are express proponents of the declaratory theory. One such example is James Crawford, author of *The Creation of States in International Law*, expressly rejecting the constitutive theory. Instead, Crawford opts for a solution where factual exercise of power must be in accordance with the principle of self-determination in order to constitute statehood. This express choice could be interpreted as suggesting a flaw in Koskenniemi's theory.[53]

On the other hand, it could be suggested that Crawford's approach only masks the underlying conflict between factual and normative statehood. Crawford's theory states that factual exercise of power must be in accordance with the principle of self-determination, which in turn is dependent on international recognition. Crawford's declaratory method would therefore be more of a dual approach, solving the conflict between factual exercise of power and normative recognition through integrating them into one perspective, requiring both factual exercise of power and international recognition of self-determination for statehood.

The same can be said for the method used in *Statehood and Self-Determination* by Duncan French (ed.). Here, the authors opt for the declaratory theory, but states that a right to self-determination can lower the threshold for the factual circumstances required for statehood. The conflict between the factual and normative views is seemingly solved through integration.[54]

This thesis proposes a factual approach as well as a normative approach. The factual approach has integrated elements of self-determination, proposing an integrated perspective similar to the one used in *Statehood and Self-Determination* towards Palestinian statehood. A second, recognition-based approach was proposed along the lines of the Courts' *Georgia* decision, a typically normative method for determining statehood. The adoption of both perspectives prevented conflict between concreteness and normativity. Both approaches had similar results, further preventing a conflict between the perspectives.

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[52] *Ibid*, at 262-263.
[53] Crawford, *supra* note 40, at 28, 131; *The Wall*, *supra* note 1, at para. 118.
[54] French (ed.), *supra* note 43, at 190.

However, the result could be criticised as being both utopian and apologetic. The normative, recognition-based approach could be accused of utopianism for its focus on the relevance of UN recognition for matters of statehood, as only matters relating to effectivity are relevant from a factual position. The factual, Montevideo-based approach could be accused of apology from a normative position, if one holds that the status of non-member observer state is insufficient evidence for the international community recognising Palestinian statehood.

The analysis suggest that factual and normative approaches to Palestinian statehood exist in doctrine as well as in this thesis. Conflict between these perspectives is generally evaded, as neither approach is preferable to the other. This evasion is only seemingly effective, and despite appealing to both concrete and normative circumstances, the thesis fails to arrive at a determinate result.

## 3.2 The occupied Palestinian territories

### 3.2.1 Occupied Palestinian territories and the Palestinian state territory

After establishing that Palestine should be considered a state for the purposes of the ICC, one will have to examine the Courts' jurisdictional parameters more closely. Article 12(2) states that:

*"In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*

*(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*

*(b) The State of which the person accused of the crime is a national."*[55]

Article 13 contains the so-called triggering mechanisms, (a) being referral by state party, (b) being referral by the UNSC, and (c) being investigation *proprio motu* by the Prosecutor. Referral by the UNSC read together with article 12(2) gives the ICC universal jurisdiction for instances where the Security Council refers a situation. Seeing as the Palestinian situation was not referred by the Security Council in this case however, the Court needs to satisfy itself according to the preconditions of article 12 (2) (a) and (b). The Court is therefore restricted to jurisdiction *ratione loci* or *ratione personae*

[55] Article 12 (2) of the Rome Statute.

when faced with the Palestinian situation. Since Israel is not a member of the Rome statute, jurisdiction *ratione personae* is unlikely to provide a jurisdictional basis for a future investigation on illegal transfer.[56]

This leaves the Court with exercising its jurisdiction on conduct that has occurred on Palestinian state territory. The exact meaning of "territory" must be determined in accordance with article 31 of the VCLT. It could be argued that the question of territory to some extent was covered by the interpretation of the word "state" in article 12 (1). According to the ordinary meaning of the word state, territory is one of the requisites for statehood.[57] If the Court has already accepted Palestinian statehood, as it has sufficient legal grounds to, this would presuppose the existence of a Palestinian territory. However, establishing the existence of territory offers no advice on how the extent of this territory can be determined.

The ordinary meaning of the wording in Article 12 (2) (a) suggests that the Court has jurisdiction over territory belonging to the referring state party. Some scholars have suggested that the wording of article 12 (2) (a) shall be read as covering the entirety of the globe, leaving no room for the existence of *terra nullius*.[58] This would also be supported by a teleological interpretation of the provision, as the existence of *terra nullius* could impede the functioning of the Court. Thus, the guidance the wording provides is that the Courts' territorial jurisdiction is dependent on the sovereign on the territory, and that such a sovereignty necessarily must exist.
When Palestine applied for an upgraded membership in the UN, it did so on the basis of previous UNGA and UNSC resolutions as well as international recognition by other states. It is generally agreed upon that international law does not require complete territorial control for determining the extent of a states' territory. Palestinian Authority President Mahmoud Abbas clarified the territory asserted by Palestine in conjunction with the UN application for upgraded membership. The territory asserted rests on the 1967 borders, with East Jerusalem as the Palestinian capital. This territory is what the UN refers to as "occupied Palestinian territories", envisioned by the General Assembly as belonging to the Palestinian people in a future Palestinian state, as expressed in UNGA resolution 67/19. Palestine is the sole claimant of sovereignty on the West Bank and the Gaza Strip, while there is a competing Israeli assertion of sovereignty over East Jerusalem. While it could be argued that Israel has aspirations regarding a future final status

[56] It is however an interesting subject concerning crimes by Palestinian citizens, especially because of the split in the Palestinian administration described above in part 2.3.4.
[57] Crawford, *supra* note 40, at 48.
[58] Meloni, Tognoni, *supra* note 28, at 422

agreement which would accord some parts of the occupied territories to Israel, this has not taken the form of a legal claim. Consent of neighbouring states cannot be considered a prerequisite of territorial sovereignty, at least if one holds that the meaning of consent is a permission of territorial sovereignty from the neighbouring state. Such a requirement would run contrary to the principle of state equality. It is one thing to weigh the legal interests of sovereign equals against each other, and another to subjugate the sovereignty of a claimant state to the consent of neighbouring states.[59]

Important to have in mind is that not acknowledging the occupied Palestinian territories as Palestinian state territory would amount to an indirect declaration of the territory belonging to another state, as the Rome Statute might not allow for the existence of *terra nullius*. It could be argued that this alone is a strong argument for interpreting the territory as Palestinian. On the Gaza Strip and on the West Bank there is a lack of competing territorial claims. As for East Jerusalem, this will be the subject of chapter 4. [60]

Another factor of importance for the determination of Palestinian territory is the principle of self-determination. The principle of self-determination is one of the most essential principles of international law, constituting an obligation *erga omnes* for states. The principle is expressed in article 1 of the ICCPR as the right of peoples to determine their political status, and to freely pursue their economic, social and cultural development. It is also the subject of the Friendly Relations Declaration, an authoritative resolution on the subject of self-determination adopted by the General Assembly. The resolution can be seen as an expression of *opinion juris* regarding self-determination. [61]

Self-determination and statehood are closely related, as self-determination can be described as the right to statehood. Self-determination has a crucial role in determining the status of territory. People who are entitled a right of self-determination also have rights to the territory on which they live. In doctrine, some have opted for the term "self-determination unit" for describing this territory. Identifying the extent of such a self-determination

[59]Crawford, *supra* note 40, at 47-50*; Application of Palestine for admission to membership in the United Nations*, A/66/371–S/2011/592, 23 September 2011, Annex II; *Statement by H.E. Mr. Mahmoud Abbas, President of the State of Palestine, Chairman of the Executive Committee of the Palestine Liberation Organization, President of the Palestinian National Authority*, GA/11152, 23 September 2011; Eugene Kontorovich, "Israel/Palestine – The ICC's Uncharted Territory", 11(5) *Journal of International Criminal Justice* 2013, 979-999, at 990; Y.Ronen, *supra* note 35, at 11-13.

[60] Meloni, Tognoni, *supra* note 28, at 422; Vagias, *supra* note 38, at 76-77.

[61] Article 21 (1) (b) of the Rome Statute; *Case concerning East Timor (Portugal v. Australia)* International Court of Justice, June 30 1995, ICJ reports (1995) 102, para. 29; International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; UNGA resolution 2625 of the 24 October 1970.

unit could affect the territorial boundaries of a state that is a result of a peoples' right to self-determination, as statehood is a consequence of the right to self-determination on the territory.[62]

The right to self-determination has been seen by some scholars seen as an argument for interpreting the occupied Palestinian territories as belonging to the Palestinian state. The argument rests upon the occupied territory originally being a Palestinian self-determination unit, now transformed to Palestinian state territory. A closer look at this argument follows. [63]

### 3.2.2 Recognition and Self-Determination

While the question of Palestinian statehood is of a more recent nature, the right to self-determination for the Palestinian people dates back to 1947 and UNGA resolution 181. The right to Palestinian self-determination has been reiterated in several later resolutions by the General Assembly. As the Palestinian people has a right of self-determination, the next step is determining the extent of the Palestinian self-determination unit.[64]

The advisory opinion of the ICJ in *The Wall* is an appropriate starting point for identifying the self-determination unit. In the case, the Court stated that Israel's construction of the wall encircled Palestinian communities between the Green Line[65] and the Israeli wall, thereby severely impeding the Palestinian peoples' right to self-determination. By implication, the Palestinian self-determination unit lies within the Green Line, encompassing East Jerusalem, the West Bank, and the Gaza Strip. This is also the area defined as the Palestinian entitlement by the General Assembly in several resolutions. Some parts of the self-determination unit does not even seem to be an issue between Israel and Palestine, as the purpose of the Oslo Accords were to establish a Palestinian self-governing authority on the West Bank and Gaza Strip.[66]

The right to self-determination for the Palestinian people should be taken into account when examining the Palestinian Authority's assertion of territory. The Palestinian state can be seen as the realisation of the Palestinian peoples' right to self-determination, and its territory should be seen as a continuation of the Palestinian self-determination unit. Important

[62] Crawford, *supra* note 40, at 107, 115-122; French, *supra* note 43, at 190.
[63] UNGA resolution 67/19 of 29 November 2012; Ronen, *supra* note 35, at 14.
[64] UNGA resolution 181(II) of 29 November 1947; UNGA resolution 66/146 of 19 December 2011; UNGA resolution 58/292 of 6 May 2004, among others.
[65] See supplement A.
[66] *The Wall*, *supra* note 2, at paras. 121-122; UNGA resolution 3175 of 17 December 1973; UNGA resolution 67/19 of 29 November 2012; Declaration of Principles on Interim Self-Government Arrangements, hereafter referred to as "Oslo I", concluded by Israel and the Palestine Liberation Organization, 13 September 1993.

to bear in mind however, is the so-called safeguard clause in principle 5 § 70 of the Friendly Relations Declaration, stating that:
*"nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color."*[67]

In cases where a self-determination unit constitutes a part of a sovereign state, the right to self-determination can in other words be complied with by a State which ensures the equal treatment of its citizens. A Palestinian state on the West Bank and the Gaza Strip would not impede on Israeli sovereignty, as Israel does not assert sovereignty over the territories. In the case of East Jerusalem, Palestinian sovereignty is dependent on the validity of the Israeli assertion of sovereignty. More on this in chapter 3.3.

