

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou

**SITUATION IN THE STATE OF PALESTINE**

**Public**

**Submissions Pursuant to Rule 103**

**Source:** Professors Asem Khalil & Halla Shoaibi

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<b>The Office of the Prosecutor</b> Ms. Fatou Bensouda, Prosecutor Mr James Stewart, Deputy Prosecutor	<b>Counsel for the Defence</b>
<b>Legal Representatives of the Victims</b>	<b>Legal Representatives of the Applicants</b>
<b>Unrepresented Victims</b>	<b>Unrepresented Applicants (Participation/Reparation)</b>
<b>The Office of Public Counsel for Victims</b> Ms. Paolina Massidda	<b>The Office of Public Counsel for the Defence</b>
<b>States' Representatives</b>	<b>Amicus Curiae</b>
<b>REGISTRY</b>	
<b>Registrar</b> Mr Peter Lewis, Registrar	<b>Counsel Support Section</b>
<b>Victims and Witnesses Unit</b>	<b>Detention Section</b>
<b>Victims Participation and Reparations Section</b> Mr. Philipp Ambach, Chief	<b>Other</b>

## Table of Contents

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>4</b>
<b>II.</b>	<b>SUBMISSIONS</b> .....	<b>4</b>
	<b>A. The absence of enforcement jurisdiction does not negate prescriptive jurisdiction.</b> .....	<b>4</b>
	<i>a. The criteria the Court should adopt is prescriptive jurisdiction.</i> .....	4
	<i>b. Palestine possesses prescriptive jurisdiction.</i> .....	6
	i. Limited Palestinian enforcement jurisdiction is not an obstacle for Palestine to delegate to the ICC to investigate international crimes.....	10
	ii. Sovereignty in abeyance does not preclude Palestine from delegating jurisdiction. ....	13
	<i>c. Burden of proof is on Israel to demonstrate that Palestine’s delegation of jurisdiction would violate a prohibitive rule of international law.</i> .....	15
	<b>B. The Oslo Accords have been concluded in violation of a peremptory norm....</b>	<b>17</b>
	<i>a. Self-determination is a peremptory norm (jus cogens).</i> .....	17
	<i>b. Settlements are a violation of the right to self-determination.</i> .....	21
	<i>c. The Oslo Accords violate the peremptory norm of self-determination.</i> .....	23
	<b>C. The Oslo Accords should not apply in cases of contradiction to the Geneva Conventions.</b> .....	<b>25</b>
<b>III.</b>	<b>CONCLUSION</b> .....	<b>30</b>

## I. INTRODUCTION

1. We submit, in support of the Prosecutor's conclusion, that the Declaration of Principles in 1993, the Interim Agreement of 1995, and the subsequent agreements between the Palestinian Liberation Organization (PLO) and Israel (hereinafter referred to as the Oslo Accords) do not bar the exercise of the Court's jurisdiction, especially in Area C. Specifically, we address the following three points: (A) The absence of enforcement jurisdiction does not negate prescriptive jurisdiction; (B) a special agreement cannot be concluded in violation of a peremptory norm; and (C) that the obligation to prosecute a grave breach under the Geneva Conventions takes priority over other conflicting obligations which arise out of a bilateral treaty.\*

## II. SUBMISSIONS

### A. The absence of enforcement jurisdiction does not negate prescriptive jurisdiction.

2. In section a, we argue that the International Criminal Court should consider prescriptive jurisdiction instead of adjudicatory and enforcement jurisdiction. In section b, we present reasoning for why the Oslo Accords do not affect Palestine's prescriptive jurisdiction. In section c, we argue that the burden of proof is on Israel to demonstrate that Palestine's delegation of jurisdiction would violate a prohibitive rule of international law.

#### *a. The criteria the Court should adopt is prescriptive jurisdiction.*

3. Assessment of the Court's jurisdiction should be in light of the principles of international public and criminal law. The primary guide to assessment of jurisdiction of the Court should be in light of the objectives of international criminal law, and not be restricted to mechanical formulas originating in private property law such the

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*maxim nemo dat quod non habet*.<sup>1</sup> International tribunals aim to achieve justice, end impunity, and protect human rights. Consequently, they also aim to extend their jurisdiction as to ensure a wider scope of protection and respect of human dignity. Therefore, in certain situations, strictly adhering to mechanical maxims such as *nemo dat quod non habet* runs contrary to the aims of these tribunals and of the Court. Such adherence would preclude the Court from prosecuting human rights violations even if such a prosecution did not violate any principle of international law. If the Court finds that a specific decision would further the aims of international criminal law, it should not preclude itself from making the decision as long as: (1) it does not violate a principle of international law; and (2) it does not hinder the effectiveness of the Court.

4. Further, the *nemo dat quod non habet* maxim has been used to claim that an entity lacking criminal jurisdiction cannot delegate jurisdiction to the Court, as one cannot give what one does not have in the first place. Such an argument presupposes an exact symmetry between domestic criminal jurisdiction and that of the Court.<sup>2</sup> It presupposes that the Court can extend its jurisdiction only to situations where the entity in question has an identical jurisdiction to that of the Court. Such a presumption is erroneous. It is not uncommon that a domestic jurisdiction may not criminalize a conduct classified as a crime under the Rome Statute.<sup>3</sup> This reality is, in fact, why the Court was established – to fill in accountability gaps, and hence, end impunity. However, under a presumption of requiring jurisdictional symmetry, the Court will not be able to extend its jurisdiction to such cases, as the entity in question would not have criminal jurisdiction to prosecute the conduct classified as a crime under the Rome Statute.

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<sup>1</sup> 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,” *Vanderbilt Journal of Transnational Law* 49 (2016): 446.

<sup>2</sup> *Ibid.*, 448.

<sup>3</sup> Rod Rastan, “The Jurisdictional Scope of Situations Before the International Criminal Court,” 23 *CRIM. L. F.* (2012): 20.

5. Furthermore, the object and purpose of the Rome Statute and the jurisdiction regime of the ICC is to respect lawful and *de jure*, not unlawful, sovereignty. The jurisdictional regime of the Court aims to encourage state ratification, and consequently, a wider scope of jurisdiction of the Court<sup>4</sup> through respecting the sovereignty of states.<sup>5</sup> Needless to say, the sovereignty the Court aims to respect is lawful, *de jure* sovereignty, not unlawful *de facto* sovereignty through aggression, occupation, or colonization.<sup>6</sup> Hence, the test to determine the capacity of the entity in question to delegate jurisdiction is whether such entity possesses “an internationally recognized legal authority, and not...the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory.”<sup>7</sup> Therefore, the necessary requirement for the capacity of delegation of jurisdiction is the jurisdiction to prescribe, not the jurisdiction to enforce or even the jurisdiction to adjudicate.<sup>8</sup>

*b. Palestine possesses prescriptive jurisdiction.*

6. We argue that the Oslo Accords do not allude to any relinquishment of Palestinian prescriptive jurisdiction, but only a temporary and limited waiver of the enforcement and adjudicatory jurisdiction.

