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**International Criminal Court's Territorial and Temporal  
Jurisdiction in the Situation of State of Palestine**

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**This Thesis Was Submitted in Partial Fulfillment of the  
Requirements for the Master Degree in International Law and  
Diplomacy**

**Palestine, 8/2025**

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## **Thesis Approval**

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## **Declaration**

I declare that, except where explicit reference is made to the contribution of others, this thesis is substantially my own work and has not been submitted for any other degree at the Arab American University or any other institution.

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## **Dedication**

I want to express my thanks to all who have contributed to the success of this thesis in many ways.

I dedicate my dissertation work to my parents, brother, sister, and fiancé for giving me all the support, appreciation, and encouragement.

Thankful for all my family and friends who have supported me throughout the process.

I sincerely appreciate my supervisor, Dr. Raed Abubadawia, for his guidance and support throughout my academic years and research.

Finally, I would like to acknowledge and thank my professors and the division for all their support throughout my academic years.

Natali Mahmoud Ahmed Musleh

## **Acknowledgments**

I would like to express my sincere appreciation to my main supervisor, Dr. Raed Abubadawia, for his guidance and support throughout this master's thesis.

I also acknowledge the examination committee members, Dr. Sani Abu Amro and Dr. Isam Abdeen, for their valuable comments and time.

My thanks are extended to the Faculty of Graduate Studies and the Department of Legal Science at The Arab American University for their academic support.

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**Dr. Raed Abubadawia, Dr. Sania Abu Amro, Dr. Isam Abdeen**

## **Abstract**

In 2012, State of Palestine was granted a non-member observer status in the United Nation by a General Assembly resolution 67/19, this had legal effects such as entering international organizations and becoming a party of various international conventions. Palestine became a state member in Rome Statute in 2015, and accepted the jurisdiction of the International Criminal Court according to Article 12(3) over alleged crimes committed on the Palestinian Territories. In 2019, the ICC Prosecutor disclosed the conclusion of the preliminary examination of the situation in Palestine after determining that the situation meets all the criteria but requesting a ruling over the scope of the Court's jurisdiction in the situation in Palestine. In 2021, the Pre-Trial Chamber I ruled that the Court's jurisdiction concerning Palestine includes the occupied territories of the West Bank, Gaza and East Jerusalem, all of which have been under Israeli control since 1967. However, the Chamber explained that this ruling did not address whether Palestine meets the criteria for statehood under international law or the ongoing dispute between Palestine and Israel. The focus of the Chamber's decision was solely to outline the scope of the Court's jurisdiction in this matter. Therefore, the Office is obliged to open an investigation in the situation in Palestine over the alleged crimes according to the Rome Status, and the Office may expand or modify the investigation as long as it's linked to the situations. The thesis will concentrate over what are the legal basis of the decision made by the International Criminal Court by the Pre-Trial Chamber I, and the effect of focusing on the General Assembly Resolution 67/19 in determining the status of Palestine as a state since that multi countries and non-governmental organization expressed during the preliminary examination that Palestine is not considered a state, and Israel's status as a non-state party to the Rome Statute may limit the International Criminal Court's jurisdiction over any crimes committed in its territories.

Keywords: International Criminal Court (ICC), Rome Statute, General Assembly Resolution 67/12, Pre-Trial Chamber I.

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## **Introduction**

The situation in Palestine started a long time ago, specifically since General Assembly Resolution 181 in 1947, which divided Palestine into two territories, a territory for Palestine and a territory for Israel, and Jerusalem was under international protection. Since then, there was no clear territory for Palestine, due to multi reasons that will be addressed later, which is now and issue for the International Criminal Court to determine its jurisdiction in State of Palestine, so that Palestine can file cases in the International Criminal Court for the committed crimes in the State of Palestine. Later, in the preliminary examination, States, international organizations, and civil societies had arguments about this situation, which were submitted to the ICC in the preliminary examination period. Some had raised the issue that Israel is a non-member of the ICC.

