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## Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton

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# Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine—A Reply to Michael Newton

Carsten Stahn\*

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## I. INTRODUCTION

It is a pleasure and a privilege to provide a few reflections on Michael Newton's thought-provoking essay on "How the ICC Threatens Treaty Norms." His article marks an important piece of scholarship. It reflects significant concerns about the reach and function of the International Criminal Court (ICC) that merit further attention and explanation in ICC practice. Newton makes a provocative argument. He argues that the ICC might undermine sovereign law enforcement efforts and exceed its powers if it exercises jurisdiction over American forces in Afghanistan or Israeli offenses in the West Bank or the Gaza Strip. This argument is not entirely new. It is part of a broader strand of critique that has been voiced against

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the Court since the entry into force of the Rome Statute.<sup>1</sup> I approach these critiques from a slightly different angle. I would argue that the type of “threats”<sup>2</sup> that he formulates are a sign that the ICC becomes more effective, and that it functions, as it is supposed to work—namely as a system of accountability that induces pressures to investigate and prosecute core crimes.<sup>3</sup>

ICC critique has evolved in stages over the past decade. Initially, the ICC was criticized for jurisdictional overreach in relation to third parties.<sup>4</sup> The United States has led a global campaign to limit the effects of ICC jurisdiction. The major arguments against these concerns have been powerfully addressed in scholarship.<sup>5</sup> In the start-up phase of the Court, the ICC avoided any jurisdictional confrontation. It discarded many of the fears voiced against it by powerful states. It focused on situations with uncontested jurisdictional titles, based on referrals of States Parties, the Security Council (which can refer situations that occur in non-States Parties) or voluntary acceptances of jurisdiction under Article 12 (3) of the Rome Statute (The Statute). Investigations were limited to easy targets: non-Western powers or non-armed groups. This has led to criticisms in relation to under-reach, selectivity, or political bias.<sup>6</sup> The Court was attacked by voices of the Global South for an undue focus on Africa and its reluctance to investigate potential crimes committed by major powers in Iraq or Libya.<sup>7</sup> The ICC justified this approach by citing gravity considerations or resource constraints.

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998), entered into force July 1, 2002, reprinted in 37 I.L.M. 999 [hereinafter Rome Statute].

2. On fears relating to international criminal justice, see Frédéric Mégret, *The Anxieties of International Criminal Justice*, 29 LEIDEN J. INT'L L. 197 (2016).

3. See Carsten Stahn, *Evolution, Revolution or New Culture? The Changing Anatomy of International Criminal Justice (And Some of Its Curiosities Culture)*, 15 INT'L CRIM. L. REV. 1122–37 (2015).

4. On ICC authority and the *pacta tertiis* rule, see Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13 (2001); David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999).

5. See Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003); Gennady M. Danilenko, *ICC Statute and Third States*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOL II 1871 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); Frédéric Mégret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT'L L. 247 (2011); Michael Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*, 64 L. & CONTEMP. PROBS. 67, 70 (2001).

6. See William A. Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545, 549 (2013).

7. For an exploration of this critique, see Carsten Stahn, *Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of 'the Local'*, in CONTESTED JUSTICE: THE

In contemporary practice, the tide is shifting. The Court engages increasingly with the conduct of Major Powers, either based on territorial jurisdiction (e.g., Afghanistan–United States; Georgia–Russia) or the nationality of defendants (e.g., Iraq–United Kingdom). All of these situations are still at a relatively early stage of proceedings. No individuals have been targeted. In certain contexts (e.g., Palestine), it is still uncertain whether there will be any investigations. The ICC will only act if there are no genuine domestic investigations and prosecutions. Affected states have multiple options to challenge ICC jurisdiction. But there are fears that the ICC may threaten established protections and overstep its boundaries.

It is thus increasingly clear that the Court will be criticized for whatever it does.<sup>8</sup> It will be blamed by one constituency if it acts, and by another if it fails to act. I would argue, that this tension is not a “negative,” but a “positive” one.<sup>9</sup>

Michael Newton’s article deserves credit for highlighting some of the difficult dilemmas that arise in the application of international criminal justice in situations where crimes occur on the territory of a State Party to the ICC Statute. The territorial state often faces difficulties to investigate or prosecute, in light of capacity constraints or impediments to exercise jurisdiction over foreign nationals (e.g., SOFAs or agreements under Article 98 of the Statute). At the same time, state practice suggests that there is not always a full and effective follow-up on violations by the state of the nationality of the offender.<sup>10</sup> The crucial question is how such accountability problems should be addressed: through trust in the exercise of jurisdiction of the state of the offender, or the prospect of ICC jurisdiction.