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<sup>4</sup> Yuval Shany, “In Defence of Functional Interpretation of Article 12(3) of the Rome Statute,” 8 *Journal of International Criminal Justice* (2010): 336.

<sup>5</sup> Philip Allott, *The Health of Nations* (Cambridge: CUP, 2003), 62-9; International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford: OUP, 2003); James Crawford, ‘An International Criminal Court?’ *Connecticut Journal of International Law* 12 (1997): 256.

<sup>6</sup> In line with the principle *ex injuria jus non oritur*, see in that regard for example: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 91

<sup>7</sup> Shany, “In Defence of Functional Interpretation of Article 12(3) of the Rome Statute,” 339.

<sup>8</sup> Salvatore Fabio Nicolosi, “The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty,” *Polish Yearbook of International Law* 31 (2011); see also: Roger O’Keefe, “Response: “Quid,” Not “Quantum”: A Comment on “How the International Criminal Court Threatens Treaty Norms” 49 *Vanderbilt Journal of International Law*, 1.

7. The term "jurisdiction" refers to the legitimate assertion of authority to affect legal interests.<sup>9</sup> Under international law, the concept of jurisdiction is generally divided into three categories: (1) jurisdiction to prescribe, i.e. to apply a community's norms to a dispute or the choice of law; (2) jurisdiction to adjudicate, i.e. to subject persons or things to legal process; (3) jurisdiction to enforce, i.e., to induce or compel compliance with a determination reached.<sup>10</sup>
8. The assertion that Palestine maintains its jurisdiction to prescribe is meaningful for the question of the adjudicative jurisdiction of the International Criminal Court (the Court) in two ways. First, Palestine accepts the Court's jurisdiction in cases of international crimes committed on its territory, including by non-member states' citizens. Secondly, Palestine accepts the Court's jurisdiction in cases of international crimes committed by its nationals extraterritorially, including in territories of non-member states. The latter is not a point of contention at the point.
9. An objection to Palestine maintaining its prescriptive jurisdiction would make its ratification of the Rome Statute meaningless. Its acceptance of the Court's adjudicative jurisdiction, as delineated above, reflects precisely what it means to be a state party to the Rome Statute.
10. Arguing that Palestine has prescriptive jurisdiction confirms Palestine's choice of law and its choice to adhere to the Rome Statute and to the Court's jurisdiction. Deciding whether an international crime is committed *within the territory* of the state, or whether the crime is committed *by a national* of the state extraterritorially, is something the Court itself will decide throughout the adjudication process, not at this preliminary stage of the process.

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<sup>9</sup> Michael P. Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position," *The United States and the International Criminal Court* 64, No. 1 (2001): 71.

<sup>10</sup> Paul Schiff Berman, "The Globalization of Jurisdiction," *University of Pennsylvania Law Review* 151, no. 2 (2002): pp. 318.

11. As argued by B'Tselem, an Israeli civil society organization, in a recent report commenting on the Israeli Attorney General's (AG) Report on the same case at hand: "In the statement, the Prosecutor dismissed the arguments of jurists calling on her to interpret the Rome Statute in a way that would allow an investigation nonetheless, and clarified that intervening when the basic conditions for jurisdiction have not been met 'is neither good law nor makes for responsible judicial action.' Despite the material change in circumstances since then (i.e., Palestine's accession to the Rome Statute), the AG quotes this phrase to argue that the [Court] still has no jurisdiction over Palestine. By doing so, he ignores the Prosecutor's comment in the very same statement that Palestine's status as a non-member observer state is enough to enable it to join the Rome Statute."<sup>11</sup>

12. We agree that, in the case of Palestine, the issues pertaining to territorial jurisdiction are hard questions. However, the difficulty of such questions does not mean that the Court should not examine them. In fact, the title to a territory (in this case, the territory of the state of Palestine) needs to be established, especially since the Palestinian territory is occupied.

13. The title to the territory can be determined through recourse by two methods: (1) Title is sufficiently proved, and the resulting borders are determined if a claimant state can show that it lawfully received the territory from a prior sovereign, whether from another state through a treaty of cession or by way of state succession, including decolonization.<sup>12</sup> Arguably, as other amicus curiae will aim to show, Palestine is the successor state, whether by going back to the Ottoman State or to Palestine under the British Mandate. This amicus curiae will not be discussing the issue aforementioned, as it is outside its scope and will be argued by others submitting to the Court.

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<sup>11</sup> *The Israeli Attorney General's Memorandum: Everything the ICC is Not Meant to Be* (Israel: BTSELEM, 2020), 16.

[https://www.btselem.org/sites/default/files/publications/202003\\_position\\_paper\\_on\\_israel\\_ag\\_icc\\_memorandum\\_eng.pdf](https://www.btselem.org/sites/default/files/publications/202003_position_paper_on_israel_ag_icc_memorandum_eng.pdf)

<sup>12</sup> Steven R. Ratner, "Land Feuds and Their Solutions: Finding International Law beyond the Tribunal," *The American Journal of International Law* 100, no. 4 (2006): 310.

14. (2) Even if your esteemed Court renders that Palestine is in absence of such proof by title as argued in the previous paragraph, the guiding principle, set nearly eighty years ago in the Island of Palmas case, remains that "continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty."<sup>13</sup> Building on this, we submit that, the state's title to its territory (West Bank, including East Jerusalem, and Gaza Strip), can be found in the display of the functions of the state within that region. Despite the limitations of the Oslo Accords and the end of its intended interim period of five years, Palestine continues to function and act as a state in the West Bank, including East Jerusalem, and the Gaza Strip.

15. It is interesting at this point to make a reference to a decision by the Supreme Court of Israel (Aruri v. IDF Commander in West Bank. Case No. HCJ 7015/02. [2002] Isr. L. Rep. 1. Supreme Court of Israel, September 3, 2002). The Israeli Court referred to the Oslo Accords, saying that the "two sides view the West Bank and the Gaza Strip as single territorial unit, the integrity and status of which shall be preserved during the interim agreement."<sup>14</sup> The Israeli Court used that reference in the decision to reject the argument that the Gaza Strip is separate from the West Bank (the case involved the transfer of population from the West Bank to the Gaza Strip).<sup>15</sup> In other words, the Israeli Court recognized that the West Bank (that the Israeli court refers to as Judea and Samaria, i.e. excluding East Jerusalem) and Gaza Strip constitute one entity. One can also deduce from that decision that the Israeli court considers that one entity to be extra-territorial in relation to the state of Israel.