The Palestinian people have historically enjoyed wide support from the international community regarding its right to self-determination on the occupied territories. Palestinian statehood can be seen as a natural consequence of this right to self-determination. In the same way, the territory of the Palestinian state can be seen as a continuation of the Palestinian self-determination unit. The Israeli *de facto* control over parts of the West Bank is not necessarily an obstacle for this. Exercise of jurisdiction over the entirety of a claimed area is not required for a territorial claim to be valid, nor is it an obstacle for the jurisdiction of the ICC.[68]

This method of determining state territory can however be criticised as being arbitrary. Some scholars have argued that Palestinian sovereignty is effectively blocked by an Israeli *uti possidetis* claim on the territories. Some have also held that complex jurisdictional determinations by the Court may undermine international law through its negligence towards inter-state treaties. Others have argued that determining territory based on the principle of self-determination could risk creating a destabilizing practice for the future, where states could use the ICC to unilaterally decide the extent of their criminal jurisdiction against the will of neighbouring non-member states. These arguments raise questions regarding the potential effects of

[67] UNGA resolution 2625 of the 24 October 1970.
[68] Victor Prescott, Gillian D. Triggs, *International Frontiers and Boundaries* (Leiden, the Netherlands, Koninklijke Brill NV 2008), at 181-182; Crawford, *supra* note 40, at 50; William A. Schabas, *The International Criminal Court: A Commentary On The Rome Statute* (Oxford, Oxford University Press 2010), at 285.

accepting the Palestinian position and will therefore be examined more closely.[69]

#### 3.2.2.1 *Uti Possidetis* or Self-Determination?

The principle of *uti possidetis* is an important principle of law, applicable even in cases where it may conflict with the right to self-determination and self-governance of another people. General principles of law are to be applied as a source of law under article 21 (1) (b) of the Rome Statute, when appropriate. The principle of *uti possidetis juris* is traditionally seen as a colonial principle, stating that a state shall inherit the territorial boundaries of the former administrative power unless otherwise agreed by treaty. This is motivated by stability reasons; inheriting the territorial borders of the previous administration prevents future conflicts with neighbouring countries regarding the extent of the territory.[70]

Whether *uti possidetis* is applicable both in cases of de-colonization and secession is disputed among scholars. Proponents of applying the principle on cases of secession have pointed towards the application of the principle among the former Yugoslavian states and the former members of the USSR. In the case of Yugoslavia, the Badinter Commission applied the principle on all seceding states of the SFRY, proclaiming that the internal borders of the Yugoslavian republic had become international borders between the new states. [71]
However, the application of the principle in cases of secession has never happened before an international court. It was only after Serbia & Montenegro had reconstituted itself and had shown signals that it was prepared to acknowledge the other states and their borders that the United Nations admitted the seceding states of the SFRY. State practice since 1945 shows that secession as a method of acquiring statehood is restrictive, and almost always dependent on the consent of the previous sovereign. Further support of the non-applicability of the principle on cases of secession is the separate opinion of judge Luchaire in the *Frontier Dispute* case, where he

[69] Kontorovich, *supra* note 59, at 984; Michael A. Newton, "How the International Criminal Court Threatens Treaty Norms", 49(2) *Vanderbilt Journal of Transnational Law* 2016, 371-431, at 379.
[70] *Frontier Dispute (Burkina Faso/Republic of Mali)*, International Court of Justice, I.C.J. Reports (1986) 554, 22 December 1986; Abraham Bell, Eugene Kontorovich, "Palestine, Uti Possidetis Juris, and the Borders of Israel", 58(3) *Arizona Law Review* 2016, 633-692, at 633.
[71] Arbitration Commission of the Peace Conference on Yugoslavia, opinion no. 9, 4 July 1992, available in 4(1) *European Journal of International Law* 1993, 72-91, at 88-90.

insists on separating matters of decolonisation from matters of independence. [72]
It can also be argued that the principle has a consensual element. This is expressed in the *Frontier Dispute* case:

*"[…] The essential requirement of stability in order to survive, to develop, and gradually to consolidate their independence in all fields, has induced African states judiciously to consent to the respecting of colonial frontiers […]*[73]

Consent to the application of the principle have been present in all cases regarding *uti possidetis juris* before the International Court of Justice. [74] In cases involving states objecting to the principle, the Court has not referred to *uti possidetis juris* for determining territory.[75]

A teleological interpretation holds that *uti possidetis juris* shall be founded on the principle of territorial stability and the right to self-determination. As Judge Abi-Saab stated in his separate opinion, the *uti possidetis* rule has to be interpreted in light of its function in the legal order.[76] The principle should not be applied in a way that would destabilise the stability of a territory rather than reinforcing it. *Uti possidetis juris* should be interpreted as a manifestation and not an obstacle to the right of self-determination. Where *uti possidetis juris* cannot be applied without severe violations of self-determination, it should not be applied at all.

In this case, it has been argued that Israel have inherited the boundaries of the 1948 Palestinian mandate, and that this overrules the Palestinian claims of sovereignty and their right to self-determination on the territories.[77] To assess the validity of this argument one would first have to discuss whether Israel in regards to the Palestinian Mandate is a seceding state, a successor

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[72] Crawford, *supra* note 40, at 401, 415-416; Separate opinion of Judge Luchaire, *Frontier Dispute case* (Burkina Faso/Republic of Mali), International Court of Justice, I.C.J. Reports (1986) 652, 22 December 1986, at 652-653.
[73] *Frontier Dispute* case, *supra* note 69, para. 25,
[74] *Frontier Dispute* case, *supra* note 69, para. 19; *Case Concerning the Frontier Dispute (Benin/Niger)*, International Court of Justice, I.C.J. Reports (2005) 90, 12 July 2005, para. 23, Judgment of 11 September 1992; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, International Court of Justice, 11 September 1992, para. 40; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, International Court of Justice, I.C.J. Reports (2007) 659, 8 October 2007, para. 154.
[75] Arman Sarvarian, "Uti Possidetis Iuris in the Twenty-First Century: Consensual or Customary?", 22(4) *International Journal of Minority and Group Rights* 2015, 511-532, at 522; *Western Sahara (Advisory Opinion)*, International Court of Justice, I.C.J. Reports (1975) 12, 16 October 1975.
[76] Separate opinion of Judge Abi-Saab, *Frontier Dispute case* (Burkina Faso/Republic of Mali), International Court of Justice, I.C.J. Reports (1986) 659, 22 December 1986, at 661.
[77] A.Bell, E.Kontorovich, *supra* note 70, at 635.

state, or both. A common view is that the creation of Israel was an act of secession. Israel was established on the territory of the Palestinian mandate after seceding from the mandate, as opposed to a situation where Israeli rule was a consequence of the mandates' termination. This seems like a plausible approach, as secession has been defined as the creation of a state with the use or threat of force, without the consent of the previous sovereign. In Israel's case, statehood was a result of the 1948 war and not of a transfer of authority from Great Britain. Since *uti possidetis juris* is likely inapplicable on cases of secession, this could provide sufficient grounds for rejecting the application of the principle.[78]

Even if one were to accept that *uti possidetis juris* is applicable on cases of secession, application of the principle in this case would violate the consensual element. There is a lack of consent from the neighbouring states, as well as from the Palestinian population.

Application would also result in a violation of the purposes of the *uti possidetis juris* rule. It is questionable if Israeli sovereignty over the Palestinian territories would have a positive effect on the territorial stability of the region, as the Israeli presence on the West Bank is in itself a destabilising factor. Application of the principle would result in the denial of Palestinian self-determination on large parts of the territory. The principle should therefore be considered inapplicable on these grounds.

Support for the inapplicability of the principle can be found in the behaviour of the parties, the position of the international community, and in the case law of the ICJ. The application of the Fourth Geneva Convention on the occupied territories combined with the lack of explicit territorial assertions suggests that the Israeli position is that the Palestinian territories are under military occupation, therefore not constituting Israeli state territory. As for the Palestinians, they have made territorial claims that cannot be combined with the general applicability of *uti possidetis juris*, or with consent to such an application.[79]

The general opinion of the international community is that Israel is an occupying power, something that amounts to a tacit rejection of Israeli territorial rights. Demands from the General Assembly for Israeli withdrawal have traditionally been founded on the negative effects of the

[78] Crawford, *supra* note 40, at 374-376, 432-434, also see above, 2.2.3.

[79] *The Wall*, *supra* note 2, at para. 93; *Application of Palestine for admission to membership in the United Nations*, A/66/371–S/2011/592, 23 September 2011, Annex II; *Statement by H.E. Mr. Mahmoud Abbas, President of the State of Palestine, Chairman of the Executive Committee of the Palestine Liberation Organization, President of the Palestinian National Authority*, GA/11152, 23 September 2011.

occupation on Palestinian self-determination, and *uti possidetis juris* has never been taken into consideration.[80]
As for the ICJ, the Court stated in its' advisory opinion of *The Wall* that the territories between the West Bank armistice line and the former boundaries of the Palestinian mandate were under military occupation by Israel, referring to relevant Security Council resolutions regarding non-permissibility of acquisition of territory by force. *Uti possidetis juris* was not taken into consideration, and was never discussed.[81]

With these facts in mind, the principle of *uti possidetis juris* cannot be said to grant Israel the territorial boundaries of the Palestinian mandate. The lack of recognition by the parties, the international community, and the International Court of Justice suggests that the principle is inapplicable, and not a factor to be taken into consideration when discussing the territorial extent of Israel and Palestine.

#### 3.2.2.2 What are the Legal Effects of an ICC Decision?

Since the principle of *uti possidetis juris* is not applicable, one will have to examine the other arguments against the Court exercising jurisdiction over the Palestinian territories. Some scholars have argued that the Courts' decisions could have serious implications for international law, as a decision could undermine the respect for inter-state treaties.[82]
Important to bear in mind when discussing the legal effects of the Courts' exercise of jurisdiction is that these legal effects will be restricted to the field of international criminal law. If the Court would exercise jurisdiction in accordance with article 12 (2) (a) of the Rome Statute in this case for example, it would not have effects on the status of the occupied territories from a public international law perspective, as the decisions of the ICC have no effect on matters of public international law. [83]
This is something that follows from the twofold relationship between international criminal law and public international law. In many cases, there is a close relationship between the fields, as the conduct prohibited in international criminal law often can be seen as a reflection of a breach in public international law. This close relationship is however deceptive, as the two fields of law rests upon separate philosophies. While international criminal law purports to pass judgment over individuals, public international law deals with the conduct of states. For international criminal law, this

[80] See for an example UNGA resolution 38/180 of 19 December 1983 and UNGA resolution 67/19 of 29 November 2012.
[81] *The Wall*, *supra* note 2, para. 78,
[82] Michael A. Newton, *supra* note 68, at 379.
[83] Article 12 (2) (a), 25(4) of the Rome Statute.

means that matters of public international law only have instrumental value to the extent that they could be used to determine individual guilt. As for public international law, individual conduct only has an instrumental value when examining the illegality of state actions.[84]

It follows from this separation of philosophies that decisions on an instrumental question outside the jurisdictional purpose of a court have limited or no effects. As for the ICC, the drafters of the Rome Statute did not intend for the statute to have effects on questions of state conduct. Article 25 (4) of the Rome Statute states that:

> *"No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."*[85]

The ICJ has also interpreted this provision as an expression of the dual character between international criminal law and public international law in the *Bosnian Genocide*[86] case. Furthermore, the Court stated that it attached no significant value to the positions adopted by the ICTY concerning matters of public international law. This can be interpreted as a confirmation of the position in article 25 (4), that international criminal tribunals cannot create legal effects for the responsibility of states under public international law. [87]

Therefore, the effects of an exercise of jurisdiction under article 12 (2) (a) will be limited to future decisions by the Court, as a source of law under article 21 (2) of the Rome Statute. It cannot undermine the application of inter-state treaties, as the application of treaties is a matter of public international law.

#### 3.2.2.3 Accepting the Palestinian Position – a Destabilizing Precedent?

Notwithstanding the lack of legal effects of an ICC decision, exercise of jurisdiction could still be discussed as problematic when taking into account the sovereignty of neighbouring states. The principle of sovereignty is yet another principle of international law to take into account in accordance with Article 21 (1) (b) of the Rome Statute. One could argue that adopting some interpretations of article 12 (2) (a) could risk creating precedents allowing systematic violations of the sovereignty principle.

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[84] Antonio Cassese, *International Criminal Law* (3rd edition, Oxford, Oxford University Press 2013, at 7-9; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford, Oxford University Press 2012), at 5-8.
[85] Art. 25 (4) of the Rome Statute.
[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* International Court of Justice, 26 February 2007, ICJ Reports (2007) 43, paras. 172-173.
[87] *Bosnian Genocide,ibid* , at 403; Y. Ronen, *supra* note 35, at 19.

When a state exercises territorial jurisdiction over third state nationals, this is not in itself a violation of the sovereignty of the third state. Exercise of territorial jurisdiction is a manifestation of the sovereignty of the state, which the state is free to delegate to the Court. It is another matter when the status of a territory is disputed. One example would be the Court exercising its criminal jurisdiction over a third state national committing a crime on disputed border territory between a member state and a third state. This could be a potential violation of third state sovereignty, depending on who is the legitimate sovereign on the disputed territory.

However, in the case of Palestine, there is a lack of competing territorial claims to large parts of the territory.[88] The ICC acknowledging a non-conflicting territorial assertion with wide international support would not amount to a violation of neighbouring sovereignty, since there are no competing territorial assertions.
As the author has tried to demonstrate above, interpreting the Palestinian territory as a continuation of the Palestinian self-determination unit would not violate an Israeli *uti possidetis* claim, nor would it risk destabilizing international law. Coupled with the fact that Palestine is the sole claimant to large parts of the territories it follows that there are no directly conflicting interests motivating a conservative approach on these territories. The Court should therefore exercise its jurisdiction over the occupied Palestinian territories, as they constitute a part of the Palestinian state.
As for the parts of the occupied Palestinian territories Israel has made legal claims on, these will be the subject of the next part of the thesis.