Newton makes a powerful argument in favor of the primacy of domestic jurisdiction, based on bilateral treaty arrangements between the territorial state and the state of the nationality of the offender. Critics would argue that Newton’s argument should be rejected since it would enable states that are not party to the Statute, such as the United States or Israel, to unilaterally preclude the ICC from exercising jurisdiction.<sup>11</sup> The novelty of Newton’s claim lies in

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(Christian de Vos, Sara Kendall & Carsten Stahn eds., 2015).

8. See Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT’L L. 323 (2015).

9. See Carsten Stahn, *More than a Court, Less Than a Court, Several Courts in One?: The International Criminal Court in Perspective*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT lxxxiii (Carsten Stahn ed., 2015).

10. In the area of peace operations, several proposals have been made to ensure that troop-contributing countries hold peacekeepers accountable for crimes committed during UN peacekeeping operations. See Prince Zeid Ra’ad Zeid al-Hussein (Secretary-General’s Special Advisor), *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, ¶ 27, U.N. Doc. A/59/710 (Mar. 24, 2005).

11. See Alain Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 981, 995 (2010); Yael Ronen,

the fact that he challenges ICC jurisdiction from the perspective of treaty law and the theory of delegation.<sup>12</sup> He claims that the ICC cannot exercise jurisdiction in cases where the State Party had “contracted out” certain types of jurisdiction at the time of accession to the Statute. He invokes the old Latin maxim from property law “*nemo dat quod non habet*” to support this claim.

I would argue that this claim merits differentiation. I will focus on three key issues. My first concern is that Newton misrepresents the foundation of ICC authority. He derives ICC jurisdiction entirely from theories of delegation, while disregarding alternative universalist foundations. Although it might be politically sensitive for the ICC to exercise jurisdiction over nationals of non-States Parties in contexts such as Afghanistan or Palestine, this option is not necessarily precluded by international law. Second, Newton overstretches the implications of the *nemo dat quod non habet* doctrine. I would argue that the conflict that Newton describes raises an enforcement problem, rather than an authority problem. A closer distinction needs to be drawn between “prescriptive jurisdiction” and “enforcement jurisdiction.” A contractual arrangement of a territorial entity with a third state, such as a SOFA, limits the exercise of jurisdiction (i.e., enforcement). But it does not necessarily extinguish the prescriptive jurisdiction of that entity (i.e., the general power to assert jurisdiction). Third, I would argue that the situations in Afghanistan and Palestine pose different problems from the perspective of the *nemo dat quod non habet* argument. They must be more closely distinguished.

#### A. Universalist v. Delegation-Based Foundations of ICC Jurisdiction

Newton’s starting point is compelling. ICC authority is grounded in state consent. The Statute is designed to strengthen domestic jurisdiction. Many agree that it should ideally be interpreted in harmony, rather than in conflict with other treaties. Article 98 of the Statute confirms the intention of the drafters to limit legal conflicts between the application of the ICC Statute and other international agreements. But the conclusion that Newton draws, namely that obligations under bilateral agreements should prevail over ICC’s jurisdiction, is open to challenge.<sup>13</sup>

The ICC Statute is a special type of multilateral treaty. The fundamental premise of the Statute goes beyond protection of

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*Israel, Palestine and the ICC—Territory Uncharted but Not Unknown*, 12 J. INT’L CRIM. JUST. 7, 23–24 (2014).

12. For previous discussions of the delegation theory in relation to Palestine, see Eugene Kontorovich, *Israel/Palestine—The ICC’s Uncharted Territory*, 11 J. INT’L CRIM. JUST. 979, 989–92 (2013); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT’L CRIM. JUST. 329, 331–33 (2010).