The territorial situation of Palestine has been in question for many decades, and now it's an essential question for the International Criminal Court to determine what the territorial jurisdiction of the Court in the situation of the State of Palestine is, and not only the territorial jurisdiction but also the temporal jurisdiction. The thesis's main question is the legal basis of determining the territorial and temporal jurisdiction of the Court, and how the legal basis may affect the temporal jurisdiction of the case of Palestine.

The main research question was divided into sub-questions that this research will look into:

1. What is the legal basis for determining the territorial jurisdiction of the ICC in the situation of the State of Palestine?
2. What is the legal basis for determining the temporal jurisdiction of the ICC in the State of Palestine?
3. How did General Assembly Resolution 67/19 affect the Pre-Trial Chamber's Decision, and why did the Pre-Trial Chamber focus only on the 67/19 General Assembly Resolution?
4. What is the international community's position on the Pre- Trial request on the situation in Palestine (States, institutions, civil society, intergovernmental and non-governmental organizations)?

5. How did the territorial jurisdiction of the ICC affect the temporal jurisdiction in the case of Palestine?

The importance of the research is reflected in understanding what is the International Criminal Court's jurisdiction in the situation of State of Palestine, according to the international resolutions and treaties, to find out what is the territorial and temporal jurisdiction of the ICC, and to acknowledge the basis of the situation that will help the Court to carry out a decision in this Case. As the objective is to determine the International Criminal Court territorial and temporal jurisdiction in the case of Palestine, so that Palestine can file cases in the Court for the alleged crimes happened or will happen by Israel, and if Israel not being a member of the Court will affect that, and to understand the challenges and the changes that might occur on the international level for Palestine due to determining the jurisdiction of the ICC.

The scope of the research is legal; it is limited to the legal framework of the International Criminal Court, especially the Rome Statute that addresses the jurisdiction of the Court, in particular Articles 12, 13, and 19. Also, the United Nations resolutions, such as General Assembly Resolutions and Security Council Resolutions, have addressed the territory of Palestine throughout the years. The International Court of Justice's advisory opinions regarding Palestine had an essential effect on the Palestinian-Israeli conflict regarding the territory and borders of the states. All these legal frameworks are necessary to determine the basis on which the Pre-Trial Chamber relies in its decision.

Previous studies are essential for any research to establish the basis of the research; thus, every study looks into the subject matter from a different point of view and discusses different questions. So, it important to establish some of the previous studies as Literature reviews that had a contribution to the thesis.

## **1. The ICC and Palestine: Breakthrough and End of the Road? By Pearce Clancy and Richard Falk<sup>1</sup>**

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<sup>1</sup> Pearce Clancy and Richard Falk, (2021), The ICC and Palestine: Breakthrough and End of the Road? Journal of Palestinian Studies.

This paper discusses the International Criminal Court's role in the Israeli-Palestinian dispute. It discussed the ICC's decision that it has the authority to investigate Israeli actions in the West Bank and Gaza Strip, and the challenges and limitations the ICC might face, mainly due to the political pressure from powerful countries such as the United States as they highlighted the significance of this ruling as a potential step toward holding Israeli officials accountable for their actions. Lastly, it emphasized the importance of this ruling in the broader context of the Palestinian struggle for recognition and rights.

**2. The Decision on the situation in Palestine issued by Pre-Trial Chamber I of the International Criminal Court: Reflecting on the Legal Merits. By Rachel Sweers<sup>2</sup>**

This paper analyzes the Prosecutor's request to the pre-Trial Chamber to affirm the Court's territorial jurisdiction to conclude an investigation. It looks into the legal basis and merits of the Chamber's decision and analyzes how the Chamber concluded. Also, it analyzes the Partially Dissenting and Partially Separate Opinions of the Judges. Most importantly, it analyzes the decision that the Court concluded.