## 3.3 Assessing Israeli Interests on the Palestinian Territories

After establishing that the uncontested parts of the Palestinian territories should be interpreted as constituting a part of the Palestinian state territory, there is still the matter of the other parts of the occupied Palestinian territories to discuss. Over these parts, sovereignty has been contested by Israel. The most pressing matter is the Israeli claims of sovereignty extending over East Jerusalem and the Mount Scopus enclave (situated within the municipal boundaries of East Jerusalem). In order to determine

[88] Y.Ronen, *supra* note 35, at 12; Duncan French (ed.), *supra* note 43, at 202-203. As for the territories that Israel have made claims of sovereignty over, these will be discussed in part 3.3.

how, or if, this can affect the Courts' jurisdiction, one would firstly have to assess the legal validity of the territorial claims made by Israel.[89]

### 3.3.1 Claims of Israeli Sovereignty over parts of the occupied territories

As a starting point, it is worthwhile to consider whether the ICC is forced to rule *de novo* on the validity of the Israeli claims of sovereignty.

Firstly, one could argue that the question of Israeli sovereignty over the occupied territories including East Jerusalem has already been settled through the ICJ's advisory opinion in *The Wall*. While the ICJ did not intend to prejudge the borders between Palestine and Israel, the confirmation of the territories as occupied by Israel must be seen as an implicit rejection of the Israeli claims of sovereignty over these areas. It could be argued that the ICC could use the judicial decision of *The Wall* as a prior determination of the legal status of the territories, as territorial status is a question of public international law under the jurisdiction of the ICJ. This would effectively bypass the need for a new assessment of the Israeli claims. [90]
Usage of the judicial decision of the ICJ would however not be without its problems. Advisory opinions are traditionally not seen as binding for the member states, since they are intended to be used by the United Nations as legal counsel. One could also argue that accepting the position on the territories expressed by the Court in *The Wall* also would amount to a violation of Israeli interests, since the advisory opinion was given without Israeli consent. Therefore, the judicial decision of *The Wall* has no value for pre-establishing the validity of Israeli territorial claims. [91]

Worth to consider is whether Security Council resolutions create binding effects for the ICC. The binding effects of Security Council resolutions on UN member states follows from article 25 of the UN Charter.[92] Whether they are binding or not is established through study of the intent behind the resolution, such as examining the language, the provisions of the UN Charter that have been invoked, and the discussions leading up to the adoption of the resolution. This has also been confirmed in the East Timor case, where Portugal argued that the ICJ could make use of the contents of

[89] Ronen, *supra* note 35, at 14.
[90] *The Wall*, *supra* note 2, paras 121, 155-159.
[91] *The Wall, ibid,* para. 47. Regarding the effects of the ICC's decisions on state responsibility, see above part 3.2.2.2.
[92] Article 25, United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, hereafter referred to as the UN Charter.

Security Council and General Assembly resolutions, as a means to avoid violating the interests of a third party through a new decision. While the Court tacitly agreed that UNSC and UNGA resolutions could be used in this way, it ultimately rejected the argument, unconvinced that the resolutions that Portugal had claimed as a legal basis could be read as imposing duties on states.[93]

Since the ICC is a treaty-based court, its jurisdiction flow from that of the member states. Concerning the crime of aggression, some scholars have argued that this principle prevents the Court from contradicting Security Council resolutions determining the existence of an act of aggression. The reason for this is that it would amount to a violation of the principle of *nemo dat quod non habet*, a general principle stating that you cannot give that which you do not have. As the member states of the Charter lack legal capacity to contradict the Security Council, then so should the ICC, as it is a Court founded by UN member states.[94]

In this case, however, the principle of *nemo dat quod non habet* is not applicable.

Firstly, the International Criminal Court is an autonomous entity. As the Court is not a party to the UN Charter, it can only be subjected to the decisions of the Security Council to the extent that the Rome Statute demands. Article 16 of the Rome Statute regarding deferral of investigations and prosecutions provides a good example of such a provision.[95]

Secondly, when a member state acts in contradiction of a Security Council resolution this act is invalid because of an agreement between the member state and the Security Council, not because of an inherent lack of capacity. The *nemo dat quod non habet* principle is only applicable in cases where the delegating entity has an inherent lack of the powers delegated. The binding effects of Security Council resolutions is not customary, but based on article 25 of the UN charter; States therefore have a customary right to contradict the resolutions of the Security Council. This customary right can be delegated to an outside entity, regardless of UN membership. The fact that this can create international responsibility for the member states in accordance with the article 25 of the UN charter has no effect on the

[93] *East Timor, Supra* note 61, paras 30-31.

[94] Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", 16(5) *European Journal of International Law* 2005, 879-906, at 885; Matthias Schuster, "The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword", 14(1) *Criminal Law Forum* 2003, 1-57, at 40; Carrie McDougall, *The Crime of Aggression under The Rome Statute of the International Criminal Court* (Cambridge, Cambridge University Press 2013), at 214.

[95] Article 16 of the Rome Statute; A. Cassese (ed.), P. Gaeta (ed.), John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I B (Oxford, Oxford University Press 2002), at 578.

jurisdiction of the ICC. The ICC is therefore not restricted by the binding resolutions of the UN Security Council.[96]
A separate question is if a UNSC resolution can have a binding effect on a Member State, preventing the state from advancing a contrary legal claim. In the *Legal Consequences* case[97], the ICJ stated that Member States are bound to comply with the decisions of the Security Council in accordance with article 25 of the UN charter. This also applies to the Member States that voted against the resolution. In the case, the ICJ concluded that the Security Council had intended for the resolution to be binding for the Member States, creating an obligation of non-recognition concerning the South African administration in Namibia.[98]

While the UN charter is not a source of law for the ICC, the Court may use the custom of states as a source of law under article 21 (1) (b). It could be argued that the UN charter has been so widely ratified that the capacity of the Security Council to make binding resolutions for the Member States of the UN should be considered constituting international custom.[99]

This argument is supported by case law. In the ICC's judicial findings on non-cooperation against the DRC[100], the Democratic Republic of Congo had refused to act on an arrest warrant for the Sudanese president Omar Al-Bashir. One of the arguments presented by the DRC was that provisions of the AU Charter accorded Al-Bashir immunity, and that acting on the arrest warrant would have constituted a violation of the DRC's responsibilities under the AU Charter. The Court was therefore acting *ultra vires* with regards to article 98 (1) of the Rome Statute.[101]

This argument was rejected on the grounds of a Security Council resolution[102], interpreted as deciding that Omar Al-Bashir's immunities were lifted for the purposes of an ICC investigation. Articles 25 and 103 of the UN Charter prevented any hypothetical conflict between an arrest warrant and the AU charter. Article 25 obliges all member states to act in

[96] Roger O'Keefe, ""Quid", Not "Quantum": A Comment on How The International Criminal Court Threatens Treaty Norms", 49(2) *Vanderbilt Journal of International Law* 2016, 433-441, at 436-437; Article 25 of the UN Charter, *supra* note 92; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), International Court of Justice, ICJ Reports (1971) 16, 21 June 1971, para. 126.
[97] *Legal Consequences, ibid.*
[98] *Legal Consequences, ibid,* paras. 111-116.
[99] Cassese, Gaeta, Jones, *supra* note 38, at 1070-1072.
[100] Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.
[101] The Prosecutor v. Omar Hassan Ahmad Al Bashir, *ibid*, at 18, 28.
[102] UN Security Council Resolution 1593 of 31 March 2005.

accordance with SC Resolutions, and article 103 states that obligations under the UN Charter prevail when in conflict with other agreements. The Resolution of the Security Council therefore prevented the DRC from claiming that the arrest warrant was in conflict with the DRC's international responsibilities. In its findings, the ICC explicitly referred to the ICJ decisions of *Legal Effects* and *Lockerbie* provisional measures, containing similar arguments regarding the application of articles 25 and 103.[103]

A similar argument can be found in Pre-Trial Chamber I's decision in the *Gaddafi* case, where the Court stated that the Libyan authorities' obligation to co-operate with the Court flowed from article 25 of the UN charter together with Security Council resolution 1970.[104]

From this, one can conclude that while Security Council resolution lack direct legal effects on the Court, it can create obligations for Member States, such as preventing states from advancing contrary claims before the ICC. The ICC could therefore avoid having to review the Israeli claims by examining the relevant Security Council resolutions to see if they have a binding effect on Israel. If that would be found to be the case, Israel would lack the capacity to advance a valid contrary legal claim.

Concerning the Israeli claims over East Jerusalem and the Mount Scopus Enclave, resolution 298 of the UNSC states that the Security Council confirms that all legislative and administrative actions taken by Israel purporting to change the status of East Jerusalem are invalid, and cannot change the status of the territory. The content of this resolution was reiterated in resolution 478, where the Security Council decided not to recognize Israeli legislation aimed at changing the status of East Jerusalem, calling upon all member states to acknowledge this decision. The strong wording of the Council in both resolution 298 and 478 could lead to the conclusion that they were intended to create an obligation of non-recognition of Israeli claims on East Jerusalem. This is especially the case with article 478, calling upon all member states to accept the Council's

[103] The Prosecutor v. Omar Hassan Ahmad Al Bashir, *supra* note 100, at 30-32; *Legal Consequences*, *supra* note 96, para. 116; Decision on the Request for the indication of Provisional Measures, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, International Court of Justice, ICJ Reports (1992) 114, 14 April 1992, paras. 41-46

[104] Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, *The Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi*, (ICC-01/11-01/11), Pre-Trial Chamber I, 7 March 2012, para. 12.

decision not to recognize Israeli acts purporting to change the status of East Jerusalem. [105]

To summarize, the Court has a possibility of avoiding an assessment of Israeli legal claims by viewing the relevant Security Council resolutions as imposing an obligation of non-recognition overriding the Israeli claims, similar to the judgment of the ICJ in the *Legal Consequences* case. This however hinges on the unclear question of whether the relevant resolutions can be interpreted as imposing obligations on Israel.

### 3.3.2 The *Monetary Gold* rule

If the ICC were to reject the notion of using UNSC resolutions or found these to be of a non-binding nature, the Court would be forced to make a legal assessment of the Israeli interests on the territories. This would actualise another important principle of international law called the *Monetary Gold* rule. The *Monetary Gold* rule derives from the case *Monetary Gold Removed from Rome in 1943*[106], where the ICJ stated that it could not rule on the legality of Albanian state conduct since Albania was not a party to the dispute, nor had accepted the Courts' jurisdiction. This has been commonly interpreted as a general principle, stating that a court cannot rule on the legality of state conduct without the consent of that state. Consequentially, some scholars have argued that the principle is applicable before the ICC in accordance with article 21 (1) (b), and that a determination of territory would amount to a violation of Israeli territorial interests, as Israel is not a party before the Court.[107]

It could however be argued that the character of the *Monetary Gold* rule is ill fitted for an international criminal tribunal. As stated above,[108] international criminal law rests on a different rationale than public international law.

In the Monetary Gold case, the ICJ stated that the principle is triggered by the prospect of a decision concerning the international responsibility of a third state, a matter which the structure of international law seems to prevent international criminal tribunals from exercising authority over. For example, nothing prevented the ICJ from ruling on state responsibility for genocide against the Federal Republic of Yugoslavia while at the same time criminal

[105] UN Security Council Resolution 298 of 25 September 1971; UN Security Council Resolution 478 of 20 August 1980.

[106] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America),* International Court of Justice, ICJ Reports (1954) 19, 15 June 1954.

[107] Kontorovich, *supra* note 59, at 989-990; "Dapo 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 17-26.

[108] See above, chapter 3.2.2.2.

proceedings for the crime of genocide were brought towards Yugoslavian nationals before the ICTY. [109]
The dual application of international criminal law and public international law would suggest that the principle is not applicable on international criminal tribunals, since the structure of international law holds that ruling on individual responsibility is something entirely different from ruling on the conduct of states. While the *Monetary Gold* rule has been applied outside the International Court of Justice, an international criminal tribunal has never applied the principle. On the contrary, both the Nuremberg and the Tokyo tribunals have convicted individuals for crimes against the peace, a crime containing elements of state conduct. On the other hand, the status of the Tokyo and Nuremberg tribunals as actual international tribunals has been questioned. [110]

Even if one were to find the *Monetary Gold* rule universally applicable, decisions by international criminal tribunals have been interpreted as having limited effects on matters of public international law. The ICJ stated in the *Bosnian Genocide* case that the decisions of international criminal tribunals have little to no effect on matters of public international law. Article 25 (4) of the Rome Statute explicitly states that no provision in the statute shall affect the responsibilities of states under international law. Consequentially, even if one were to accept that the Monetary Gold rule was applicable before the ICC, both the Rome Statute and the jurisprudence of the ICJ reject the notion that international criminal tribunals can decide on responsibility in a way that would trigger the rule. This garners further support in the context of the *Frontier Dispute* case, interpreted as the ICJ adopting a restrictive approach in regards to the *Monetary Gold* rule.[111]

Presupposing that the Monetary Gold rule was applicable and that the decisions of the ICC could affect the responsibilities of states, this would also severely destabilize the functioning of the Courts' jurisdiction.