16. To conclude, we submit that the Court should confirm its adjudicative jurisdiction. As Palestine has prescriptive jurisdiction, it has the power to choose the law to apply on international crimes.

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<sup>13</sup> *Ibid.*

<sup>14</sup> Israeli-Palestine Liberation Organization, Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995.

<sup>15</sup> Detlev F. Vagts, "Ajuri v. IDF Commander in West Bank. Case No. HCJ 7015/02," *The American Journal of International Law* 97, no. 1 (2003): 173-4.

- i. Limited Palestinian enforcement jurisdiction is not an obstacle for Palestine to delegate to the ICC to investigate international crimes.

17. As a result of Israeli occupation, Palestine is still incapable of exercising enforcement jurisdiction over all of its territory. The Oslo Accords did not end the occupation.

18. The Oslo Accords provide for a Palestinian Interim Self-Government Authority; the elected Council (the Council) was supposed to assume limited jurisdiction over the West Bank and Gaza Strip for a five-year transitional period, during which negotiations continued to occur on the regions' permanent status.<sup>16</sup>

19. What was proposed as a temporary period, has not, to date, ended. Palestine and Israel have still not come to an agreement on final status issues. While one may disagree about the legal nature of the Oslo Accords decades later, and though we believe that this question goes beyond our concern here, we share nonetheless the opinion<sup>17</sup> that the Oslo Accords were binding and are largely still in force.

20. The Oslo Accords envisaged a transfer of power to the 'Council' – the elected body the Oslo Accords refer to as having the autonomous powers to run the territorial, functional and personal powers transferred to it. The 'Council' and its *chairperson*, is what became, and what Palestinians refer to today as, the Palestinian National Authority (PNA) and its president. This body was replaced, following the 2012 UNGA resolution,<sup>18</sup> by the State of Palestine. As a result, it is our opinion that the State of Palestine is the hereditary state of the obligations and responsibilities of the PNA.

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<sup>16</sup> George E. Bisharat, "Courting Justice? Legitimation in Lawyering under Israeli Occupation," *Law & Social Inquiry* 20, no. 2 (1995): 355.

<sup>17</sup> See for example: Geoffrey R. Watson, "The "Wall" Decisions in Legal and Political," *The American Journal of International Law* 99, no. 1 (2005): 23.

<sup>18</sup> The Resolution adopted by the General Assembly on 29 November 2012, A/RES/67/19, 67<sup>th</sup> sess, decided to accord to Palestine non-member observer State status in the United Nations. The reference to Palestine as non-member state made it possible for Palestine to adhere to international treaties.

21. The Oslo Accords envisaged a gradual withdrawal of Israeli military forces and gradual transfer of powers during an interim period – originally for five years, 1994-1999. The transfer of powers was also envisaged to be territorially defined as three areas – where the so-called area C remains under complete Israeli control during the interim period and until an agreement on final status issues, including borders, is reached. As mentioned, such a final status agreement was not reached, and Israel continues to de facto control area C and also partially limit enforcement powers in area B.
22. The Oslo Accords also exempted Israeli citizens wherever they are from the jurisdiction of the Council; i.e. Palestinian Courts have no jurisdiction over Israeli citizens, and the Council does not have enforcement jurisdiction over Israeli citizens, including in Area A where it enjoys such enforcement jurisdiction over all others, citizens and foreigners.
23. Rather than the boundaries of the PNA and Israeli legal regimes being based on geographical borders, they have predominantly been based on practices of legal status.<sup>19</sup> It is useful here to refer to the Israeli Attorney General who argued, following the Oslo Accords, that ‘local law,’ (meaning Jordanian law and its PNA successors) was territorially in force in the West Bank.<sup>20</sup> However, this was in effect vetoed whenever applied to an Israeli identity card holder.<sup>21</sup>
24. It is our assumption that it is within a state’s power to relinquish temporarily or permanently its enforcement and adjudication jurisdiction. In such cases, one should not only insist on the fact that prescriptive jurisdiction of the state remains intact, but also that because the state has such prescriptive jurisdiction, it can agree by an

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<sup>19</sup> Tobias Kelly, “Jurisdictional Politics” in the Occupied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects,” *Law & Social Inquiry* 31, no. 1 (2006): 48.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

international treaty to limit its own adjudication and enforcement jurisdiction in the first place.

25. In other words, it is our opinion that the Council agreeing to limit its adjudication jurisdiction when it comes to Israeli citizens, not only signals the maintenance of Palestine's prescriptive jurisdiction, but confirms it. How can Palestine agree to limit its adjudication jurisdiction towards Israeli citizens, through an international agreement, if it does not have and maintain the prescriptive jurisdiction? Moreover, the limitation to adjudication jurisdiction towards Israeli citizens, does not impact Palestine's adjudication power towards Palestinian and foreign (non-Israeli) subjects within its territory
26. The drafters of the Rome Statute took into consideration limitations to prosecution arising from lack of enforcement jurisdiction under part 9, issues of cooperation. Through this regulation, lacking the jurisdiction to enforce, and even to adjudicate, does not preclude the court from extending its jurisdiction. Hence, issues such as the capacity to surrender suspects are not regulated under part 2, that of jurisdiction. In fact, "[t]he *raison d'être* for Article 98 [under part 9] is recognition that the Court has and is exercising jurisdiction with respect to a particular person sought".<sup>22</sup>
27. In a recent analogous situation on 10 March 2020, the Appeals Chamber authorized the investigation into the situation of Afghanistan, despite the fact that Afghanistan has signed Status of Forces agreements (SOFAs) with the United States, waiving Afghanistan's criminal jurisdiction over US forces. The Appeals Chamber emphasized the distinction between issues pertaining to jurisdiction, under Part 2 of the Rome Statute, and issues pertaining to pre-existing treaty obligations, under Part 9 of the

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<sup>22</sup> Rod Rastan, "Jurisdiction," in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: OUP, 2015), 162.

Rome Statute.<sup>23</sup> The Court concluded that the SOFAs are not to be discussed as an issue affecting jurisdiction.<sup>24</sup>

28. Palestine's limited adjudication and enforcement jurisdiction exemplify the spirit of the Rome Statute, not a reason for the Court to declare it has no adjudicative jurisdiction. Instead, the situation provides an additional reason, based on the principle of complementarity, to intervene due to the incapability of national systems to prosecute those who commit international crimes.