**3. Palestinian Membership of the ICC: A Preliminary Examination by Sofie Hogestol<sup>3</sup>**

This paper discusses the legal issues raised by Palestine's membership in the International Criminal Court. The author discusses the complexities of international law and politics surrounding the Israeli-Palestinian conflict and the significance of the ICC's involvement in addressing the Israeli-Palestinian

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<sup>2</sup> Rachel Sweers, (2021), The Decision on the situation in Palestine issued by Pre-Trial Chamber I of the International Criminal Court: Reflecting on the Legal Merits. Hungarian Yearbook of International Law and European Law, volume 9, no.3.

<sup>3</sup> Sofie Hogestol, (2015), Palestinian Membership of the ICC: A Preliminary Examination, Nordic Journal of Human Rights, Volume 3, No. 3.

situation. The paper also delves into the details of the ICC's investigation in Palestine and the legal basis of the ICC's jurisdiction in Palestine.

Those papers were essential in my research. However, my paper is slightly different and more thorough and detailed, as it has gone through the critical bases of establishing the territory of Palestine through the international resolutions and the International Court of Justice advisory opinions regarding Palestine and the Oslo Accords. Later, we analyzed the Court's temporal jurisdiction in Palestine, the decision of the Pre-Trial Chamber I, and the legal basis of the decision. We concluded the paper by looking into the challenges that may arise with such a decision.

Thus, this study seeks to adopt an analytical descriptive research methodology. This research will describe and analyze some Rome Statute articles relating to the jurisdiction of the International Criminal Court to conclude the legitimacy of the jurisdiction of the Court in the situation of the State of Palestine—General Assembly Resolution 67/19, which the Court had based its decision on this resolution. Also, it will analyze different United Nations Resolutions and the Oslo Accords, which addressed the territory of Palestine, especially the West Bank, including East Jerusalem and the Gaza Strip. Most importantly, it will describe and analyze the legal basis and the merits upon which the Court relied to decide on the situation of Palestine.

Thus, the thesis is divided into two chapters. The first chapter will look into the legal status of the Palestinian territories according to the United Nations Resolutions, especially the General Assembly and Security Council Resolutions, and the International Court of Justice advisory opinion regarding Palestine. Lastly, it will examine the effectiveness of the Oslo Accords in this case.

As the Second Chamber, it looked at the Situation of Palestine in the International Criminal Court and the decision taken by the Pre-Trial Chamber I. The chapter looked into the procedural history of Palestine becoming a Party to the Rome Statute and the case's procedural history in front of the Court. After that, the chapter addressed all the submissions made by the States, International Organizations, and *amici curiae* regarding the situation in Palestine, according to the Court's request. Lastly, it looked

into the International Criminal Court's decision on its jurisdiction over Palestine and the potential challenges that might arise from that decision.

# **Chapter One: Legal status of the Palestinian territory according to international law resolutions and international organizations**

The status of the Palestinian territory has long been a contentious issue in international law. Various resolutions by the United Nations Bodies attempt to address the complex geopolitical situation in Palestine. Thus, this chapter will thoroughly examine the geopolitical situation in the Palestinian Territories since 1947.

## **1.1 United Nations Resolutions Regarding Palestine**

The geographical situation in Palestine started with the United Nations (UN), where the General Assembly divided Palestinian territories to create two independent states, one for the Palestinian People and one for the Jewish People, and Jerusalem was under a special International Regime.<sup>4</sup> Later, throughout the years, many resolutions were adopted related to the geographical situation in Palestine. In the following two parts, we will look into the main resolutions adopted by the United Nations' main bodies associated with the Palestinian geographical situation.

### **1.1.1 General Assembly Resolutions**

Before 1947, Palestine was under the mandatory Power of the British Administration within the territories of Palestine.<sup>5</sup> The United Kingdom transferred the situation of Palestine to the General Assembly of the United Nations in 1947, as they would be evacuating the Palestinian Territories in 1948.<sup>6</sup> In November of 1947, the Resolution 181 (II) was adopted by the General, which adopted the "UN Partition Plan" to create two states, an Arab State and a Jewish State, joined together by an economic union.<sup>7</sup>

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<sup>4</sup> General Assembly Resolution 181 (II), A/RES/181(II), 1947.

<sup>5</sup> Mandate for Palestine, League of Nations, C.529. M.315. 1922 VI.