Territorial and personal jurisdiction in accordance with article 12 (2) of the Rome Statute are alternative modes of jurisdiction. Applying the Monetary Gold rule would prevent the exercise of territorial jurisdiction over non-member state nationals whenever state conduct could be implicated. Where the establishment of state conduct would be required, the statute would effectively require the cumulative application of both territorial and personal

[109] *Monetary Gold*, *supra* note 106, at 32-33; Cassese, *supra* note 84, at 7.
[110] Beth van Schaack, "Negotiating at the Interface of Power and Law: The Crime of Aggression", 49(3) *Columbia Journal of Transnational Law* 2011, 505-601, at 580; Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press 2011), at 112.
[111] See above, chapter 3.2.2.2; *Frontier Dispute* case, *supra* note 69.

modes of jurisdiction. In addition to contradicting the wording of the statute, the cumulative requirement was discussed and rejected at the Rome Conference.[112]
In addition to contradicting the wording of the Statute and the intention of its drafters, applying the Monetary Gold rule would lead to member state territories occupied by non-member states becoming veritable zones of impunity. This would not only affect the Palestinian territories, but also regions such as northern Cyprus, South Ossetia and Abkhazia. In the regions where international justice is needed the most, the Courts' jurisdiction would be dependent on the unlikely fulfilment of both territorial and personal jurisdiction, or on the implausible case of Security Council referral. Allowing for these zones of impunity would go against the rationale of the Rome Statute, as expressed in the preamble.[113]

To summarize, the *Monetary Gold* rule is most likely not applicable, and even if it was, judgments by international criminal tribunals have such a limited effect on public international law that triggering the rule would be difficult. Furthermore, applying the principle would risk destabilizing the jurisdictional system of the Court, creating zones of impunity in territories occupied by non-member states. Therefore, the *Monetary Gold* rule is not a factor that should influence the Courts' decision, even if the Court were to reject the application of previous Security Council resolutions.

### 3.3.3 Assessing Israeli Interests on the Territories

Without the *Monetary Gold* rule, the Court would be free to examine the weight of the Israeli territorial claims. It could be argued that it is near impossible for the Court to accord the Israeli territorial claims any weight. No other state in the world acknowledges the Israeli claim on East Jerusalem. This, coupled with the resolutions by the General Assembly, the advisory opinion of *The Wall*, and the general principles of law such as the unlawfulness of acquisition of territory by force would have a very negative effect on the value of the Israeli claims on East Jerusalem.[114] East Jerusalem would most likely be considered a part of the Palestinian state for the same

[112] Article 12 of the Rome Statute; Vagias, *supra* note 38, at 57-59.
[113] Preamble of the Rome Statute.
[114] Sharon Korman, *the Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, Clarendon Press 1996), at 254; UNGA resolution 67/19 of 29 November 2012; UNGA resolution 66/146 of 19 December 2011; UNGA resolution 58/292 of 6 May 2004; *The Wall*, *supra* note 2; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, ICJ Reports (1984) 392, 26 November 1984, para. 73.

reasons presented above concerning the rest of the occupied Palestinian territories.[115]

Regardless of the existence and the value of Israeli territorial claims, Israel has other, non-territorial interests on the Palestinian territories. One such interest is the large number of Israeli citizens on the occupied territories, 550 000 people[116]. Another is the economic assets located on the territories, such as the Israeli industrial parks of Barkan, Shahak, and Atarot. Israel has 16 industrial zones on the West Bank, producing approximately 550 million euros' worth of goods annually. Ruling on the extent of Palestinian state territory would risk subjugating Israeli citizens and industry to ICC jurisdiction, which could be seen as a detrimental effect for Israel.[117]

These interests would most likely not be acknowledged by the ICC when determining the status of the territories. Firstly, it could be argued that Israel is bound by the numerous Security Council resolutions declaring the settlement policy as having no effect on the status of the territories. In the case of *The Wall*, the ICJ stated that these resolutions had been breached by Israel, thereby implying that the Court regarded these resolutions as binding. This could prevent Israel from claiming any direct legal interests based on the settlements.[118]
Notwithstanding this, another problem would be to reconcile Israeli interests on the occupied territories with general principles of international law, such as the principle of *ex injuria jus non oritur*, stating that you cannot base legal interests on an illegal act. While military occupation is not prohibited in international law, attempts to solidify the rule over occupied territory is unlawful, as it constitutes acquisition of territory by force.[119]
Consequentially, consequences flowing from ICC jurisdiction over the settlement industry sector and on the Israeli citizens on Palestinian territory cannot be acknowledged, as these interests are a result of an illegal administration over the occupied territories. Israeli state actions that purport to change the status of the territory cannot be the basis for legal interests.

Worth to discuss is how the principle of *ex injuria jus non oritur* should be applied in the context of the *ex factis jus oritur* principle. This principle states that all factual circumstances create legal interests, and can therefore

[115] See above at 3.2.
[116] See above, part. 2.3.1.
[117] "Israeli Companies in West Bank feel Pressure to Relocate", *Haaretz*, 23 February 2016, available at http://www.haaretz.com/israel-news/1.704931 controlled 30th of October 2016.
[118] See above, 3.3.1; *The Wall*, *supra* note 2, at 120, 134; Security Council resolution 446 of 22 March 1979; Security Council resolution 452 of 20 July 1979; Security Council resolution 465 of 1 March 1980.
[119] *Military and Paramilitary activities*, *supra* note 114, para. 73.

be regarded as the opposite of the *ex injuria jus non oritur* principle. In the *Legal Consequences* case, the ICJ stated that not all consequences of the South African rule over Namibia were without legal value. Illegal acts that were to the advantage of the population on the territory, such as registrations of birth, death and marriages could only be ignored to the detriment of the population. For acts that are advantageous for the population, *ex factis jus oritur* applies; this forms the so-called *Namibia exception*.

It is uncertain if this notion of "population" also includes settlers directly or indirectly implanted by an unlawful regime, but interpretations of the *Namibia* exception agree on the inability for States to base legal interests on illegal acts. While the *Namibia* exception could be interesting for assessing the legal validity of Israeli state actions for the consequences of Israeli residents on occupied territory, such as building permits, it does not provide a basis for Israeli non-territorial state interests. [120]

Therefore, if a legal assessment of Israeli state interests on the occupied territories were to be made, this assessment would accord the Israeli interests a very low value. Since the *Monetary Gold* rule is not a relevant factor, the Court would most likely view the territory as Palestinian state territory in accordance with the principle of self-determination and the international consensus regarding the status of the territory.

## 3.4 Summary

What follows is a short summary of the conclusions of this chapter as a clarification for the reader.
The Court should regard Palestine as a state in accordance with the criteria of the Montevideo convention or in accordance with international recognition.[121] All states have territory. To determine the extent of this territory, the Court can interpret the occupied Palestinian territories as Palestinian state territory. The territory of Palestine is a continuation of the area of the Palestinian self-determination unit, as large parts of the territories lack competing territorial claims.[122] There are also parts of the occupied Palestinian territories where Israeli competing claims exist, namely East Jerusalem. The Israeli claims on these territories constitute a violation of binding Security Council resolutions, and are therefore invalid in

[120] *Legal Consequences, supra* note 96, at para. 125; Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes", 79 (1) *The British Year Book of International Law* 2008, 194-263, at 231-234.
[121] See part 3.1.
[122] See part 3.2.1-3.2.2.

accordance with the UN Charter.[123] If the Court despite this were to find itself forced to assess Israeli interests, this would not constitute a violation of the *Monetary Gold* rule, as the rule is not relevant for international criminal tribunals.[124] An assessment would effectively result in a very low yield for the Israeli interests, as it has been previously established in a multitude of cases that Israeli is an occupying power, unable to base legal claims of sovereignty on its military occupation. The territory with conflicting legal claims would therefore most likely be regarded as Palestinian as well. [125]

## 3.5 Analysis

The problem facing the Court is determining the extent of the Palestinian territory. In similar regards to the concept of statehood, territoriality can be discussed from either a factual or a normative position. A separate dimension is the conflict of interests between Israel and Palestine regarding the status of the territories.

A factual approach to territoriality would focus on exercised control. Palestinian control on the occupied territories is limited to the Gaza Strip and areas A and B of the West Bank, while Israel exercises territorial control over area C and East Jerusalem. The territory of Palestine would therefore comprise of the Gaza strip and areas A and B of the West Bank. This approach can be criticised as apologetic as it fails to take into account the circumstances surrounding territorial control, such as military occupation.

A normative approach would focus on international recognition concerning the status of the territories. The occupied Palestinian territories form a part of the Palestinian entitlement, according to the international community. A normative approach therefore suggests that the territory of Palestine consists of the whole extent of the occupied Palestinian territories. This can be criticised as utopian and political, as a Palestinian state has never exercised control over parts of these territories. The method also fails to take into account the sovereign interests of other states, such as Israel.[126]

International law can recognise neither factual control nor normative recognition as sufficient in themselves. The factual position is unsatisfactory due to its apologetic results, and the normative position is unsatisfactory due to its utopian results. Legal practitioners must combine the positions in order to produce a viable outcome, which is further complicated between the

[123] See part 3.3-3.3.1.
[124] See part 3.3.2.
[125] See part 3.3.3.
[126] Koskenniemi, *supra* note 6, at 249-250.

discrepancy between factual control and international recognition in the case of the occupied Palestinian territories. The situation must be interpreted in such a way as to evade conflicting results between the methods.

This argumentative structure can be exemplified by two contributions in the contemporary scholarship.
A factual position can be found in *Israel/Palestine – The ICC's Uncharted Territory* by Eugene Kontorovich. In this article, Kontorovich tries to deal with problems relating to the Palestinian claims on occupied territory. To do this, he argues that the status of the territories must be determined in conjunction with Israel, as a party to the dispute. This argument renders the status of the territories irrelevant for ICC purposes, thereby avoiding a conflict between factual and normative positions.
While Kontorovich rejects the discussion on the status of the territories, his position can still be regarded as factual. The argument is that Israel has not consented to subjecting its capacity to determine territorial extent to the ICC. This points to an approach to statehood that is subject-oriented and factual, as it is based on a requirement of Israeli consent. Kontorovich refers to the *Monetary Gold* rule as support, thereby introducing a legal, normative element to avoid apologetic results. [127]
This argument was criticised in the article *Israel, Palestine, and the ICC – Territory Uncharted but not Unknown* by Yaël Ronen. Ronen argues from a normative position, stating that international recognition of the territories as part of the Palestinian entitlement is cause enough to consider them Palestinian state territory. To avoid utopian results, Ronen argues that the factual control exercised on the West Bank and the Gaza Strip provides sufficient grounds for extending Palestinian territoriality to the occupied territories, recognised as part of the future Palestinian state. The conflict between factual and normative is thus solved by using limited factual control to legitimise a wider territorial claim based on recognition.

Ronen argues that the result of Kontorovich's approach regarding the violation of Israeli territorial rights would be apologetic, as it would allow states unilaterally preventing ICC jurisdiction through assertions of sovereignty. The ICC should therefore found its jurisdiction on international recognition, a normative approach. Application of the *Monetary Gold* rule is rejected, as Israel has not made any claims of sovereignty over the occupied Palestinian territories. This is a factual requirement, as the will and intent to act as a sovereign constitutes a part of the control assessment. [128]

[127] Kontorovich, *supra* note 59, at 983-989.
[128] Ronen, *supra* note 35, at 13-14, 17-19.

In this thesis, the author has adopted a normative approach to territoriality. Territoriality is seen as a continuation of the borders of the Palestinian self-determination unit, which in turn is defined by international recognition. To avoid utopian results, it is argued from a factual position that Palestine is the only state with intent and will to act as a sovereign on the West Bank, and that territorial control does not have to be absolute in order to for a territorial claim to be valid. This approach to territoriality is susceptible to criticism of utopianism; there is no factual justification for seeing a state as a continuation of a self-determination unit, as self-determination units are constructs created through international recognition.