29. As rightly emphasized by a recent report by B'Tselem, there are provisions in the Rome Statute that "address those situations in which states are not capable of fulfilling the provisions of these articles, which clearly indicates this is not a condition *sine qua non*. With respect to a possible inability to cooperate with and assist the ICC, the Statute explicitly provides that in cases in which a state cannot cooperate with the court due to the unavailability of a relevant authority or a functioning judicial system, the court may authorize the Prosecutor to take on these functions. The same holds true for the principle of complementarity. After all, the Rome Statute is based on the principle that when a state's legal system is unable or unwilling to obtain the evidence and testimony needed to reach a suspect and hold proceedings against him, the ICC will apply its jurisdiction to the case."<sup>25</sup>

- ii. Sovereignty in abeyance does not preclude Palestine from delegating jurisdiction.

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<sup>23</sup> Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138 05-03-2020 1/35 NM PT OA4, para 44.

<sup>24</sup> Ibid.

<sup>25</sup> *The Israeli Attorney General's Memorandum*, 7-8.

30. Claims that sovereignty in the occupied Palestinian territories is in "abeyance" does not preclude Palestine from delegating jurisdiction to the Court. In fact, whether sovereignty is in abeyance is not determinative of the capacity to delegate jurisdiction.
31. Israel as the occupying power has consistently claimed that the Palestinian people lack sovereignty over the occupied territories because there was no "ousted sovereign" prior to the occupation of 1967 and that the Palestinian population was stateless during that time. As such, Israel claims that sovereignty over the occupied territories is in "abeyance" and does not lie with the Palestinian people.<sup>26</sup>
32. Such assumptions run contrary to the well-established principles of international law and the law of occupation, enshrined under the Hague Regulations and the Geneva Conventions,<sup>27</sup> as well as the position of international courts<sup>28</sup> and UN resolutions.<sup>29</sup>
33. First, *de jure* sovereignty stems from the right to self-determination not from statehood.<sup>30</sup> The fact that the Palestinian population, or any other occupied population for that matter, do not manifest their *de jure* sovereignty through a state is irrelevant to their entitlement to such sovereignty.<sup>31</sup> The Palestinian entitlement to *de jure* sovereignty is further supported by numerous UN resolutions and was affirmed even

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<sup>26</sup> See for example the recent statement of the Attorney General of Israel dated on 20 December 2019: *The International Criminal Court's lack of jurisdiction over the so-called "situation in Palestine"* (Israel: IMFA, 2019).

<sup>27</sup> International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Art. 43; Kenneth Watkin, "Maintaining Law and Order during Occupation: Breaking the Normative Chains" *Israel Law Review* 41, no. 1-2 (2008): 175; Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* 16, no. 4 (2005): 661.

<sup>28</sup> *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)* (1925) 1 RIAA 529–624.

<sup>29</sup> A/RES/ES-7/2. *Question of Palestine of 29 July 1980; 2535 (XXIV). United Nations Relief and Works Agency for Palestine Refugees in the Near East; UNGA Resolution 2628 (XXV) of 4 November 1970; UNGA Resolution 2672 (XXV) of 8 December 1970; UNGA Resolution 3089 (XXVIII) of 7 December 1973; for more resolutions see: <https://www.un.org/unispal/document/auto-insert-203742/>*

<sup>30</sup> Nicolosi, "The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty," 2011.

<sup>31</sup> L. C. Green, "Is There a 'New' Law of Intervention and Occupation?," *Israel Yearbook on Human Rights* 35, no. 71 (2005): 71; Ch. Bassiouni, Self-determination and the Palestinians, 65(4) *American Journal of International Law* 32 (1971), p. 32

before UN Resolution 242.<sup>32</sup> The *de jure* sovereignty of the Palestinian population has been emphasized since the British mandate, and was emphasized yet again by the UN in 1947 through the partition plan.<sup>33</sup>

34. Secondly, the concept of "sovereignty in abeyance" refers to the discrepancy between sovereignty as a legal right and the practice of such sovereignty on the ground.<sup>34</sup> Put differently, it refers to the rupture between *de jure* and *de facto* sovereignty. In the case of occupation, sovereignty would be in abeyance, in the sense that the occupied population cannot enforce their *de jure* sovereignty and manifest it *de facto* through statehood. It does not mean that the occupied population does not have *de jure* sovereignty, or that *de jure* sovereignty does not lie on either side.<sup>35</sup>

35. As such, claiming that in the occupied Palestinian territories sovereignty is in abeyance should not affect the Court's decision to extend jurisdiction to the situation of Palestine. If anything, such a claim only affirms the inalienable right of the occupied Palestinian population to *de jure* sovereignty, which is "suspended" due to the occupation.

***c. Burden of proof is on Israel to demonstrate that Palestine's delegation of jurisdiction would violate a prohibitive rule of international law.***

36. In section A, subsection b, we have asserted Palestine has prescriptive jurisdiction. This jurisdiction means that Palestine has the authority to make law applicable to certain persons, territories, or situations despite having agreed to limit its

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<sup>32</sup> Watson, "The "Wall" Decisions in Legal and Political," 2005.

<sup>33</sup> See for example: U.N. SCOR 3<sup>rd</sup> sess (270th and 271st Meetings) 1948, 140-173; *see also* UNGA, *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People The Legal Status of the West Bank and Gaza*, UNGAOR, 74th Sess, Supp No. 35, UN Doc A/74/35 (2019).

<sup>34</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: 1990), 84.

<sup>35</sup> Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 49.

adjudicatory jurisdiction in the Oslo Accords and despite being incapable to exercise its enforcement jurisdiction over most of its territory because of the Israeli occupation.<sup>36</sup>

37. It is inevitable that the issue of jurisdiction of the Court based on article 12 of the Rome Statute will cause controversy, as it means that citizens of non-member states would be subject to the jurisdiction of the court. In this case, it would be the question of Israelis if they commit or have committed international crimes on the territory of the state of Palestine.

38. Such adjudicative jurisdiction of the Court is not without precedents in international law. It finds echo in a much older and fundamental principle of international law, first articulated by the Permanent International Court of Justice (PCIJ) in the 1927 case of the S.S. Lotus. The PCIJ stated that "restrictions upon the independence of [s]tates cannot... be presumed" and that international law leaves to states "a wide measure of discretion which is only limited in certain cases by prohibitive rules."<sup>37</sup>

39. "The Lotus Case concerned a dispute between France and Turkey about whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. A French vessel had run into a Turkish vessel, causing the death of Turkish citizens. When the French vessel anchored at a Turkish port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. France argued that the flag state alone had jurisdiction in such cases and that Turkey could not legitimately try a French citizen under international law since it could not "point to some title of jurisdiction recognized by international law." The PCIJ rejected France's argument, ruling that the burden was on France to demonstrate that Turkey's exercise of jurisdiction violated some prohibitive rule of international law."<sup>38</sup>

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<sup>36</sup> For more about the three kind of jurisdiction, see: P. Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S.," *Law and Contemporary Problems* 64, no. 1 (2001): 71.