<sup>6</sup> Origins and Evolution of the Palestine Problem: 1917-1947 (Part I), United Nation, <https://www.un.org/unispal/history/>

<sup>7</sup> General Assembly Resolution 181 (II), A/RES/181(II), 1947

Jerusalem will be under a special international regime that the United Nations Trusteeship Council will administer for a period of 10 years.<sup>8</sup>

In 1948, David Ben-Gurion announced the establishment of the State of Israel. This declaration prompted immediate military action by surrounding Arab states against the newly declared nation. The ensuing conflict, known as the Arab-Israeli War of 1948, resulted in considerable territorial changes, where Israel expanded its territory beyond the partition plan of the UN.<sup>9</sup> Thus, the General Assembly had considered taking further action on the situation in Palestine due to the war. Still, it didn't take any resolution about the geographical situation in Palestine. Still, the General Assembly called upon the situation in Jerusalem under a special regime<sup>10</sup> and asked the Security Council to take measures according to the Charter regarding the situation in the Palestinian Territories, especially the geographical situation.<sup>11</sup>

Later, due to the 1967 War in Palestine between Israel and the surrounding Arab States ( Egypt, Jordan, and Syria) that led for Israel to occupy more of the Palestinian Territories and even some territories of the surrounding states such as the Syrian Golan, some of the Sinai Peninsula area, West Bank and Gaza.<sup>12</sup> Due to the war, Israel had occupied East Jerusalem; the General Assembly had adopted a resolution that considered the measures embraced by Israel to modify the status of Jerusalem invalid and that Israel must rescind all measures that were taken to alter the situation in Jerusalem.<sup>13</sup>

Throughout the years, many resolutions have condemned the Israeli occupation of the Palestinian Territories. A General Assembly Resolution had denounced the ongoing presence of the Israeli military in the occupied territories over the course of the 1976 Six-Day War, which encompassed the West Bank, Gaza Strip, and East Jerusalem, and

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<sup>8</sup> General Assembly Resolution 181 (II), PART (III), 1947.

<sup>9</sup> The Declaration of the Establishment of the State of Israel, 1947.

<https://www.gov.il/en/pages/declaration-of-establishment-state-of-israel>

<sup>10</sup> General Assembly Resolution 303 (IV), A/RES/303(IV), 1949.

<sup>11</sup> General Assembly Resolution 194 (III), A/RES/194(III), 1948.

<sup>12</sup> Naksa 67. When Israel defeated Arabs in 6 days, Aljazeera, 2024.

<https://www.aljazeera.net/encyclopedia/2016/6/5/النكسة-إسرائيل-أسرائيل>

<sup>13</sup> General Assembly Resolution 2253, A/RES/2253, 1976.

also called for an immediate withdrawal from these areas in pursuit of establishing a Palestinian State.<sup>14</sup>

General Assembly Resolution had referred that the borders between Palestine and Israel must be according to pre-1967 borders, which is referred to also as "Green Line", this line refers to the demarcation line between Israel and the neighbor Arab States ( Jordan, Egypt, Syria, and Lebanon), thus they signed armistice agreements, the reason behind these agreements is to establish cease-fire lines to prevent further wars.<sup>15</sup> These lines were never meant to be permanent; they were armistice lines and a base for future negotiations between the States, especially for Palestine.

However, after the Six-Day War in 1976, Israel found itself occupying more land in the West Bank, Gaza Strip, and East Jerusalem, which made an obstacle for peace efforts between Palestine and Israel, especially with the expansion of the Israeli settlements.<sup>16</sup>

The General Assembly had consistently highlighted, through different resolutions, the issue of Israeli settlements in the Occupied Palestinian Territory, which includes East Jerusalem, and the occupied Syrian Golan, so the General Assembly had emphasized through resolutions that the Israeli settlement activities that involves taking over the power of the Palestinian Territories, expelling Palestinians, demolition of houses, and other Israel's actions against the Palestinian civilians in the occupied territories are inconsistent with the international law, violates international humanitarian law, relevant United Nation resolutions, and breaches the agreements reached between the parties.<sup>17</sup>

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<sup>14</sup> General Assembly Resolution 36/226, A/RES/36/226, 17 December 1981.