13. See Ronen, *supra* note 11, at 21–24.

sovereignty and state interests. It is geared at the protection of individuals and the establishment of a system of justice. This is reflected in the preamble in which States Parties express their commitment to “guarantee lasting respect for and the enforcement of international justice.”<sup>14</sup> The treaty is thus more than the sum of its parts.<sup>15</sup> It affirms the obligation of states, namely “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>16</sup> It is grounded in the idea of a *jus puniendi*.<sup>17</sup> It makes sovereignty answerable. This is reflected in the regime of complementarity. Complementarity is not a mere protection of state sovereignty. It does not mean primacy of state jurisdiction, in the sense of a right, as implied by Newton, but the “primary responsibility” of states. It is more in line with the idea of “sovereignty as responsibility.”<sup>18</sup> The exercise of domestic jurisdiction is tied to the ability and willingness to deliver justice. This responsibility needs to be taken into account in the assessment of treaty regimes. States Parties entrusted the Court to have a final say over certain issues, including the question whether or not the Court is entitled to exercise jurisdiction. Conflicts of jurisdiction are no longer bilateral matters but subject to the legal order of the ICC, and its methods of treaty interpretation, in the relationship between the Court and its Parties.

Newton submits that ICC authority is exclusively derived from an act of delegation, which requires two elements: the power of the affected state to exercise jurisdiction, and a delegation of that power to the ICC. But this is not the entire truth. The delegation theory is not the only model to explain ICC jurisdiction.<sup>19</sup> According to an alternative model, ICC jurisdiction is not derived from the territorial or national jurisdiction of a specific state,<sup>20</sup> but grounded in a broader entitlement of states and the international legal community under international law. This theory posits that the normative justification

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14. Rome Statute, *supra* note 1.

15. See Mégret, *supra* note 5, at 260.

16. Rome Statute, *supra* note 1.

17. See Kai Ambos, *Punishment Without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law*, 33 OXFORD J. LEGAL STUD. 293 (2013).

18. See generally Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT'L L. 99 (2007). On complementarity as responsibility, see Rod Rastan, *Complementarity: Contest or Collaboration?*, in COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 83, 97–88 (Morten Bergsmo ed., 2010).

19. As aptly noted by Yuval Shany, the “actual reach of the ICC depends on the combined effect of its delegation-based and universalistic jurisdictional powers. Cutting one ‘branch’ of jurisdiction would leave the ICC with truncated capabilities for fulfilling its mandate.” Shany, *supra* note 12, at 337.

20. On the “universalistic view,” see Shany, *supra* note 12, at 331.

of punishment is independent of the will of the respective sovereign.<sup>21</sup> It receives support from the fact that individuals face direct individual criminal responsibility under international law for international crimes.<sup>22</sup> States exercise this jurisdiction on behalf of the international community.<sup>23</sup> According to this logic, ratification of the Statute does not necessarily establish a title for ICC jurisdiction. It rather authorizes, as Antonio Cassese put it, “the ICC to substitute itself for a consenting state, which would thus waive its right to exercise its criminal jurisdiction.”<sup>24</sup> Following this reading, the authority of the ICC to exercise jurisdiction does not depend on a corresponding domestic jurisdictional title of the state. The act of accession to the Statute merely activates the power of the ICC to exercise a jurisdiction grounded in international law. Jurisdictional constraints encountered by the acceding state do not necessarily affect the jurisdictional title of the ICC.

### B. *Limits of the Nemo Dat Quo Non Habet Doctrine*

A second weakness of Newton’s argument is that he overstretches the application of the *nemo dat quo non habet* doctrine.

#### 1. Limits of the Symmetry Requirement

Newton argues that a State Party must have jurisdictional authority at the time of the alleged offense. He implies that there must be a symmetry between ICC jurisdiction and domestic jurisdiction since the former derives from the latter. This assumption is questionable. International criminal jurisdiction is typically meant to complement certain gaps in domestic jurisdiction. It is misleading to assert that the ICC can only exercise those jurisdictional titles that a state holds in its domestic setting. The jurisdictional titles of the ICC under Article 12 reflect archetypes of state jurisdiction. But, as correctly noted by Rod Rastan, “the Court does not have to establish the existence of matching legislation at the national level before its

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21. International criminal justice differs from domestic criminal law. One of its specificities is that the State is not always “a defender of law and order,” but “the principal perpetrator of crimes.” See Lawrence Douglas, *Truth and Justice in Atrocity Trials*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 34, 36 (William Schabas ed., 2016).

22. Note that even the Nuremberg Tribunal could be conceptualized in different ways, i.e. as an entity acting on behalf of the international community or as an entity with delegated national jurisdiction of the Allied Powers. See Scharf, *supra* note 5, at 103–09.

23. In particular, the exercise of universal jurisdiction is based on the idea that states act as trustees of humankind based on the nature, i.e. the gravity of the crime.

24. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 160 (1999).

jurisdiction can be exercised in a particular case.”<sup>25</sup> Such a reading would deprive international criminal justice of much of its function. The very rationale of accession to the Rome Statute may lie in the prospect that it offers greater options of prescription and enforcement jurisdiction.

The idea that there must be exact symmetry between ICC jurisdiction and domestic jurisdiction goes against the rationale of complementarity. Article 17 of the Statute foresees that a State may be found inactive or unable because it cannot prosecute a certain crime. This may arise, for instance, if that State has no domestic prohibition for a particular conduct. It would be strange if the ICC, which is supposed to fill the gap left by State inaction, would itself be deprived of competence because of the same domestic deficiency.

The more plausible reading is that the ability of the ICC to exercise jurisdiction is grounded in the competence of the state to adhere to treaties, rather than delegation of equivalent jurisdictional titles by the state. Any other reading would lead to absurd results. It would imply that the ICC regime is subject to constant uncertainty, since it derives authority from the domestic realm. The ICC would lose its own jurisdiction, when a state loses its title to jurisdiction. Such a vision was rejected by States Parties. The overwhelming majority of states during the negotiations accepted the idea of “automatic jurisdiction.”<sup>26</sup> Consent to the acceptance and exercise of jurisdiction were integrated into one act. This means that the ICC is automatically entitled to exercise jurisdiction over the core crimes once a state becomes a party to the Statute. No additional consent or parallelism of jurisdictional titles is necessary.

Such an understanding is fully consistent with the *nullum crimen sine lege principle* (Art. 22 of the Statute). Human rights law does not require the ICC to verify whether a person can be tried in his or her own domestic court, even if ICC proceedings concern nationals of third-party states.<sup>27</sup> This follows from the international crime exception in Article 15 (2) of the International Covenant on Civil and Political Rights, which provides a title for “trial and punishment of any person” for conduct that is “criminal according to the general principles of law recognized by the community of nations.”<sup>28</sup>

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25. Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 CRIM. L. F. 1, 20 (2012).

26. See William Schabas, *Article 12: Preconditions to the Exercise of Jurisdiction*, in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 277, 280–82 (William Schabas ed., 2010).

27. See Danilenko, *supra* note 5, at 1884.

28. International Covenant on Economic, Social and Cultural Rights, Art. 15(2), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.



## 2. The Distinction Between Prescriptive Jurisdiction and Enforcement Jurisdiction

Newton's argument is further open to critique since it pays insufficient attention to the distinction between prescriptive jurisdiction and enforcement jurisdiction.

Jurisdiction is typically divided into two types: the jurisdiction to prescribe and jurisdiction to enforce.<sup>29</sup> The first one concerns the capacity of a state to "make its law applicable to the activities, relations, or status of persons, or the interests of persons in things."<sup>30</sup> The second one governs the power of a state to "to enforce or compel compliance or to punish noncompliance with its laws or regulations."<sup>31</sup> Jurisdiction to enforce is typically territorial, while jurisdiction to prescribe can be extraterritorial.

A strong argument can be made that the bilateral jurisdictional treaty regimes that Newton discusses (e.g., SOFAS, Oslo II) limit the jurisdiction to enforce, but not the jurisdiction to prescribe.<sup>32</sup> This means that the respective state would retain the authority to vest the ICC with jurisdiction, although it is limited in its own jurisdiction to enforce. This argument is in line with general jurisdictional theories under international law.

As Yuval Shany rightly points out:

The right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory.<sup>33</sup>

Any other conception would have detrimental consequences for international law. It would imply that a state that is unable to exercise jurisdiction over specific parts of its territory would lose its ability to investigate or prosecute offenders or to seize an international jurisdiction with the power to try offenders. This would create significant accountability gaps.

The question as to whether the respective state (e.g., Afghanistan, Palestine) has the capacity to delegate jurisdiction to

29. See Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 736–37 (2004).

30. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (AM. LAW INST. 1987).

31. *Id.* § 401(c).

32. See Kai Ambos, *Palestine, UN Non-Member Observer Status and ICC Jurisdiction*, EJIL: TALK! (May 6, 2014), <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/> [https://perma.cc/G56L-2ZK7] (archived Feb. 20, 2016); Ronen, *supra* note 11, at 21–22.