<sup>37</sup> Michael P. Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S.," *Law and Contemporary Problems* 64, no. 1 (2001): 72.

<sup>38</sup> *Ibid.*

40. Building on this precedent, it is our argument here that Palestine, by ratifying the Rome Statute, agreed with the collective of states to establish an international jurisdiction applicable to the nationals of non-party states. Such an expectation and understanding is in accordance with international law. The burden of proof is on Israel to show if there are any rules of international law that prohibits the Court from exercising its adjudicating jurisdiction.

**B. The Oslo Accords have been concluded in violation of a peremptory norm.**

41. The Israeli occupation violates the right of the Palestinian people to self-determination. Specifically, we submit that the continuing existence and expansion of settlements in the West Bank – a main driver of occupation – has a detrimental effect on a wide range of human rights in Palestine, as well as the right to self-determination. These factors in combination with the role of the Oslo Accords in preventing the state of Palestine from delegating its criminal jurisdiction in Area C inevitably preserve the continued violation of self-determination as a peremptory norm. Hence, resulting in the Oslo Accords being concluded in violation of a peremptory norm.<sup>39</sup>

*a. Self-determination is a peremptory norm (jus cogens).*

42. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) gave recognition of the norms of *jus cogens*; these norms were examined in the International Court of Justice (ICJ) decisions. In its judgement on *Question Relating to the Obligation to Prosecute or Extradite*, the ICJ provided the latest jurisdictional underpinnings of the norms of *jus cogens* that fall within the premises of Article 53 of the VCLT. It further established the evidence needed to determine that a norm of general international law has been elevated to a peremptory norm (*jus cogens*). In that decision, the ICJ held that the prohibition of torture has become a peremptory norm of general international

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<sup>39</sup> Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875, art. 53.

law,<sup>40</sup> and it grounded its findings on the widespread international instruments that prohibited torture as a substantiation of state practice and *opinio juris* sufficient to determine that the prohibition of torture is a peremptory norm.<sup>41</sup>

43. The ICJ approach in the advisory opinion mentioned above undoubtedly gives rise to evidential information needed to establish that the right to self-determination is a peremptory norm. In his separate opinion in the Advisory opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Judge Robinson stressed that self-determination is a core principle of international law, citing the prominent international instruments of universal application that embody the peremptory nature of the right of self-determination.<sup>42</sup>

44. Self-determination is affirmed in Article 1, paragraph 2 of the United Nations Charter, reflecting a crucial purpose of the United Nations: “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>43</sup> In its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall, the ICJ highlighted self-determination as a critical purpose of the United Nations.<sup>44</sup> This purpose is repeatedly emphasized by the UN in a series of resolutions, the most prominent of which, the General Assembly resolution 1514(XV) of 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, reinforced the concept of self-determination as a core principle of the United Nations.<sup>45</sup>

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<sup>40</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [2012] I.C.J. Rep (II), p. 457, para. 99.

<sup>41</sup> Separate Opinion of Judge Robinson, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ GL No 169, ICGJ 534, 25th February 2019, 17.

<sup>42</sup> *Ibid.*, 18.

<sup>43</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>44</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para.148.

<sup>45</sup> GA Res 1514 (XV), (14 December 1960), paras 1 and 2.

45. More importantly, the unanimously adopted General Assembly resolution 2625(XV) of 1970 regarding Declaration of Principles of International Law concerning Friendly Relation,<sup>46</sup> which is considered by many an authoritative text of formulation of customary international law,<sup>47</sup> emphasized not only the importance of self-determination as a principle of international law but also imposes a duty upon states to take the necessary measures to promote the realization of that principle.
46. Considering that principle, Judge Robinson stressed in his separate opinion that norms that emanate from the UN Charter and that constitute a purpose of the United Nations, such as self-determination, have earned the characterization of peremptory norms by virtue of their normative value and because the purposes of the UN Charter constitute fundamental pillars that affect the way the UN structures its work.<sup>48</sup>
47. The peremptory characteristic of self-determination was additionally highlighted in the fourth report on peremptory norms of general international law (*jus cogens*), where the Special Rapporteur Dire Tladi indicated in several instances that self-determination is a peremptory norm.<sup>49</sup> Similarly, in the commentary of Article 26 of the Responsibility of States for Internationally Wrongful Acts, the right to self-determination was recognized as a “clearly accepted and recognized” peremptory norm.<sup>50</sup> Unsurprisingly, self-determination became recognized by many as the peremptory norm of international law.<sup>51</sup>

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<sup>46</sup> GA Res 2625 (XXV), (24 October 1970).

<sup>47</sup> Christine D. Gray, *International Law and the Use of Force* (Oxford: OUP, 2000),13.

<sup>48</sup> Separate Opinion of Judge Robinson, 18.

<sup>49</sup> Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, p.48.

<sup>50</sup> Commentary on the draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Art.26, p. 85, para. 5.

<sup>51</sup> Deborah Z. Cass, “Re-Thinking Self-determination: A Critical Analysis of Current International Law Theories”, *Syracuse Journal of International Law and Commerce*, Vol. 18, No. 1 [1992], Art. 4, 26.

48. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and related General Comments, recognized that self-determination is particularly important because its “realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>52</sup> In its advisory opinion on *Namibia and Western Sahara*, the ICJ emphasized the importance of the right to self-determination yet again.<sup>53</sup> This right is further reiterated in the *East Timor case (Portugal v. Australia)*, where the ICJ identifies self-determination as an “essential principle of contemporary international law.”<sup>54</sup>

49. The fundamental characteristic of self-determination is also evident in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,<sup>55</sup> and was further reaffirmed inter alia, in the General Assembly resolution 66/146 of 19 December 2011 on the right of the Palestinian people to self-determination, and resolution 67/19 of 29 November 2012 which referred to “the inalienable rights of the Palestinian people, primarily the right to self-determination.”<sup>56</sup>

50. The evidentiary materials demonstrated above not only illustrate that self-determination is customary international law, but more significantly, that it warrants the characterization of a peremptory norm, particularly and as emphasized by Judge Robinson. Robinson indicates the recognition and acceptance of that norm by the international community as a whole,<sup>57</sup> which are fundamental features for the

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<sup>52</sup> UNHRC ‘General Comment No 34, Article 19, Freedoms of Opinion and Expression’ (13 March 1984) UN Doc.

<sup>53</sup> *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12.

<sup>54</sup> *Case Concerning East Timor (Portugal v Australia) Merits*, Judgment, ICJ Reports 1995 4 at 102, para 29.