<sup>15</sup> Green Line, United Nation Department for General Assembly and Conference Management. <https://unterm.un.org/unterm2/en/view/UNHQ/7D6F452F75A653B2852569FA00005347>

<sup>16</sup> Owda, Reham. "How Israeli Settlements Impede the Two-State Solution", 2023. <https://carnegieendowment.org/sada/2023/03/how-israeli-settlements-impede-the-two-state-solution?lang=en>

<sup>17</sup> General Assembly Resolution 74/88, A/RES/74/88, 13/12/2019.

As regards the city of Jerusalem, the General Assembly has adopted multiple resolutions throughout the years regarding changes in its demographic composition, especially after the Israeli military occupied East Jerusalem in 1976. The General Assembly stated through various resolutions, that any actions changing the character, status, or population of the City of Jerusalem have no legal standing and considered null and void.<sup>18</sup>

General Assembly Resolutions throughout the years have proven that the international community is united in condemning all Israeli actions and the Israeli occupation, which have led to many changes that will be addressed in the next part.

### **1.1.1.1 Membership of the State of Palestine in the United Nations**

The State of Palestine has a complex and unique status within the United Nations system. On November 29, 2012, the UN General Assembly voted to grant Palestine a non-member observer state status. Majority of countries, 138 to be exact, voted in favor, with only nine against and 41 abstentions. It was granted non-member observer state status by the UN General Assembly on November 29, 2012, by a majority vote of 138 countries in favor, with nine against and 41 abstentions.<sup>19</sup> This status allows Palestine to participate in general debates and activities of the UN but does not grant full membership rights, including voting on resolutions.<sup>20</sup>

Before this recognition, Palestine had been a non-member observer entity since 1974, allowing the Palestine Liberation Organization (PLO) to engage in various United Nations activities.<sup>21</sup> The upgraded status aimed to enhance the Palestinian presence in international forums and strengthen its claims for statehood. Later in 1988, the General Assembly made a significant move by deciding that the designation “Palestine” should be used instead of “Palestine Liberation Organization” within the UN system, which

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<sup>18</sup> General Assembly Resolution 10/19, A/RES/ES-10/19, Status of Jerusalem, 2017.

<sup>19</sup> General Assembly Resolution 67/19, A/RES/67/19, November 2012.

<sup>20</sup> General Assembly Resolution ES-10/23, A/RES/ES-10/23, 2024.

<sup>21</sup> General Assembly Resolution 3236 (XXIX), A/RES/3236(XXIX), November 1974.

<sup>21</sup> General Assembly Resolution 3237 (XXIX), A/RES/3237(XXIX), November 1974.

was a step forward for Palestine to be recognized as a State rather than just a Palestinian movement.<sup>22</sup>

Throughout the years, the State of Palestine has sought full membership in the United Nations. Still, it was met with a veto from the United States, which was an obstacle in the way of Palestine to reach full membership, even though the General Assembly had recommended that the Security Council reconsider the matter.<sup>23</sup> Even so, the recognition of Palestine as a non-member observer state further reinforced its sovereignty claims and was seen as a victory in its long-standing pursuit of international recognition. Since gaining independence, Palestine has sought to join various international treaties and organizations, expanding its diplomatic reach globally.

### **1.1.2 Security Council Resolutions**

The establishment and expansion of Israeli settlements in the occupied Palestinian territories, has been a major point of contention in the Palestinian-Israeli conflict. International Law and the United Nations consider these settlement illegal, which are embodied in numerous Security Council Resolutions.

The Security Council in the Six-Day War had affirmed that for having peace in the Middle East, Israel should withdraw armed forces from the territories occupied during this war,<sup>24</sup> this resolution was pointed out in various resolution later on such as Security Council Resolution 338,<sup>25</sup> but Israel since Resolution 242 is insisting that there cannot be returning to the areas that is considered to be under the Israeli sovereignty.<sup>26</sup>

Another issue that is making it harder to determine the territory of Palestine is the increase numbers of settlements, especially in the West Bank. The subject of the Israeli

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<sup>22</sup> General Assembly Resolution 42/177, A/RES/43/177, December 1988.