Both Israel and Palestine express will and intent to act as sovereign over East Jerusalem, with Israel being the only state with actual territorial control. Avoiding conflict between factual control and normative recognition, the thesis focuses on the validity of Israel's claims on East Jerusalem. Israel cannot possess the will and intent required for territoriality over East Jerusalem, as Israel has already expressed factual will and intent to follow the binding resolutions of the Security Council. The conflicting assertions of sovereignty is therefore interpreted as not constituting a conflict at all. This is a paradox, prevalent in the case law of the ICJ, according to Koskenniemi. The territory is therefore interpreted as Palestinian state territory, along the lines of a normative argument based on recognition.
This argument is vulnerable to criticism from a factual position. It could for example be argued that while Israel has consented to being bound by the resolutions of the Security Council, it has not consented to being subject to the ICC's interpretation of these resolutions. This is in turn an apologetic argument, as it is founded on the presupposition that valid treaty interpretation requires unequivocal state consent.

Application of the *Monetary Gold* rule is first rejected on factual grounds, as it is argued that Israel lacks sovereign interests in the Courts' exercise of territorial jurisdiction. This is supported by a normative approach, where the rule is described as unsuitable before international criminal tribunals. The thesis therefore argues that Israeli sovereign interests are irrelevant for the Court, regardless of whether a factual approach or a normative approach is used. However, the argument does not reflect on the fact that the Court places itself in the position to determine its own jurisdictional capacity, and to weigh the value of Israeli sovereign interests. This could constitute a factual rebuttal of the adopted position.

The final part features a normative approach to other Israeli interests located on Palestinian territory. It is argued that the factual presence of economic

resources and Israeli citizens on Palestinian soil are irrelevant for the Courts' jurisdiction, as they are in violation of generally recognized international law. According to the principle of *ex injuria jus non oritur*, Israeli factual interests should be disregarded. This argument might be susceptible to criticism of utopianism, as it fails to reconcile the content of international law and the factual circumstances on the territory.

Neither factual control nor normative recognition is sufficient circumstances for territoriality, something that further complicates a situation where there is a large discrepancy between control and recognition. This is relevant in the case of the occupied Palestinian territories. The position of authors, including the author of this thesis reveal that contradiction is solved through analysis, relying on both factual and normative factors in order to produce coherence.
However, analysis suggests that the reconciliation of the factual and the normative perspective is a phantasm, masking the inherently indeterminate character of international law. The legal argumentation suggested in the thesis appeals to both normative and factual arguments in order to arrive at a result, but this does not prevent that the same could be said for a number of scholarly contributions arriving at different results. These contributions in turn face the same problems with indeterminacy, as evidenced by the positions of Eugene Kontorovich and Yaël Ronen.

It can therefore be argued that the discussion on territoriality in the thesis can be seen as an expression of indeterminacy in international law. The method and results are legally coherent, but vulnerable to criticism from opposing positions.

# 4 The Oslo Accords and the Question of Delegated Jurisdiction

After establishing the extent of the Palestinian state territory, it is time to turn to the Oslo Accords and the effect they could have on the Courts' jurisdiction. To reiterate, the Israeli government and the PLO entered into the Oslo accords in 1993 and 1995, thereby creating the Palestinian Authority. The treaties were thought of as transitional, paving the way for a future final agreement between the parties.[129]

According to article XVII of the Oslo II accord[130], the Palestinian Authority lack jurisdiction over issues that will be covered by a final status agreement, such as Jerusalem, Israeli settlements and Israeli citizens. Furthermore, the Authority lacks territorial jurisdiction outside areas A and B as specified in the accords.[131]
This has prompted some scholars to argue that the principle of *nemo dat quod non habet* prevents the Court from exercising its jurisdiction over Israeli citizens and settlements. Put simply, if the Palestinian Authority has transferred its jurisdiction over Israeli citizens and settlements to Israel, then jurisdiction over these matters cannot be delegated to the ICC as well.[132]

In order to determine the effects of the Oslo Accords, and whether this proposed interpretation is correct, the validity of the accords must first be established.

## 4.1 The validity of the Oslo Accords

In order for the Oslo Accords to influence the jurisdiction of the ICC, they must first restrict the jurisdiction of the Palestinian entity. One problem with the Oslo Accords was that they were entered into by Israel and the PLO, a non-state actor. It could therefore be argued that the agreement have no effects on the Palestinian state, as the Palestinian state is a separate entity

[129] For more on the factual circumstances surrounding the Oslo Accords, see part. 2.3.3.
[130] Article XVII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, hereafter referred to as "Oslo II", concluded by Israel and the Palestine Liberation Organization (PLO), 28 September 1995.
[131] See supplement A.
[132] Kontorovich, *supra* note 59, at 989-992; Newton *supra* note 68, at 421.

not party to the accords. The accords can only bind the relevant parties, in accordance with the principle of *pacta tertiis nec nocent nec prosunt*.

The problem with this proposal is that it could be argued that treaties entered into by non-state actors in some cases can continue to have binding effects if the non-state actor were to acquire statehood. For an example, James Crawford has proposed that international treaties entered into by provisional governments that later become states are binding, unless they are disavowed by the newly formed state within a reasonable time after independence.[133] This is generally a satisfactory approach, as it permits pre-statehood treaties entered into under the threat of force by the previous sovereign to be disavowed after acquiring statehood.

The Oslo II accord gave the PLO capacity to enter into agreements that are binding upon the Palestinian Authority, since the Authority lacks this capacity itself. The PLO is responsible for the capacity to enter into agreement with other states, an integral part of the Palestinian statehood.[134] This merits that the PLO should be seen as a part of the Palestinian state. Historically, there is continuity between the PLO as a non-state party entering into international relations through the Oslo Accords, and the PLO as an international relations-organ of the modern Palestinian state.

Adopting Crawford's proposal, the result would be that the accords should be seen as binding for the Palestinian state since neither Palestine nor Israel has disavowed the accords. Supporting this interpretation is also the fact that both Israel and the Palestinian Authority continue to treat the accords as binding. The fact that the Oslo Accords were entered into by the PLO as a non-state actor does not restrict its binding effects on the Palestinian state.[135]

As regards the prospects of withdrawing from the Oslo II, customary law reflects the wording of article 56 of the VCLT. International agreements without a withdrawal clause will remain in force unless it can be established that the parties intended to permit denunciation or withdrawal from the agreement, or if such a right is implied by the nature of the treaty. The Oslo Accords lack such a clause. It has been held that the five-year goal expressed in the preamble of Oslo II could be interpreted as providing a time limit, terminating the agreement after 4 May 1999. The subsequent practice of the parties seem to dismiss such an interpretation, as the parties continue to treat the agreement as binding. Palestine therefore lacks the possibility of withdrawing from the treaty on this basis. However, this does

[133] Crawford, *supra* note 40, at 658-661.
[134] Oslo II, *supra* note 130, article IX.
[135] Kontorovich, *supra* note 59, at 990.

not mean that Oslo II cannot be terminated. Both Palestine and Israel have a right to suspend or terminate the agreement as a consequence of material breach, in accordance with the customary rule derived from article 60 of the VCLT.[136]

Accepting the binding effects of the accords, the next question concerns the nature of the Palestinian jurisdiction on the West Bank. Several authors have argued that the Palestinian jurisdiction is limited due to a consensual transfer of authority, giving Israel jurisdiction over area C of the West Bank. Article XVII regulates the jurisdiction of the Palestinian Authority. Interpreting this article is therefore essential for the question of whether the Israeli jurisdiction on the West Bank is consensual or not. [137]

The Vienna Convention on the Law of Treaties[138] is most likely not applicable for interpreting Oslo II, if one adopts the view that Palestine was not a state during the signing of the agreement. Articles 31-33 of the VCLT can however be seen as an expression of the customary law applicable when interpreting the accords. Article 31 (1) of the VCLT states that a treaty shall be interpreted in good faith, according to the ordinary meaning of the wording and the object and purpose of the treaty. [139]
Article XVII (2) (a) of Oslo II states that the territorial jurisdiction over area C shall be gradually transferred from Israeli to Palestinian jurisdiction. That territorial jurisdiction is transferred to Palestine and not the other way around is also stated in articles XI (2) (c) and XX. Article XVII (4) states that the Israeli military shall keep the legislative, judicial and executive powers over area C. [140]
The wording of Oslo II is quite clear on the Palestinian Authority's jurisdiction, limiting the territorial jurisdiction to areas A and B. It also suggests that the Palestinian jurisdiction derives from the Israeli withdrawal rather than the other way around. While Oslo II may limit the jurisdiction of the Palestinian Authority, Israeli jurisdiction over area C is not a result of a transfer of powers from Palestine to Israel. It is rather a continuation of the jurisdiction exercised through military occupation.

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[136] Oliver Dörr (ed.), Kirsten Schmalenbach (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin, Heidelberg, Springer Berlin Heidelberg, 2012), at 986-987; Geoffrey Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford, Oxford University Press, 2000), at 246-251; Legal Consequences, *supra* note 96, at para. 94; Kontorovich, *ibid*, at 990.
[137] Kontorovich, *ibid* at 990-991; Newton *supra* note 68, at 373; Oslo II, *supra* note 130, article XVII.
[138] VCLT, *supra* note 36.
[139] VCLT, *ibid*, article 31 (1); *The Wall*, *supra* note 2, para. 94; *Bosnian Genocide*, *supra* note 86, para. 160.
[140] Oslo II, articles XI, XVII, XX.

These interpretations are also furthered by the circumstances of the occupation. Both Israel and Palestine continue to treat the accords as binding, restricting the jurisdiction of the Palestinian Authority. Palestinian territorial control and jurisdiction were a consequence of Israeli withdrawal, and not the other way around. These circumstances are relevant according to article 31 (3) (b) of the Vienna Convention, holding that subsequent practice in the application of a treaty shall be taken into account together with the context. [141]

It follows from the above that Oslo II constitutes an obstacle for Palestinian jurisdiction over area C, but that Israel's continued jurisdiction over area C cannot be regarded as a power transferred by the Palestinian state.

## 4.2 Do the Oslo Accords Constitute an Obstacle for ICC Jurisdiction?

After establishing the binding effects of the Oslo Accords on the Palestinian state, it is time to assess what effects this has on the jurisdiction of the ICC and how the *nemo dat quod non habet* rule should be applied in the present case.

The *nemo dat* rule was discussed to some extent above in part 3.3.1. Some authors have argued that the rule prevents the ICC from exercising jurisdiction, as Palestine cannot delegate jurisdiction to the Court that Palestine itself does not enjoy under the Oslo Accords.[142] Other scholars have questioned this interpretation. They claim instead that treaty-imposed jurisdictional limitations are a matter of enforcement, leaving the jurisdictional power of states unaffected. Oslo II does not affect the customary right of Palestine to exercise jurisdiction over the extent of the Palestinian territories. This interpretation would result in the inapplicability of the *nemo dat* rule, as the Palestinian state is the territorial sovereign on area C. [143]

This later interpretation is more reasonable to apply in the light of the Rome statute. Conflicting agreements is a question of international co-operation under part IX of the Rome statute, not a jurisdictional question under part II. The later interpretation could therefore be motivated by the structure of the Statute. Secondly, the Statute already seems to contain mechanisms purporting to avoid conflict between the ICC and a third state. Article 98 (2) holds that the Court cannot proceed with a request for surrender against a

[141] VCLT, *supra* note 36, Art. 31 (3) (b).
[142] Kontorovich, *supra* note 59, at 989-992; Newton *supra* note 68, at 421.
[143] Carsten Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine - A Reply to Michael Newton, 49(2) *Vanderbilt Journal of Transnational Law* 2016, 443-454, at 450-451; O'Keefe, *supra* note 96, at 439.

third-state national if the request would require the state to act inconsistently with its obligations under international agreement with the third state. This rather narrow exception leaves some leeway for the member state to exempt third state nationals, while simultaneously preventing the member state from abusing bilateral treaties to exempt its own nationals from the Courts' jurisdiction. Viewing bilateral treaties as jurisdictional obstacles would therefore go against the balance of the Statute as expressed in article 98 (2). It would also allow member states to circumvent the jurisdiction of the Court.[144]
Consequently, Oslo II may have effects on the Palestinian jurisdiction to enforce, but it does not constitute an obstacle for the jurisdiction of the ICC.