<sup>55</sup> General Assembly resolution 2131 (XX), annex, para. 6.

<sup>56</sup> GA, *Status of Palestine in the United Nations*, res A/RES/67/19, UNGA, 67th sess, 44th plenary meeting (29 November 2012).

<sup>57</sup> Separate Opinion of Judge Robinson, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ GL No 169, ICGJ 534 (ICJ 2019), 25th February 2019, p.22

identification of norms as *jus cogens* as established by the ICJ in its decision on *Armed Activities on the Territory of the Congo* (where it gave referral to its 1951 *Advisory Opinion on Reservations to the Convention on the Crime of Genocide* and cited those features).<sup>58</sup>

***b. Settlements are a violation of the right to self-determination.***

51. The continuing existence and expansion of settlements in the West Bank has a detrimental effect on a wide range of Human Rights in Palestine, including on the right to self-determination. The denial of fundamental human rights which deprives people of their right to self-determination is a violation of a peremptory norm of general international law. According to the ICJ in the *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.”<sup>59</sup>

52. The mere construction of settlements as measures to create a reality on the ground that could become permanent and would create changes to the demographic composition of the Palestinian territory, along with its impediment on the human rights of Palestinians. The building and expansion of settlements must be viewed within the lens of annexation, in violation of international law, as Israel is creating a reality on the ground to expand its territory. As John Dugard, Special Rapporteur of the Commission on Human Rights, argued in his 2004 report: “the main beneficiaries of the Wall are settlers” and that such penetration by the Wall into Palestinian territory “seems designed to expand Israeli territory and to bring illegal settlements into Israel. It must therefore be seen as an instrument of annexation, in violation of international

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<sup>58</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, 32, para. 64; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 23.

<sup>59</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 149.

law.”<sup>60</sup> In his Separate Opinion, Judge Koroma further concluded that *anything* that changes the character of the occupied territory is illegal.<sup>61</sup>

53. As indicated by the Secretary-General report, the right to self-determination is “adversely affected not only by the expansion of Israeli settlements but also by the mere presence of the settlements.”<sup>62</sup> Recent figures put the size of the Israeli settler population in the West Bank, including East Jerusalem, at approximately 630,000<sup>63</sup> living in at least 143 settlements and 113 outposts.<sup>64</sup> This represents a dramatic increase in the past 13 years, from the 450,000 settlers who were living in the same area in 2007.<sup>65</sup> As a consequence, Palestinian families have been divided and displaced; their movement and access to their land are restricted; and they are deprived of their basic human rights.

54. The ICJ concluded that the Israeli settlements in the West Bank, including East Jerusalem, are unlawful and in breach of international law.<sup>66</sup> The ICJ’s conclusion on the illegality of settlements, assisted the Court in its conclusion on self-determination.<sup>67</sup> The Court indicated, “the route chosen for the wall gives expression

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<sup>60</sup> Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, E/CN.4/2004/6/Add.1, para 27.

<sup>61</sup> Separate Opinion of Judge Koroma, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 ILM para. 1056, para. 2.

<sup>62</sup> Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan Report by the Secretary-General A/67/375, 5.

<sup>63</sup> According to the special rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, Michael Lynk: In November 2019, approximately 240 Israeli settlements and around 650,000 Israeli settlers in East Jerusalem and the West Bank. See:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25319&LangID=E>

<sup>64</sup> There was (until the first half of 2019) approximately 215,000 Israelis living in East Jerusalem while the settler population in Area C of the occupied West Bank is some 413,000.

<sup>65</sup> See: Six-Month Report on Israeli settlements in the occupied West Bank, including East Jerusalem, (reporting period January-June 2019).

[https://eeas.europa.eu/sites/eeas/files/20190930\\_final\\_six-month\\_report\\_on\\_israeli\\_settlements\\_in\\_the\\_occupied\\_west\\_bank\\_including\\_east\\_jerusalem\\_reporting\\_period\\_january\\_to\\_june\\_2019\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/20190930_final_six-month_report_on_israeli_settlements_in_the_occupied_west_bank_including_east_jerusalem_reporting_period_january_to_june_2019_0.pdf)

<sup>66</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, para. 120.

<sup>67</sup> Geoffrey, R. Watson, “The “Wall” Decisions in Legal and Political Context,” *AJIL* 99, no. 1 (2005): 13.

*in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements,"<sup>68</sup> consequently that the construction of the Wall, "along with measures taken previously, severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."<sup>69</sup>

55. Acts of annexation and the changes to the demographic composition of the occupied territory through the construction of Israeli settlements and their expansion, along with all related Israeli measures denying the human rights of Palestinians, impedes the Palestinian people's ability to exercise their right to self-determination, which is, again, breach of Israel's obligation to respect that right within international law. The ICRC further indicated that, "[t]he establishment and expansion of settlements over many years as well as the routing of the West Bank barrier – in contravention of IHL – has in effect profoundly altered the social, demographic and economic landscape of the West Bank to the detriment of the Palestinian population, hindering the territory's development as a viable nation and undermining future prospects for reconciliation."<sup>70</sup>

56. Given the fact that the continued existence of settlements in the West Bank is one of the main reasons driving the occupation and hindering Palestinians from actualizing self-determination, interpreting the Oslo Accords as preventing Palestine from delegating its criminal jurisdiction in Area C, would inevitably preserve the continued violation of self-determination as a peremptory norm.<sup>71</sup>

***c. The Oslo Accords violate the peremptory norm of self-determination.***

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<sup>68</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, para. 122.

<sup>69</sup> *Ibid.*

<sup>70</sup> "Fifty years of occupation: Where do we go from here?," ICRC, 2 June, 2017.

<sup>71</sup> UN, *Vienna Convention on the Law of Treaties*, (Entered into force on 27 January 1980) Treaty Series 1155 (1969): 331, art. 53.

57. Article 53 of the VCLT envisions a reality in which states conclude treaties explicitly obligating or allowing a violation of peremptory norm. However, states rarely, if ever, conduct treaties or maintain explicitly that they are violating a peremptory norm. On the contrary, states profoundly argue that their actions do not constitute a violation of a norm. The Israeli-Palestinian Interim Agreement of 1995 stipulates that the jurisdiction of the Palestinian Authority will apply to all persons, except for Israelis. Although the Oslo Accords do not create a direct obligation to violate a peremptory norm, fulfilling the limitation on the adjudication jurisdiction over Israeli nationals would lead to a violation of the norm for the right to self-determination.

58. We argue, where a conflict exists between a *jus cogens* and another rule of international law, the treaty shall be “interpreted and applied” as to be consistent with the peremptory norm. Even if a treaty does not create an obligation to violate a peremptory norm, fulfilling an obligation within the treaty can still lead to a violation of a norm.