<sup>23</sup> General Assembly Resolution ES-10/23, A/RES/ES-10/23 2024.

<sup>24</sup> Security Council Resolution 242, S/RES/242, 1967, page 8.

<sup>25</sup> Security Council Resolution 338, S/RES/338, 1973, page 10.

<sup>26</sup> Scheindlin, Dahlia. "Neither Intractable nor Unique: A Practical Solution for Palestinian Right of Return, 28/04/2020, <https://tcf.org/content/report/neither-intractable-unique-practical-solution-palestinian-right-return/>

settlements was a subject of interest in various Security Council resolutions. The Security Council determined that all measures taken by Israel to change the geographical and demographical composition of the Palestinian Territories since 1967, including Jerusalem, have no legal validity and they must rescind all measures taken by Israel to establish Israeli settlements in the Palestinian Territories.<sup>27</sup>

The most notable Security Council resolution is the 2334 resolution, which explicitly states that Israeli settlements have no legal validity and are a "flagrant violation" of international law and an obstacle to the two-state solution. It demands that Israel cease all settlement activities in the occupied Palestinian Territories, including East Jerusalem.<sup>28</sup> A most important decision was taken in the resolution, that the Security Council will not recognize any changes to the 1967 lines, including the changes made in Jerusalem, unless agreed upon by the parties in this matter.<sup>29</sup>

The decisions by the Security Council are essential especially for the Palestinian people, due to that Security Council resolution are bound for States under the Charter,<sup>30</sup> because of that all territories that were occupied after 1967 must not be recognized by the states, and Israel must endorse this resolution due to being a member of the United Nation. In conclusion, Israeli settlement activities in the occupied Palestinian Territories are imperiling the chance of the two-state solution based on the 1967 lines.

On the other hand, the status of Jerusalem is affected by the Israeli policies and measures, which aim to alter the geographical and demographic composition and character by settlement expansion, confiscation of land, demolition of homes, and displacement of Palestinian civilians.<sup>31</sup> Security Council had taken this matter seriously where many resolution were adopted where the Security Council had stated that all legislative and administrative measure taken by Israel, which tend to change the status of city of Jerusalem are invalid,<sup>32</sup> and called Israel to remind all measures taken that

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<sup>27</sup> Security Council Resolution 465, S/RES/465, 1980.

<sup>28</sup> Security Council Resolution 2334, S/RES/2334, 2016.

<sup>29</sup> Security Council Resolution 2334, S/RES/2334, 2016.

<sup>30</sup> Article 25, United Nation Charter, 1945.

<sup>31</sup> Security Council Resolution 476, S/RES/476, 1980.

<sup>32</sup> Security Council Resolution 252, S/RES/252, 1968.

may which tend to change the status of Jerusalem.<sup>33</sup> The Security Council even adopted a resolution where they affirmed that the legislative actions taken by the Israeli Knesset proclaiming a change in the character of Jerusalem are a violation of international law, especially the "Basic Law", where the Security Council had decided it is null and void and must be rescinded.<sup>34</sup>

In conclusion, the geographical changes made by Israel had the attention of the United Nations, especially the Security Council. Throughout the years, many resolution was adopted that considered the Israeli practices and measures illegal and in violation of international law and United Nations resolutions. It emphasized rescinding all legislative and administrative measures taken by the Israeli government. All these measures are an obstacle to the two-state solution, and to carrying on with the negotiations based on the pre-1967 line.