## 4.3 Do the Oslo Accords constitute an obstacle for an ICC arrest warrant?

As stated above, conflicts between the Rome statute and the international obligations of member states are a matter of international co-operation under part IX and article 98 (2) of the Rome statute. This provision bars the Court from proceeding with an arrest warrant against a third state national if the warrant would require the requested state to breach its international obligations towards the third state:
*The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.*[145]

The article suggests that applicability hinges on the existence of an international agreement requiring consent of a sending state. The exact meaning of this term is not provided, and should therefore be interpreted in accordance with articles 31-33 of the VCLT. The preamble of the Rome statute suggests a restrictive approach, as the objective of the parties was to stop impunity for the most serious of crimes. The very existence of article 98 (2) has on these grounds been accused of contradicting the purpose of the statute.[146]

Article 98 (2) is also the subject of rule 195 (2) of the ICC Rules on Procedure and Evidence, a source of interpretation under article 31 (2) (b) of

[144] Part IX, Article 98 (2) of the Rome Statute
[145] Article 98 (2) of the Rome Statute.
[146] Chimène Keitner, Crafting the International Criminal Court: Trials and Tribulations in Article 98(2), 6(1) *UCLA Journal of International Law and Foreign Affairs* 2001, 215-264, at 250.

the VCLT. Rule 98 (2) states the following regarding cooperation under article 98:
*The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.*[147]

This rule provides no clarity on the exact meaning of the term "sending state".
Supplementary means of interpreting article 98 (2) includes the circumstances of its conclusion. The formulation "sending state" was the result of an American proposal early in the ICC negotiations. According to David Scheffer, the former head of the US delegation at the negotiations on the Rome Statute, the purpose of the provision from an American perspective was to exempt U.S. military personnel covered by SOF and SOM agreements on foreign soil. The term "sending state" is often used in SOF agreements to describe the state to which the military force belongs. In addition to military employees, SOF agreements can also include civilians employed by the force. It has been argued however that there must be a functional or organic relationship between the individual and the state.[148]

As for the circumstances concerning rule 195 (2) of the Rules on Procedure and Evidence, the rule was the result of an American effort aimed at widening the possibilities of exemption under article 98 (2). The American intent was that this would further another American objective, namely influencing the UN-ICC relationship agreement in a way that would provide American veto power over the ICC's exercise of jurisdiction. The objective was never to create a legal basis for agreements exempting jurisdiction over non-official personnel. [149]
Article 98 (2) should therefore be interpreted as applicable only in situations where a nexus exists between the sending state and the individual. This nexus should be of a qualified nature, as article 98(2) contradicts the object and purpose of the Rome Statute. The Court is not automatically barred from requesting the arrest of an Israeli citizen, as the individual must have been "sent" by Israel in order for article 98 (2) to be applicable.

[147] Rule 195 of the ICC Rules on Procedure and Evidence.
[148] David Scheffer, Article 98(2) of the Rome Statute: America's Original Intent, 3(2) *Journal of International Criminal Justice*, 2005, 333-353, at 337-339; Antonio Cassese (ed.) *The Oxford Companion to International Justice* (Oxford, Oxford University Press 2009), at 253.
[149] Scheffer,*ibid* , at 341-342; Keitner, *supra* note 146, at 243, 249.

## 4.4 Summary

A short summary of chapter 4 follows. Israel and the PLO entered into Oslo II, the document of the Oslo Accords with the highest legal character, in 1995. The parties continue to treat the document as binding to this day. The document prevents the Palestinian Authority from exercising jurisdiction over Israeli-controlled territories and Israeli citizens. Oslo II has binding effects on Palestine due to the absence of a disavowal from the Parties.

However, it does not have any effects on the jurisdiction of the ICC. The validity of a delegation of jurisdiction depends on the customary rights of the delegating party. While the Accords may obligate Palestine to not exercise some parts of its jurisdiction, this has no effect on the customary jurisdiction of the Palestinian state. It is this customary right that is delegated to the ICC.
In the Rome Statute, conflicting jurisdiction is a matter of international co-operation, not jurisdiction. Article 98 holds that the Court cannot proceed with a warrant of arrest, which would require a member state to breach its obligations towards a sending state. The term "sending state" should be interpreted as requiring a nexus between the person in the arrest warrant and the state. Article 98 is of an exceptional character, and the nexus requirement should therefore have an appropriate threshold.

## 4.5 Analysis

The question of the Oslo Accords and delegated jurisdiction relates heavily to questions of state sovereignty. The main point of conflict concerns the Palestinian Authority's international obligations under the Oslo Accords, and how these obligations affect the jurisdiction of the ICC.

As previously stated, a factual approach to statehood and sovereignty derives legitimacy from factual exercise of power, whereas a normative approach derives legitimacy from law and international recognition. Neither of these positions are satisfactory. A pure factual approach can be accused of apology, and a normative approach can be accused of utopianism.

Question regarding the limitations of sovereignty mainly relates to whether the Oslo Accords affect the jurisdiction of the Palestinian state, or the jurisdiction of the ICC.

Regarding the effects of the accords on Palestine, this thesis argues from a normative position along the lines of doctrine derived from James Crawford that the Oslo Accords have binding effects on Palestine. This is utopian, as it concerns a rule in international law that can be interpreted as being imposed without consent on Palestine. In order to mitigate utopian results, it is argued that the PLO constitutes a part of the Palestinian state responsible for foreign relations, and that the PLO's agreement to be bound by the Oslo Accords constitutes consent from the State of Palestine. Mitigating utopian results is also the fact that both Palestine and Israel regard the accords as binding, implying consent. This seemingly avoids conflict between the normative and the factual position. This position is however vulnerable to criticism from a factual position. It could be claimed that Court places itself in a position to decide on the composition of the Palestinian state and the contents of its international obligations, thereby violating Palestinian sovereignty by acting outside its legal capacity.

The capacity of the Palestinian state to delegate criminal jurisdiction to the ICC has been a main point of scholarly debate. This can be exemplified by the views of Michael Newton in *How the International Criminal Court Threatens Treaty Norms*. From a factual position, it is argued that Palestine has consented to delimiting its jurisdiction through the Oslo Accords, something that prevents Palestine from delegating the same jurisdiction to the ICC. This is a factual argument, as it is founded on the presupposition that the concept of jurisdiction can be transferred through the consent and will of sovereign states.[150]
Newton's argument is rebutted in *Response: "Quid," Not "Quantum"*, by Roger O'Keefe. O'Keefe adopts a normative approach, focusing on the jurisdictional rights enjoyed by states according to customary international law. The article argues that Palestine has customary sovereign rights on the Palestinian territory, which can be delegated to the International Criminal Court. This is normative, as the argument is founded on the concept of jurisdiction being a question of customary international law, with character independent of Palestinian or Israeli consent. It is also a utopian argument, as it is implied that international custom prevents Palestine from transferring its sovereign jurisdiction.[151]
As for this thesis, it adopts a normative approach which is similar to O'Keefe's. Newton's proposed solution is interpreted as apologetic, and is rejected from a normative position, referring to the Rome Statutes' rules on international co-operation as ensuring respect for third state sovereignty. Secondly, the thesis argue that Newton's proposal would allow member states to circumvent the jurisdiction of the ICC, thereby creating apologetic

[150] Newton, *supra* note 68, at 412-413.
[151] O'Keefe, *supra* note 96, at 438-439.

results. However, this position places the Court in a position to assess the effects on Israeli sovereignty by an exercise of the Courts' jurisdiction, and the position is therefore susceptible to an accusation of utopianism.

The thesis can also be accused of utopianism in regards to the interpretation and application of article 98(2) of the Rome Statute. The discussion is mainly focused on the interpretation of the Statute in accordance with the intent of the parties, but fails to take into account the sovereign interests of Israel. How the Court interprets article 98 (2) may very well have effects on Israel, without the state consenting to being subject to such effects.

Analysis of the thesis suggests that the thesis contains both factual and normative considerations, creating an argumentative structure where the results are motivated by both reasons of factual state behaviour as well as a normative legal order. This is only seemingly, as the particular considerations are vulnerable to opposing criticism. Other scholarly contributions face the same difficulty, such as those of Newton and O'Keefe. The analysis suggests that the thesis and the scholarship on the area arrive at indeterminate results, an expression of the similar problems that may be inherent in international law.

# 5 The Crime of Illegal Transfer - Article 8 (b) (viii) of the Rome Statute

After establishing that the Court has jurisdiction over the occupied Palestinian territories, the next question is how this jurisdiction should be exercised concerning crimes of illegal transfer. Article 8 (2) (b) (viii) of the Rome Statute reads as follows.

*[…]The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;[…]*[152]

The provision was the subject of some dispute during the drafting of the Rome Statute, as the Israeli delegation showed great reluctance towards the inclusion of illegal transfer as a war crime. Some scholars have argued that the inclusion of the provision was politically motivated, specifically targeting the Israeli settlement policy.[153] However, the transfer of civilians to occupied territory by the occupying power has been a war crime under the Fourth Geneva Convention since 1949. The adoption of article 8(2)(b)(viii) was uncontroversial, with Israel being the only state advocating that the provision should be excluded from the Rome Statute.[154]

The purpose of this thesis is not to investigate the prospects of litigation against specific individuals. However, some aspects relating to the crime of illegal transfer are of a more general character, and will have to be addressed by the Court regardless of the individual on trial.

The first aspect is the contextual element of illegal transfer. All crimes of the Rome Statute consists of specific elements combined with contextual elements. For illegal transfer, the contextual element is the existence of an international armed conflict. The Court will therefore be required to address

[152] Article 8 (2) (b) (viii) of the Rome Statute.
[153] Kontorovich, *supra* note 59, at 985.
[154] Schabas, *supra* note 68, at 234-235; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th Plenary Meeting, A/CONF.183/SR.9, Paras. 33-34; Article 49 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, hereafter referred to as "Geneva Convention IV", International Committee of the Red Cross (ICRC), 12 August 1949, 75 UNTS 287

whether there is a context of international armed conflict on the Palestinian territories.
A second aspect is how the Court should deal with potential cross-border crimes committed on the territory, since the Rome Statute offers no clear answer on whether the Court has jurisdiction over such crimes. This is an important aspect as the answer could either include or exclude senior officials of the Israeli government. The answer depends on how article 12 (2) (a) of the Rome Statute should be interpreted.
A third aspect relates to how the conduct element should be interpreted; more specifically, the facilitation of direct or indirect transfer by the Occupying Power of its own civilian population.

## 5.1 The Contextual Element – International Armed Conflict

As stated above, the contextual element of illegal transfer is the existence of an international armed conflict. In addition to this, there is a threshold in article 8 (1) of the Rome Statute regarding war crimes committed on a large scale or as a part of a plan or policy. The nature of this threshold will be discussed first.

### 5.1.1 The Threshold in Article 8 (1) of the Rome Statute

Article 8 (1) of the Rome Statute states the following:
*"The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes[…]*

According to the Appeals Chamber, the requirement of war crimes being part of a plan or policy is alternative in regards to the requirement of large scale commission. The use of the term "in particular" means that the requirement of policy or large-scale commission is not absolute, rather serving as a guideline for the Court.[155]

[155] Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Situation in the Democratic Republic of the Congo* (ICC-01/04), Appeals Chamber, 13 July 2006, para. 70; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 38, para. 211.

It could be argued that the construction of settlements on the occupied West Bank are committed as a part of a plan, or policy. Evidence that suggests this is the ICJ's advisory opinion in *The Wall*, where the ICJ states that Israel has conducted a policy and developed practices regarding the establishment of settlements on the Palestinian territory in violation of article 49 of Geneva Convention IV. [156]
Further evidence of a settlement policy can be found in the UN's fact-finding mission on the implications of Israeli settlements on Palestinian human rights. According to the report of the mission, the Israeli government has since 1967 implemented measures to further the construction of settlements. These measures include the building of infrastructure, subsidies and economic incentives for settlers and industry, as well as direct governmental investment in the settlements.[157]

Illegal transfer can therefore be said to be committed in the context of a plan or policy.

### 5.1.2 The Existence of an International Armed Conflict

Illegal transfer is a crime falling under article 8 (2) (b) of the Rome Statute, therefore requiring the existence of an international armed conflict.
Articles 8(2) and 8(2)(b) reads as follows:
*[…]For the purpose of this Statute, "war crimes" means:[…]*

*[…]Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […]*[158]

Both the Rome Statute and the ICC Elements of Crimes lack a definition of international armed conflict, but according to the ICC Elements of Crimes, the meaning of international armed conflict includes military occupation. This has also been upheld by Pre-Trial Chamber II in the *Bemba* case, referring to common article 2(1) of the Geneva Conventions as a source of law under article 21 (1) (b) of the Rome Statute. [159] Common article 2(1) of the Geneva Conventions states that the Convention is applicable in all cases

[156] *The Wall, supra* note 2, para. 120.
[157] *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/22/63, 7 February 2013, para. 20-22.
[158] Articles 8 (2) and 8 (2) (b) of the Rome Statute.
[159] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 38, para. 221.

of armed conflict between High Contracting Parties. According to the commentary attached to common article 2, this includes occupation as a result of armed conflict. Occupation without armed resistance however is covered by common article 2 (2).[160]
In the case of *The Wall*, the ICJ interpreted article 2(1) as providing the applicability of the Geneva Conventions on all territory occupied during an armed conflict between two High Contracting Parties. The Palestinian territories were under Jordanian control at the time before the war in 1967, Jordan and Israel being parties to the Geneva Conventions. The Court determined that when Israel took territorial control over the West Bank during the war, this was a case of military occupation. The territories were therefore subjected to the provisions of Geneva Convention IV.[161]
The Israeli Supreme Court has also upheld the applicability of the Convention on the West Bank.[162]
As stated above[163], Israeli control over area C of the West Bank in accordance with Oslo II is not a result of delegation, but rather a continuation of the military occupation.