59. Any interpretation of the Oslo Accords that negates Palestinian prescriptive jurisdiction – that is negating the Palestinian right to self-determination, is in violation of a peremptory norm. According to the Draft Articles on Peremptory Norms, in the case of a conflict between a peremptory norm and another rule of international law, “the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.”<sup>72</sup> This guideline was applied by the Court of Justice of the European Union, in the *Council of the European Union v. Front Polisario*, in which the court maintained that interpreting the treaty between the European Commission and Morocco (Liberalisation Agreement) should be concluded in a way to respect the rule of self-determination which is a “legally enforceable right *erga omnes* and one of the essential principles of international law.”<sup>73</sup>

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<sup>72</sup> See Report of the International Law Commission, A/74/10, Draft Articles on Peremptory norms of general international law (*jus cogens*), 141, 198.

<sup>73</sup> Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario), Case C-104/16 P, [2016] CJEU, para. 88-114.

60. Accordingly, interpreting the Oslo Accords as denying the Palestinian state the capacity to *delegate* jurisdiction based on the lack of enforcement jurisdiction is a violation of the right to self-determination. The restrictions placed on Palestinian jurisdiction ought to be consistent with the peremptory norm of self-determination. Denying the Palestinian state the right to delegate jurisdiction provides unlawful Israeli authority with impunity and with a route to circumvent the jurisdiction of the court.

61. Furthermore, even if the *interpretation* of the rule in question does not give rise to a violation of peremptory norm, but the *application* of the rule, in a certain way, violates a peremptory norm, then such application would be contrary to the relevant peremptory norm.<sup>74</sup> Hence, resulting in the unlawfulness of the application of said rule. The obligation of states to respect the right to self-determination may suspend another treaty obligation – in this case, the limitation on the adjudication jurisdiction over Israeli nationals. In this case, concluding the Interim Agreement in a way that limits Palestinians adjudication jurisdiction, does not necessarily deem the agreement void, but rather suspends the obligation to limit such jurisdiction.

62. In this sense, applying the Oslo Accords in a manner that hinders the Palestinian state from delegating jurisdiction to the Court violates the right of Palestinians to self-determination. The consequence of denying the enjoyment of the right to self-determination would also deny the population in question the right to seek international justice and remedy the violations against them.

### **C. The Oslo Accords should not apply in cases of contradiction to the Geneva Conventions.**

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<sup>74</sup> See UN, Report of the International Law Commission, A/74/10, sess 71, Draft Articles on Peremptory norms of general international law (jus cogens), 141, 198. “What may be at issue is not the interpretation of the rule in question but its application. This may be the case, for example, where a rule is, on its face, consistent with the relevant peremptory norm of general international law (jus cogens), but its application in a particular way, would be contrary to the relevant peremptory norm.”

63. Palestine has an obligation to prosecute grave breaches under the Geneva Conventions and customary international law (such as settlements,<sup>75</sup> extensive destruction and appropriation of property,<sup>76</sup> and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity<sup>77</sup>) which in many instances amount to violations of *erga omnes* norms. Given its occupied status, Palestine cannot fulfil this obligation, therefore, it delegated its jurisdiction to the Court to prosecute. Accordingly, arguing that the Oslo Accords prevents Palestine from delegating jurisdiction would create a conflict between Palestine's obligations under the Geneva Conventions and the Oslo Accords. In light of this, we submit that the obligation of Palestine to prosecute grave breaches takes precedence over any conflicting obligation that arises out of a bilateral treaty. This precedence effectively sets aside any argument on the non-ability of Palestine to delegate jurisdiction to the Court due to its obligations under the Oslo Accords.

64. The applicability of the 4th Geneva Conventions on the Occupied Palestinian Territory, including Jerusalem, has been affirmed in numerous Security Council and General Assembly resolutions,<sup>78</sup> along with other bodies of the UN, and by the International Committee of the Red Cross (ICRC) and the High Contracting Parties to the Geneva Convention.<sup>79</sup>

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<sup>75</sup> Protocols Additional to the Geneva Conventions of 12 August 1949 (ICRC), art. 85(4)(a). *See also* Jean-Marie Henckaerts and Louise Doswald-Beck, "Customary International Humanitarian Law," *ICRC and Cambridge University Press* 1 (2009), Rule 158.

<sup>76</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949 (Entered into force 21 October 1950), art. 147.

<sup>77</sup> Protocols Additional to the Geneva Conventions of 12 August 1949 (ICRC), art. 85(4)(c)

<sup>78</sup> *See*: UN Security Council Resolution United Nations, S/RES/681, 20 December 1990; General Assembly UN Doc. A/RES/ES-10/2 (May 5, 1997); United Nations, A/RES/ES-10/3, July 15 1997; UN Doc. A/RES/ES-10/4 (November 19, 1997); United Nations, A/RES/ES-10/6, 24 February 1999; United Nations, A/RES/ES-10/10, 7 May 2002; United Nations, A/RES/ES-10/15, 2 August 2004; United Nations, A/RES/64/10, 1 December 2009; United Nations, A/RES/64/92 (19 January 2010).

<sup>79</sup> Conference of States Parties to the Fourth Geneva Convention, experts' meeting on the Fourth Geneva Convention, Geneva, 27-29 October, 1998; Declaration adopted at the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, published in IRRC, No. 847 (2002).

65. In line with Article 4 of the 4<sup>th</sup> Geneva Convention, the Palestinian population are protected persons, defined as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>80</sup> More importantly, any act of occupation or annexation of the territory does not deprive the protected persons of said protection accorded to them by the convention,<sup>81</sup> and according to Article 7 of the Geneva Conventions, “[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.”<sup>82</sup>

66. The Oslo Accords are special agreements between two subjects of international law; this agreement produces limitations on the Palestinian obligation to prosecute grave breaches, many of which have an *erga omnes* character. The ICJ, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, held that Israel violates the *erga omnes* obligation to respect the right of the Palestinian people to self-determination along with other obligations it has under international humanitarian law.<sup>83</sup> The ICJ further recalled the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which rules of humanitarian law applicable in armed conflict “incorporate obligations which are essentially of an *erga omnes* character.”<sup>84</sup> The ICJ identified these obligations to be owned by “states towards the international community as a whole” and “thus all states can be held to have a

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<sup>80</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, para. 4.

<sup>81</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, para. 47 “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”; Shawan Jabarin, *The Occupied Palestinian Territory and international humanitarian law: a response to Peter Maurer International Review of the Red Cross* (2013), 95 (890), 415–428, p. 420.

<sup>82</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, art. 7.