## **1.2 International Court of Justice Advisory Opinions regarding Palestine**

The International Court of Justice (ICJ) is the primary judicial organ of the United Nations, established to settle disputes between states and provide advisory opinions on international law matters.<sup>35</sup> As a cornerstone of the UN system, the ICJ plays a crucial role in promoting the rule of law, upholding international norms, and resolving conflicts between nations. In 2004, the ICJ rendered an advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory",<sup>36</sup> and in 2024, provided an advisory opinion on the "Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territories, including East Jerusalem".<sup>37</sup> These advisory opinions, even though they are not binding on the states, still affect the international community and the case of Palestine.

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<sup>33</sup> Security Council Resolution 267, S/RES/267, 1969.

<sup>34</sup> Security Council Resolution 478, S/RES/478, 1980.

<sup>35</sup> Article 59, International Court of Justice Statute, 1945.

<sup>36</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136. 09/07/2004.

<sup>37</sup> Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territories, including East Jerusalem, International Court of Justice, General List No. 186, 19/07/2024.

The General Assembly has requested the advisory opinion, which sought to understand the legal implications of Israel's creation of a separation wall on the West Bank territories,<sup>38</sup> The ICJ's opinion provided a landmark interpretation of international law, declaring that the construction of the wall and associated actions by Israel breached several key provisions of international humanitarian law and human rights law. The opinions specifically highlighted the illegality of Israel's actions under the Fourth Geneva Convention, which prohibits an occupying power to transfer its own civilians into the territory it occupies.<sup>39</sup> It also emphasized violations of the International Convention on Civil and Political Rights, which guarantees the right to self-determination.<sup>40</sup>

That advisory opinion was a milestone in the geographical situation of the Occupied Palestinian Territories. It documented most of the geographical and demographic changes in the Palestinian Territories, how Israel deviated from the pre-1976 borders, how it encroached further into the Palestinian lands, and the implications this had for the Palestinian people's ability to access basic resources.

Also, the ICJ advisory opinion had emphasized on the Israeli settlement expansion and how the road was designed to include the settlements in these areas, which raises the matter of transferring Palestinian citizens out of these areas, and transferring Israeli citizens into the occupied territories that are primarily a Palestinian land that was taken by force by the Israeli military.<sup>41</sup> The Court concluded that the construction of the wall on the Occupied Palestinian Territories by Israel is an illegal annexation of the Palestinian land, and it altered the geographical and demographical composition of the Occupied Palestinian Territories, creating a de facto annexation.<sup>42</sup>

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<sup>38</sup> General Assembly Resolution ES-10/14, A/RES/ES-10/24, 2003.

<sup>39</sup> Article 49, Geneva Convention relative to the protection of civilian persons in time of war, 1949.

<sup>40</sup> Article 1, International Covenant on Civil and Political Rights, 1976.

<sup>41</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 2004, pages 168-169.

<sup>42</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, pages 201-202.

After 20 years, the General Assembly had asked for another advisory opinion in the situation on the Palestinian Territories, which sought to understand the “legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territories, including East Jerusalem.”<sup>43</sup>

The ICJ’s advisory opinion addressed the significant changes to the geography of the Palestinian’s territory that have resulted from Israel’s policies and practices. Some of the main points that the court had addressed are the establishments of settlements, the expansion of existing settlements, and the confiscation of Palestinian land for settlement purposes.<sup>44</sup> This practice led to a “*de facto*” annexation of significant part of Palestinian territory. The most crucial aspect that the ICJ emphasized several times is that the Occupied Palestinian Territories, including East Jerusalem, constitute a single territorial unit.<sup>45</sup>

As a result, the Court concluded that the Israeli presence on the Occupied Palestinian Territories is unlawful, and they must terminate all new settlement activities and the Israeli settlers must withdraw from those areas. Israel has an obligation returning the land and all assets seized since its occupation from 1976, and provide full reparation for the damages caused by the Israeli military.

Overall, the advisory opinions had indicated that the Green Line that separates the Palestinian Territories from the Israeli territories must be applicable and must be according to the pre-1967 borders. Judge Al-Khasawneh had raised an important question if the Green Line is an armistice line or a permeant one from which Israeli occupation is measured, and that’s due to that Israeli jurists before the Six-Day War sought to prove that the Green Line is more than an armistice line,<sup>46</sup> which will lead to

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<sup>43</sup> General Assembly Resolution 77/247, A/RES/77/247, 2023.