33. See Shany, *supra* note 12, at 339.

the ICC is not a matter that is governed by the bilateral agreements. It depends on the objective status of the territory.<sup>34</sup>

Sovereignty typically creates a presumption in favor of territorial jurisdiction. In the *Lotus* case, the Permanent Court of International Justice famously held that the “title to exercise jurisdiction rests in its sovereignty.”<sup>35</sup> Bilateral immunity agreements that award exclusive jurisdiction over specific categories of persons to another state do not extinguish the general capacity of the contracting state to allocate jurisdiction to another entity. If anything, such agreements demonstrate the inherent or pre-existing competence of the State to exercise such jurisdiction. Delegation merely constrains the exercise of domestic jurisdiction. The general prescriptive jurisdiction in relation to international crimes cannot be contracted out.

This understanding is reflected in the structure of the ICC Statute. It addresses conflicts with bilateral agreements not in Part 2 of the Statute, which deals with jurisdictional issues, but in Part 9, which governs cooperation. The fact that Article 98 forms part of Part 9 of the Statute confirms the theory that drafters viewed conflicting obligations under SOFA arrangements as an enforcement, rather than a jurisdictional problem. As it was correctly noted elsewhere: “The *raison d’être* for Article 98 is recognition that the Court has and is exercising jurisdiction with respect to a particular person sought.”<sup>36</sup>

Article 98 deals with the question to what obligations are States Parties bound.<sup>37</sup> It regulates both the obligations of States and the conduct of the ICC towards such a state. However, Article 98 does not govern the way in which the ICC exercises its jurisdiction. ICC jurisdiction is governed by Article 12 and Article 27, which state that immunities shall not bar the exercise of jurisdiction.<sup>38</sup> It is irrelevant to ICC jurisdiction whether there is an Article 98 agreement. Article 98 is only relevant to identifying whether there is a surrender obligation to which that particular State can be held accountable.<sup>39</sup>

If a state has conferred jurisdiction to the ICC, despite a previous bilateral treaty arrangement limiting domestic jurisdiction, the resolution of conflicting obligations becomes an issue of complementarity and cooperation. The ICC is not bound by the agreement of the State Party. It does therefore not have to apply the

34. See Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip*, 8 J. INT’L CRIM. JUST. 3, 19 (2010).

35. *SS Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 19.

36. Rod Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 141, 162 (Carsten Stahn ed., 2015).

37. Article 98 is placed in Part 9 which deals with the obligations of States Parties to cooperate fully. See Article 86 of the Statute.

38. See Rome Statute, *supra* note 1, art. 27 (2).

39. See Article 98 (The “Court may not proceed with a request for surrender which . . .”).

rule *lex specialis derogat lex generalis*. It will instead have to assess whether there are any domestic investigations or not. In case of inaction, the ICC is generally competent to proceed with its own investigations and prosecution.<sup>40</sup> Relevant states have the option to challenge admissibility under Article 19 of the Statute. The options of ICC enforcement depend on the interpretation of the scope of Article 98 (2),<sup>41</sup> which limits the ability of the Court to request the arrest and surrender of a person.

### C. Situational Differences

I would agree with Newton that the ICC has not been very explicit in explaining its reasoning for jurisdiction in relation to Afghanistan and Palestine. Both situations are under preliminary examination by the Prosecutor. This assessment precedes any investigations. It encompasses different phases: initial assessment of all information on alleged crimes received under article 15 (“Phase 1”), analysis of jurisdiction (“Phase 2”), analysis of complementarity and gravity (“Phase 3”) and interest of justice considerations (“Phase 4”). Palestine is currently at Phase 2, Afghanistan at Phase 3.<sup>42</sup> The Office of the Prosecutor (OTP) analysis engages *inter alia* with potential crimes committed by Israeli nationals<sup>43</sup> and U.S.<sup>44</sup> armed forces. But it does not set out an explicit basis for jurisdiction.

In my view, the reasoning needs to differentiate between the two contexts. The case of Afghanistan is rather straightforward. Afghanistan is a sovereign state. It has a jurisdictional title inherent in statehood. The jurisdiction to prescribe was not contracted out by any SOFA. This implies that the *nemo dat quo non habet argument* does not cause any conflict in relation to ICC jurisdiction.

40. See Rome Statute, *supra* note 1, art. 17(1); Prosecutor v. Katanga, ICC-01/04-01/07 OA8, Appeals Chamber Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009) (“[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.”).