<sup>83</sup> *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory*, para. 155; Ali Reza Hojatzadeh and Hossein Sartipi, “The Innovation in Concept of the Erga-Omnisation of International Law”, *IJHSS* 2, no. 2 (2015): 201; *see also* Geoffrey R. Watson, “The “Wall” Decisions in Legal and Political Context,” *The American Journal of International Law* 99, no. 1 (2005): 6-26.

<sup>84</sup> *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory*, para. 157.

legal interest in their protection.”<sup>85</sup> In light of this, we submit that the obligation to prosecute grave breaches, especially those of *erga omnes* character, takes precedence over any conflicting obligation that arises out of a bilateral treaty.

67. Within the realm of human rights law, the European Court of Human Rights in *Soering vs. The United Kingdom* maintained that “the object and purpose of the [European Convention of Human Rights] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”<sup>86</sup> The ECtHR held that extradition of the applicant to the United States to stand trial for capital murder, would violate Article 3 of the European Convention of Human Rights, even if such extradition *was not explicitly referred* to in the general wording of Article 3.<sup>87</sup> Hence, in similarity, the Geneva Conventions as an instrument to protect people in armed conflict and in times of occupation, should be interpreted as to make its safeguards actually effective. The limitation on the Palestinian state from delegating jurisdiction to the ICC through a bilateral treaty, would violate the obligation of the Palestine to prosecute grave breaches under the Geneva Conventions, hence, rendering it ineffective and non-practical. Such application would defy the object and purpose of the Geneva Conventions, and in a matter of fact, the object and purpose of the Rome Statute as well.

68. Jure Vidmar, in his article “Rethinking Jus Cogens after Germany v. Italy: Back to Article 53?,” makes a similar argument with regards to torture and the prohibition to extradite to states where torture is committed. “This means that international law does not absolutely prohibit extradition to states where torture is commonly practiced [if states make a promise or diplomatic assurances the person would not be tortured].

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<sup>85</sup> Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) Merits, Judgment, (1970) ICJ Reports 3, para 33.

<sup>86</sup> *Soering v. United Kingdom*, 161 Eur. CT. H.R. (ser. A) (1989), para. 87.

<sup>87</sup> *Ibid.*, para. 88; Richard B. Lillich, “The Soering Case,” *The American Journal of International Law* 85, No. 1 (1991): 138.

Consequently, concluding an extradition treaty with a notorious torture jurisdiction is not illegal or automatically void under Article 53 of the VCLT. It is rather that the prohibition of torture may suspend the treaty obligation to extradite (where assurances are not given).”<sup>88</sup>

69. Originally, there was a clearer distinction between the terms “grave breaches” and “war crimes;” however, this distinction was blurred as the meaning and application of grave breaches developed.<sup>89</sup> Consequently, the Rome Statute of the ICC listed grave breaches as a category of war crimes under Article 8(2)(a). Additionally, grave breaches may overlap with other international crimes like genocide, crimes against humanity, and torture.<sup>90</sup> International crimes, such as those codified in the Rome Statute, are of such importance and concern to the international community and give rise to the need for individual criminal responsibility that puts an end to impunity for the perpetrators of these crimes.<sup>91</sup> Given the nature of the crimes within the Rome Statute of the ICC, an argument could be made that carrying out the obligations in the Oslo Accords, of limiting the delegation of Palestinian jurisdiction to the ICC in issues of grave breaches within the Geneva Conventions and the Rome Statute of the ICC, is voided.<sup>92</sup>

70. Notably, the idea of an occupying state concluding a treaty with the occupied state that restricts the occupied state from bringing cases and prosecuting the occupying state’s agents, military personnel and/or citizens, is not new in the international legal

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<sup>88</sup> Jure Vidmar, “Rethinking Jus Cogens after Germany v. Italy: Back to Article 53?,” *NILR* 60 (2013): 11.

<sup>89</sup> Marko Divac O’ berg, “The Absorption of Grave Breaches into War Crimes Law,” *International Review of the Red Cross* 91, no. 873 (2009): 163–83.

<sup>90</sup> Ward Ferdinandusse, “The Prosecution of Grave Breaches in National Courts,” *Journal of International Criminal Justice* 7 (2009): 724-725

<sup>91</sup> Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law*, 100, no. 2 (2006): 318; UNGA, *Preamble of Rome Statute of the International Criminal Court*, 17 July 1998.

<sup>92</sup> Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law* 100, no. 2 (2006): 318 “It has been clear since the Nuremberg trials that conforming to or carrying out domestic law is no excuse for breach of international criminal law; it would seem plausible as well, if unlikely to arise in practice, that a defense based on carrying out international legal obligations, such as those contained in a bilateral treaty, would fail if those obligations contradict the requirements of criminal law. In this respect, norms of criminal law would be given supremacy over other international law in practice.”

realm.<sup>93</sup> For example, the United States restricted Iraqi jurisdiction against its military personnel in Iraq.<sup>94</sup> Hence, the inclusion of such a provision in the Oslo Accords is not a novel notion. However, such limitations in treaties should be viewed as a consequence of occupation, and such consequences should not go beyond its original purpose – that is, to prohibit *national* occupied courts from prosecuting occupier’s agents, and not to prevent delegation of jurisdiction.

### III. CONCLUSION

71. This amicus curiae supports the prosecutor in her opinion that the term territory over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and the Gaza Strip. We submit that the Oslo Accords do not bar the exercise of the Court’s jurisdiction. Specifically, we addressed and maintained that: (1) The absence of enforcement jurisdiction does not mean the absence of prescriptive jurisdiction; (2) A special agreement cannot be concluded in violation of a peremptory norm; and (3) that the obligation to prosecute a grave breach under the Geneva Conventions takes priority over other conflicting obligations which arises out of a bilateral treaty.




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Asem Khalil, Professor of Public Law at Birzeit University

Dated this 16<sup>th</sup> of March 2020

At Ramallah, Palestine.

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<sup>93</sup> Valentina Azarov & Chantal Melonie, “Disentangling the Knots: A Comment on Ambos’ “Palestine, ‘Non-Member Observer’ Status and ICC Jurisdiction””, *EJIL: Talk!*, May 27, 2014, <http://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/> (“It established the Palestinian Authority (PA) as an interim Palestinian local government, and merely granted the PA limited capacities in specific domains of daily life. It is common practice for the foreign military government of an occupied territory to avail itself of a form of local government by the inhabitants of the occupied territory”).

<sup>94</sup> See Article on Jurisdiction in the Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, *available at* <http://www.state.gov/documents/organization/122074.pdf>; *accord* Treaty of Mutual Cooperation And Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1633 (entered into force June 23, 1960) (instituting the similar restrictions on Japanese Jurisdiction over United States Nationals).