The facts therefore suggest a context of international armed conflict in the present case. In addition to the existence of an international armed conflict, individual responsibility requires awareness of the factual circumstances establishing the existence of the conflict. In this case, it would be required that the individual perpetrator be aware of the Israeli military presence on occupied territory. In addition to this, a nexus must be established between the conduct of the individual and the armed conflict.[164]

## 5.2 Localising Crimes of Illegal Transfer

After establishing that the threshold and the contextual element are fulfilled, another question relates to the localisation of the crime. Regardless of whom the criminal proceedings are brought against, the Court will be required to determine whether any crimes of illegal transfer can be localised to the Palestinian territory.

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[160] Article 2, *1958 Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Vol. IV, ICRC.
[161] *The Wall*, *supra* note 2, at paras. 90-101.
[162] Ayub et al. v. Minister of Defense et al., Supreme Court of Israel, judgment of 15 March 1979, HCJ 606/78, HCJ 610/78, non-official English translation available at: (http://www.hamoked.org/files/2016/3860_eng.pdf); Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces on the West Bank, Supreme Court of Israel, judgment of the 30 May 2004, HCJ 2056/04, para. 23, English translation available at: (http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf).
[163] Part 4.1.
[164] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 38, paras. 238-239.

The Rome Statute offers no significant guidance on how criminal conduct shall be localised in accordance with article 12(2)(a), simply stating that the Court shall have jurisdiction on the "territory of which the conduct in question occurred"[165]. In case law, the Court has interpreted "conduct in question" as meaning "crimes in question". No guidance has been given for how the Court shall resolve situations of cross-border crime, where parts of the crime may have been committed on the territory of a state not party to the Rome Statute. [166]

The ICC is a creation of state consent, and its jurisdiction flow from that of the Rome Statutes' member states. The territorial jurisdiction of the member states must be regarded as the ultimate boundary of the ICC's territorial jurisdiction, as exercising territorial jurisdiction outside of this scope would violate the principle of *nemo dat quod non habet*. The traditional concept of territorial jurisdiction derives from the *Lotus* case, where the PCIJ stated that:

*[…] the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."*[167]

The Court then proceeds with establishing that territorial jurisdiction of this character is consistent with the territoriality principle.

In international law, a distinction is often made between subjective territoriality and objective territoriality. A state has subjective territorial jurisdiction if the commencing of a crime can be located to its territory. On the other side of the spectrum, a state has objective territorial jurisdiction if the crime has been completed on its territory. The principles of delegation holds that the International Criminal Court can claim territorial jurisdiction to the same extent, or less. The extent of the territorial jurisdiction is to be determined by the Court using its *kompetenz kompetenz* to interpret the

[165] Article 12(2)(a) of the Rome Statute.

[166] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, para. 36; Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, *Situation in the Democratic Republic of the Congo* (ICC-01/04), Pre-Trial Chamber I, 17 January 2006, paras. 85, 91-92.

[167] *The case of the S.S "Lotus" (France v. Turkey)*, Permanent Court of International Justice, Series A no. 10, 7 September 1927, at 23.

Rome Statute, a competence which should be considered uncontroversial for criminal tribunals.[168]

Article 31(1) of the VCLT suggests that a treaty shall be interpreted in the light of its ordinary meaning and purpose. The Court has previously adopted a teleological approach favouring effectiveness when interpreting the Rome Statute.[169] A teleological approach suggests an interpretation of article 12(2)(a) which assures the effective operability of the territorial jurisdiction of the Court.

Reading article 12(2)(a) narrowly as requiring the localisation of all constituent elements of a crime to state party territory would risk creating impunity for cross-border crimes. The Court would lack jurisdiction over all criminal conduct occurring on more than one states' territory, a detrimental effect on the Courts' abilities.

Such an interpretation would also damage the prospects of indicting high-ranking officials committing statute crimes during armed conflict, as commanders and superior officers tend to be further away from the conflict area, possibly on the other side of a border. The rationale of the statute is to prevent the perpetration of the most serious of international crimes.[170] High-ranking officials could be responsible for ordering the commission of international crimes on a large scale, and are therefore better targets for international indictment. A narrow interpretation would therefore be contrary to this purpose.

Both objective and subjective criminal jurisdiction is appropriate in order to secure the functioning of the Rome Statute. Objective territorial jurisdiction also seems to enjoy broad support from Member States. The Court should therefore have both subjective and objective criminal jurisdiction on member state territories, a conclusion supported by other writers as well. [171]

In this case, jurisdiction over crimes of illegal transfer would require either localising the commencement or the completion of the crime to Palestinian territory. Completion of the crime of illegal transfer results in the presence of civilians from the Occupying Power on the occupied territory. The Court should therefore have jurisdiction over all crimes of illegal transfer resulting in the indirect or direct transfer of Israeli civilians to occupied Palestinian territory.

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[168] Vagias, *supra* note 38, at 14-15; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 38, para. 23; Decision on the Defence Motion for Interlocutary Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic* (IT-94-1), Appeals Chamber, 2 October 1995 at para. 18.

[169] Article 31(1) of the VCLT; Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *supra* note 44, paras. 34-36.

[170] Preamble of the Rome Statute.

[171] Vagias, *supra* note 38, at 158-162; Cassese (ed.), Gaeta (ed.), Jones (ed.), *supra* note 95, at 566-567; Report of the Special Working Group on the Crime of Aggression, 7th session, (ICC-ASP/7/20/Add.1), paras. 38-39.

## 5.3 Conduct falling under the jurisdiction of the Court

As stated above, the facts suggest that the Palestinian territories are under military occupation, falling under the definition of international armed conflict. War crimes seem to be committed in the context of a policy. A teleological interpretation of article 12(2)(a) of the Rome Statute grants the Court jurisdiction over potential crimes of illegal transfer that commence or complete on Palestinian territory.
The ICC Elements of Crimes list two alternative modes of conduct for the perpetration of illegal transfer:
*The perpetrator:*
*(a) Transferred, directly or indirectly, parts of its own population into the territory it occupies; or*
*(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.*[172]

Firstly, the provision requires the establishment of a nexus between the individual perpetrator and the Occupying Power. The perpetrator must act in an official capacity. This has prompted some writers to argue that ruling on illegal transfer would effectively be a ruling on state conduct, which would be a violation of the Monetary Gold rule. As stated above under part 3.3.2., The *Monetary Gold* rule is not an applicable rule for international criminal tribunals, and would risk destabilizing the jurisdictional system of the Rome Statute. Furthermore, application of the principle would have detrimental effects on the crime catalogue of the Rome Statute. The *Monetary Gold* rule would render provisions with elements of state conduct inoperable or crippled whenever the state has not consented to the jurisdiction of the Court.[173] In addition to what has been stated in part 3.3.2., the application of the rule should also be dismissed to secure the effective operation of the Statutes' crime catalogue.

Article 8 (2) (b) (viii) refers to the "transfer" of all or parts of the population of the territory, or parts of the Occupying Powers' own population. "All or parts of the population" could imply that one of the constituent elements of

[172] Art. 8 (2) (b) (viii) of the ICC Elements of Crimes.
[173] The *Monetary Gold* rule could for example affect prosecutions of crimes of aggression (article 8 *bis*). Another example of how the rule could damage the functioning of the statute is instances where crimes against humanity are committed pursuant to or in furtherance of a state policy. In these cases, the Court would likely be prevented from investigating and ruling on that policy, as it would be considered a ruling on state conduct. It could be argued that many of the crimes in the Rome Statute could potentially implicate state conduct, as the crimes are often derived from the area of public international law.

the crime is that at least a certain amount of people must have been transferred.[174] The meaning of the word "transferred" is to be interpreted in accordance with international humanitarian law.

The wording of article 8(2)(b)(viii) of the Rome Statute is based on article 85(4)(a) of AP I to the Geneva Conventions[175]. This article is in turn derived from article 49 of the fourth Geneva Convention. In article 49, the meaning of the word "transfer" is dependent on whether it is in regard to the populace of the territory, or in regard to the civilian population of the Occupying Power. Transferring the populace of the occupied territory is only illegal if it's forcible. Evacuating the territory is permissible when there are security concerns for the population or imperative military reasons, but the evacuation must always be of a temporary nature. This interpretation of "transfer" is not applicable for when the occupying power transfer its own civilian population into the territory it occupies. In these cases, there is no requirement that the transfer must be forcible, and the exceptions concerning evacuation are not applicable.[176]
Interpreting "transfer" in article 8(2)(b)(viii) of the Rome Statute in accordance with article 49 of the Fourth Geneva Convention suggests that when the occupying power deports or transfers the population of the territory, this is only illegal to the extent that it is forcible and cannot be motivated by imperative military reasons, or security concerns for the population. However, when the Occupying Power transfers its own civilian population into the territory it occupies, this is illegal regardless of whether it is forcible or not. This type of transfer cannot be motivated by military reasons or security concerns for the population. This interpretation is also supported by the negotiations of the Rome Conference. At the conference, the Chinese delegation suggested that cases where the Occupying Power transfers its own civilian population should be legal if the transfer could be motivated by imperative military reasons or security concerns for the population. This proposal gained no support from the other delegations.[177]

Article 8 (2) (b) (viii) explicitly refers to both direct and indirect transfer as a means of committing the crime, in cases where it's the civilian population of the occupying power that are being transferred. In cases of direct transfer, the occupying power directly organizes the transfer of its own civilian

[174] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, (Cambridge, Cambridge University Press 2003), at 212.
[175]Article 85(4)(a) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Hereafter referred to as "AP I", ICRC, 8 June 1977, 1125 UNTS 3.
[176]Dörmann, *supra* note 174, at 209-210; Article 49 of the *1958 Commentary to the Geneva Convention, supra* note 160; Article 49 of Geneva Convention IV.
[177] Schabas, *supra* note 68, at 234-235.

population into occupied territory. Indirect transfer refers to situations where the Occupying Power fails to take effective measures to prevent other instances of its civilians being transferred to the occupied territory.[178]

## 5.4 Summary

The International Criminal Court has jurisdiction over war crimes in particular when they are perpetrated as a part of a plan or policy, or on a large scale. This is not a restriction on the Courts' jurisdiction, but serves as a guideline. In this case, the facts suggest that the Israeli transfer of civilians into occupied territory is to be seen as a part of a policy. Application of article 8(2)(b)(viii) of the Rome Statute is dependent on the existence of an international armed conflict. In this case, the Israeli occupation of Palestinian territories falls under the concept of international armed conflict.

The Court has jurisdiction over crimes of illegal transfer that begin or are completed on Palestinian territory. This follows from the nature of territorial jurisdiction and a teleological interpretation of article 12(2)(a).

Perpetration of illegal transfer requires that there is a nexus between the conduct of the individual and the Occupying Power. The crime can be committed in two ways. The first conduct consists of the individual acting on behalf of the Occupying Power, deporting or transferring the population of the occupied territory elsewhere. This can be legitimised by concern for the safety of the civilian population, or imperative military demands. The transfer must be forcible.
The alternative conduct element consists of the perpetrator acting on behalf of the Occupying Power, transferring its own civilians into the occupied territory. This conduct cannot be legitimised, and there is no need for the transfer to be forcible. Both indirect and direct transfer is criminalised, indirect transfer referring to situations where the Occupying Power fails to take appropriate measures against the transfer of its own civilians into occupied territory.

## 5.5 Analysis

The analysis in this chapter relates to the extent of the ICC's territorial jurisdiction, and its capacity to indict third-state nationals.

As regards the extent of the Courts' territorial jurisdiction, the thesis argues along the lines of a factual argument that the Member States' consent

[178] *Ibid,* at 235.

provides the Court with subjective as well as objective territorial jurisdiction. This is an apologetic argument, as it provides the ICC with the means to impose territorial jurisdiction on Israel, a third state. To avoid this apologetic result, the thesis argues that this is a case of delegation, where the member states delegate their sovereign powers flowing from the *Lotus* principle. This provides both a factual and a normative basis for the argument, presenting the solution as both based on state conduct as well as normative international rules. However, it provides no factual justification for why Israel should have to tolerate subjective or objective Palestinian jurisdiction in accordance with the *Lotus* principle, especially in the light of Israel's reluctance to recognise Palestinian statehood. The normative justification is in other words susceptible to a factual rebuttal.