41. On the controversial issue of whether Article 98(2) covers only pre-existing or also “new” SOFA agreements, see Claus Kress & Kimberly Prost, *Article 98, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 2144–46 (Otto Triffterer & Kai Ambos eds., 3d ed. 2015).

42. Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities* (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [<https://perma.cc/5QNL-ZRSY>] (archived Feb. 20, 2016).

43. *Id.* ¶¶ 63 et seq. (including Gaza, the West Bank and Jerusalem).

44. *Id.* ¶ 120 (relating to the bombardment of the *Médecins Sans Frontières* (MSF) hospital in Kunduz).

The Palestinian situation, however, is more far more complex.<sup>45</sup> As noted earlier, I would defend the view that ICC jurisdiction can be established by virtue of the ability of Palestine to adhere to treaties as a state, irrespective of whether Palestine is able to exercise such jurisdiction domestically under the Oslo accords. But the argument becomes more difficult if one takes the view that ICC jurisdiction can only be asserted through a delegation of jurisdiction that matches a domestic title, as claimed by Newton. Then the decisive question is who delegated what to whom.

Israel might claim that it delegated jurisdictional authority to an entity created by the Oslo accord, called the “Palestinian Authority,” and that the Palestinian Authority could not vest the ICC with criminal jurisdiction over Israeli citizens and territorial jurisdiction over “Area C” in the West Bank since it does not itself possess such jurisdiction under the Oslo Accords. Accordingly, the Palestinian Authority could only transfer criminal jurisdiction with respect to the conduct of its own nationals or other non-Israelis.<sup>46</sup> Israel might invoke Article 98 of the ICC Statute to support the view that international crimes can be excluded from the jurisdiction of the ICC through a bilateral arrangement.<sup>47</sup>

Palestine might claim that it always had a legal title of its own that dates back to the Mandate period,<sup>48</sup> and that this title existed at the time of Oslo, even if it was not recognized by Israel. It might claim that this title was recognized in UN practice, at the latest at the date of the UN vote in the General Assembly on 29 November 2012, which granted Palestine non-member observer State status in the United Nations.<sup>49</sup> It could argue that Oslo does not extinguish this title since it only provides a temporary waiver of criminal jurisdiction over Israeli nationals under Oslo.<sup>50</sup> ICC authority would thus be grounded in a genuine Palestinian title of jurisdiction. A further argument could be made that the exclusion of Israelis from Palestinian criminal jurisdiction does not apply to certain international crimes, since conduct proscribed under the ICC Statute is of international concern and gives rise to pre-existing treaty

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45. For an account, see Office of the Prosecutor, International Criminal Court, *Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements* (May 3, 2010), <https://www.icc-cpi.int/NR/rdonlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/282852/PALESTINEFINAL201010272.pdf> [<https://perma.cc/8H44-S62V>] (archived Feb. 20, 2016).

46. See Kontorovich, *supra* note 12, at 989–991.

47. See Shany, *supra* note 12, at 340 n.40.

48. See generally John Quigley, THE STATEHOOD OF PALESTINE 3–114 (2010); *Situation in Palestine*, *supra* note 45, ¶¶50–52.

49. See General Assembly Resolution 67/19 (Status of Palestine in the United Nations), A/RES/67/19, 4 December 2012, ¶2.

50. See Ronen, *supra* note 11, at 22–23.

obligations, including under the grave breaches of the Geneva Conventions.<sup>51</sup> Palestine might further submit that conflicts between ICC jurisdiction and any pre-existing third party rights of Israel under Oslo should be settled under the cooperation regime, rather than jurisdiction,<sup>52</sup> and that Article 98 might not cover restrictions under Oslo II.<sup>53</sup>

The *nemo dat quo non habet argument* would thus have some relevance under this premise. But the discussion would be more complex than highlighted by Newton in his argument.

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51. See Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute, ¶ 36 (Dec. 14, 2009), [https://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281874/OTPAIHaq\\_positionpapericc14December20091.pdf](https://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281874/OTPAIHaq_positionpapericc14December20091.pdf) [<https://perma.cc/YY3Q-V65D>] (archived Feb. 20, 2016) ("The exclusion of Israelis from PA jurisdiction as provided for in the Interim Agreement cannot legitimately be considered as extending to the international crimes of war crimes and crimes against humanity as to do so would be incompatible with international law.").

52. See Ambos, *supra* note 32.

53. See *supra* note 41.