Regarding the Courts' capacity to indict third state nationals, the thesis proposes that the Court should have full authority to indict third state nationals due to the inapplicability of the *Monetary Gold* rule. As stated above, the *Monetary Gold* rule was rejected from a factual as well as a normative position. It is here argued that application of the rule would destabilise the operability of the Rome Statutes' crime catalogue and provide third states with the means to avoid the Courts' jurisdiction. This argument is normative, as jurisdiction over nationals of non-consenting states is derived from the coherence of the Rome Statute. It is therefore susceptible to factual rebuttals. Since Israel is not a member of the Rome Statute, it could be argued that jurisdiction derived this way violates Israeli sovereignty.

The analysis suggests that the positions adopted in the thesis are vulnerable towards rebuttal from opposing positions. Similar to the other parts of the thesis, the final results are indeterminate due to the structure of international law.

# 6 Conclusions

## 6.1 Findings

This thesis has featured an inquiry on four aspects of the ICC's jurisdiction over crimes of illegal transfer conducted on the occupied Palestinian territories, as well as a critical analysis of the international legal arguments' capacity to provide determinate results.

*Is Palestine to be considered a state in accordance with article 12(2)(a) of the Rome Statute?*
Interpreting article 12 (1) of the Rome Statute, statehood is required for the acceptance of the Courts' jurisdiction. The ordinary meaning of statehood requires the fulfilment of the Montevideo criteria; government, territory, and the capacity to enter into relations with other states. Palestine fulfils these criteria. An alternative method could be found in the Courts' jurisprudence, where an approach centred on recognition for determining statehood has been used. Palestinian statehood has been recognised in the General Assembly's resolutions.
The author concludes that Palestine is to be considered a state in accordance with article 12(2)(a) of the Rome Statute.

*Are the occupied Palestinian territories and East Jerusalem a part of the Palestinian state territory for the purposes of applying article 12(2)(a) of the Rome Statute?*
According to article 12(2)(a) of the Rome Statute, the Court has jurisdiction on territory belonging to a state party. The occupied Palestinian territories are to be interpreted as Palestinian state territory. This follows from the fact that the Palestinian government is the sole claimant to large parts of the occupied territories, and that Palestinian statehood can be seen as a realisation of Palestinian self-determination. The listed arguments against such a determination are without merit.
A different subject is East Jerusalem, which both Israel and Palestine claim sovereignty over. The Israeli claim on East Jerusalem is contrary to binding Security Council resolutions. Israel's claim on East Jerusalem is therefore without merit for the Court. Even if this was not the case, Israel's presence in East Jerusalem lacks international recognition, and according Israel sovereignty in East Jerusalem is prevented by the principle on the unlawfulness of acquisition of territory by force. The *Monetary Gold* rule is not applicable.

My conclusion is that the occupied Palestinian territories, including East Jerusalem, constitute a part of the Palestinian state territory for the purposes of article 12(2)(a) of the Rome Statute.

*Do the Oslo Accords constitute an obstacle for the jurisdiction of the International Criminal Court regarding application of article 8(2)(b)(viii) of the Rome Statute on the occupied Palestinian territories?*

According to the Oslo Accords, the Palestinian Authority lack jurisdiction over the parts of the West Bank where Israeli settlements are located. This has been interpreted by some as an obstacle for the Courts' jurisdiction, the argument being that Palestine cannot delegate jurisdiction that it does not have to the Court.
The PLO and Israel entered into Oslo II, the document with the highest legal character, in 1995. In some cases, agreements entered into by a non-state entity can continue to bind the entity even if it subsequently acquires statehood. It is argued that there is continuity between the PLO and the Palestinian state, and that the accords therefore should continue to have binding effects.
The accords do not affect the jurisdiction of the ICC. The lack of Palestinian jurisdiction over certain areas of the West Bank is a consequence of an agreement with Israel not to exercise jurisdiction, but this does not affect the customary jurisdiction enjoyed by Palestine over the territory. It is this customary jurisdiction that is delegated.
According to Article 98(2) of the Rome Statute, international agreements can in some instances constitute an obstacle for the Court issuing a warrant of arrest. It could therefore be argued that the Oslo Accords are an obstacle in accordance with article 98(2). However, the wording and the drafting history of the provision suggests that article 98(2) is only applicable in cases where the warrant of arrest regards an individual "sent" by a third state. This must be interpreted narrowly, as article 98(2) is a provision of exceptional nature.
My conclusion is therefore that the Oslo Accords are not to be considered an obstacle for the jurisdiction of the Court over crimes of illegal transfer, but that the accords can have effects on the Courts' ability to issue warrants of arrest in accordance with article 98(2) of the Rome Statute.

*Provided the Court has jurisdiction, what conduct would fall under the Courts' jurisdiction in accordance with article 8(2)(b)(viii) of the Rome Statute?*
The fourth aspect of my thesis was general questions regarding the application of article 8(2)(b)(viii) of the Rome Statute, the war crime of illegal transfer. Article 8(1) holds that the Court shall have jurisdiction in

particular when committed as a part of a plan or a policy. The facts suggest that crimes of illegal transfer are being committed as a part of a policy.
According to article 8(2)(b) of the Statute, war crimes require a context of international armed conflict. The concept of international armed conflict includes cases of military occupation. There have been previous findings on the status of the occupied Palestinian territories as subject to military occupation.
Another question relates to how the crimes of illegal transfer should be located when applying article 12(2)(a). The traditional concept of territorial jurisdiction derives from the *Lotus* case. Territorial jurisdiction can be founded on where the crime was initiated, and founded on where the crime was completed. In doctrine, this is described as subjective and objective territorial jurisdiction. Theory of delegation holds that the Court is entitled to exercise territorial jurisdiction to the same extent or less. A teleological interpretation favours a territorial jurisdiction that is as wide as the member states'. The Court therefore enjoys subjective and objective territorial jurisdiction.
Finally, I have examined the prohibited conduct in article 8(2)(b)(viii). The provision differentiates between cases where the occupying power are transferring the population of the territory and cases where the occupying power are transferring its own citizens into the occupied territory. Both cases require a nexus between the conduct of the perpetrator and the occupying power. This does not trigger the *Monetary Gold* rule.

A minimum amount of people must be transferred in order for the rule to be triggered. The meaning of "transfer" is interpreted in accordance with international humanitarian law. Transferring the population of the territory is illegal if it's forcible. An exception is made for temporary evacuations, motivated either by the safety of the population of the territory, or by imperative military reasons. Transfer by the Occupying Power of its own population into the territory it occupies is illegal regardless whether it is forcible or not. No exceptions exist for this type of transfer.
Transfer by the Occupying Power of its own population into the territory it occupies can be committed both directly and indirectly, where indirectly refers to situations where the Occupying Power fails to take effective preventive measures.

My conclusion is that he Court has jurisdiction over all instances of illegal transfer that have a nexus to the military occupation of Palestine, and are initiated or completed on the territory.
The Court has jurisdiction over all individuals acting in an official capacity that are responsible for the forcible transfer of all or parts of the population of the occupied Palestinian territory. An exemption exists for temporary

evacuations. Falling within the jurisdiction of the Court are also individuals acting in an official capacity that are directly or indirectly responsible for the transfer of Israeli civilians into occupied territory.

*Does the International Criminal Court have territorial jurisdiction over potential crimes of illegal transfer committed on occupied Palestinian territory?*

The results of the thesis seem to suggest that the Court has territorial jurisdiction over potential crimes of illegal transfer committed on occupied Palestinian territory.

*How should the results in the thesis be interpreted in the light of Koskenniemi's theory on the structure of the international legal argument?*

In the thesis, the author has tried to analyse the arguments of scholars and the arguments on which the results of the thesis rest. The analysis suggests that scholars as well as the author consistently try to appeal to reasons of concreteness and reasons of normativity in their work. The conclusion is that the legal positions adopted by scholars and in the thesis are in no way fool proof, and that they are susceptible to counterarguments from opposing positions. This suggests that there is a problem with indeterminacy, at least when it concerns the question of ICC jurisdiction over Palestinian territory.

Indeterminacy does not have to be a result of inherent problems in the international legal system. However, the Palestinian situation is one where there is a large difference between state behaviour, and the behaviour recognised by the international community. There is in other words a large difference between concrete behaviour and normative recognition. This correlates with the great legal dispute on the ICC's jurisdiction over Palestinian territory, a dispute on which the legal scholars argue on every aspect.
This author believes that this is not only an instance of correlation, but of causality. In cases where state sovereignty and international community collide, it is only reasonable that the opinions of authors collide as well. As the thesis shows, different authors emphasise factual and normative arguments differently, yet they all face difficulty when it comes to providing objective justification for their results.

The author concludes that interpreting the results of the thesis in the light of Koskenniemi's theory suggest problems with indeterminacy, and that these problems are a result of inherent problems in the international legal system.

## 6.2 Assessing the results

This thesis has been centred on several novel questions relating to the jurisdiction of the International Criminal Court, and is to be seen as a part of a legal debate on how the Rome Statute should be applied on the Palestinian territories. It is also a part of a larger debate on the International Criminal Courts' role in the international community, and the Courts' relationship to third-state parties.
During the work, the author has aspired towards an interpretation of the Rome Statute that would secure the effective operation of the Court, while simultaneously providing respect for state sovereignty. The results of this thesis provides the effective operability of the statute, while simultaneously preventing the Court from stepping over the internationally recognized limits of Israeli sovereignty. It is the authors belief that the conclusions and the reasoning behind them are satisfactory, and in accordance with international law.
However, the author would also like to emphasise the results of the analysis. The analysis suggests that there are problems with the international legal system, resulting in inherent indeterminacy for producing legal results. As stated, the author has done his best to base his result on concrete state behaviour and sovereignty as well as the normative content of international law and the opinions of the international community. This in no way prevents other authors from making different assessments and arriving at different results, all in accordance with international law.

The author is aware that the findings of the analysis introduce a contradiction in his thesis; on the one hand, the author has produced a legal investigation of the ICC's jurisdiction over Palestinian territory. On the other hand, he has conducted an analysis, which postulates that international legal arguments, including his own, lack the objectivity and determination required by international law. However, the author does not reject the capacity of solutions in international law to be equitable, providing a fair balance between state behaviour and normative requirements.

This author would argue that indeterminacy, regardless of whether it is desirable or not, forms a part of the international legal system, and that international legal scholars should account for this indeterminacy in their work. When determinacy and objectivity are unobtainable, the legal scholar is left to argue on a basis of equity and fairness. The author believes his own work to satisfy these criteria.

The effects of indeterminacy could suggest that international law and the ICC is an inappropriate course of action in regards to aspirations of objectivity, as the demands of objective legal results require a standard outside the reach of the contemporary international legal system. Whatever the Court may find, the results risk being susceptible either to allegations of uninspired state apology, or to accusations of blind utopianism. The author believes that the appropriate course of action is to accept these shortcomings as an inherent part of law, and lessen the expectations of impartial and determinate legal result.

The author hopes that the work done here can be of importance to the scholarship on the area, as a coherent analysis of whether jurisdiction over crimes of illegal transfer can or should be exercised in this case. The author has taken recent factual and legal developments into consideration that will hopefully shine a new light on the subject. The conclusions drawn can serve both as a welcome analysis of the Courts' jurisdiction, or as a jumping-off point for a completely different take on the appropriate jurisdictional parameters of the ICC in this case. The analysis can serve either as a welcome critique of the Courts' ability to pass independent judgment, or as a starting point for a wider debate on the purpose and properties of international law.

The author hopes that the work done and the conclusions drawn can inspire future research on the ICC's role in the conflict. The thesis has mainly focused on jurisdiction, delegation and the application of article 8(2)(b)(viii), but there are a multitude of other subjects that remain open for investigation. Examples for future research could for example be how the statehood requirement should be applied with regards to the Gaza strip, subject to Hamas administration. Another interesting subject is questions relating to the gravity requirement in 17(1)(d), in the light of the recent *Comoros* decision by Pre-Trial Chamber I[179]. Would illegal transfer be considered a crime of sufficient gravity for the jurisdiction of the Court, and what would the limitations of admissibility be?

In addition to this, illegal transfer is just one of the crimes under the jurisdiction of the ICC. Countless other research questions could be found in the application of the Rome Statutes' other provisions on the Palestinian territories.

[179] Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia,* Pre-Trial Chamber I (ICC-01/13), 16 July 2015.

# Supplement A – Regional Map

2011 Map of the occupied West Bank showing areas under PA control, areas under Israeli control, and the Israeli West Bank barrier.[180]


[180] OCHA, map available at https://www.ochaopt.org/documents/ocha_opt_area_c_map_2011_02_22.pdf, last visited 30th December 2016.

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