<sup>44</sup> Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territories, including East Jerusalem, ICJ, 2024.

<sup>45</sup> Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territories, including East Jerusalem, ICJ, 2024, pages 78-79.

<sup>46</sup> Separate Opinion of Judge Al-Khasawneh, Advisory Opinion "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories", 2004, page 238.

that Israel is expanding its territory beyond what was anticipated in the partition plan of Palestine in 1947.<sup>47</sup>

The advisory opinions by the International Court of Justice have also been used by Palestinian leaders to reinforce their claims for statehood and territorial righteousness, while also drawing attention to the ongoing humanitarian crisis in Gaza, the West Bank, and East Jerusalem. As a result, the ICJ's advisory opinions have become a critical component in international efforts to address the conflict between Palestine and Israel, and promote a right and lasting proposal to the contentious conflict.

### **1.3 Oslo Accords**

The Oslo Accords, are agreements reached between the Palestine Liberation Organization and Israel in the mid-1990s, marked a pivotal moment in the Palestinian-Israeli conflict. These accords aimed to establish a framework for Palestinian self-governance in the West Bank and Gaza Strip, culminating in a mutually agreed-upon final status agreement that would address core issues like borders, security, and the fate of Jerusalem. It is important to address that the peace settlements between Palestine and Israel (Oslo Accords) are based on Security Council resolutions 242<sup>48</sup> and 338.<sup>49</sup>

Security Council Resolution 242 was the foundational framework for the negotiations between Palestine and Israel. The resolution emphasized “land for peace” and recognized borders according to the pre-1967 borders. The Oslo Accords aimed to address the issues outlined in Resolution 242, including the Israeli withdrawal from the occupied territories, security arrangements, and a resolution to the Palestinian refugee issue.<sup>50</sup>

Unfortunately, the Oslo Accords didn't define the borders between Palestine and Israel, but they covered the areas that the Palestinians would govern. As the main key

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<sup>47</sup> General Assembly Resolution 181, A/RES/181, 1947.

<sup>48</sup> Security Council Resolution 242, S/RES/242, 1967.

<sup>49</sup> Security Council Resolution 338, S/RES/338, 1973.

<sup>50</sup> Security Council Resolution 242, S/RES/242, 1967.

provision of the “Declaration of Principles on Interim Self-Government Arrangement” was to establish a Council for the Palestinian people to govern themselves within their territory,<sup>51</sup> according to the agreement, the jurisdiction of the Council will cover the West Bank and Gaza Strip territory, and it doesn’t mention anything about Jerusalem.<sup>52</sup> At the time, the parties agreed to negotiate later about what would happen to Jerusalem. Since 1976, the Palestinians have not had control over East Jerusalem, and it is entirely under Israeli control.

The Oslo Accords also partitioned the Palestinian territory into three areas: Area A, which will be under the Palestinian control, Area B, under joint Palestinian-Israeli control, and Area C, which is under Israeli control.<sup>53</sup> Even though the West Bank is under Area (A) and must be under Palestinian control, Israel has occupied more than 50% of each city in the West Bank. It is now under Israeli control<sup>54</sup>, which means that Israel, throughout the years, was in breach of agreements, international law, and international resolutions.

Even though the Palestinian National Authorities were established as a result of the Oslo Accords, some writers argued that the Oslo Accords limit the powers of the Palestinian Authority to conduct international relations. Consequently, Palestine’s endeavor to authorize the ICC to exercise jurisdiction appears to be in conflict with its commitments under the Oslo Accords.

Thus, Palestine’s attempt to authorize the ICC to exercise jurisdiction would appear opposite to its obligations under the Oslo Accords.<sup>55</sup>

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<sup>51</sup> Article (I), Declaration of Principles on Interim Self-Government Arrangements, 1993.

<sup>52</sup> Article (IV), Declaration of Principles on Interim Self-Government Arrangements, 1993.

<sup>53</sup> Sean McMahon. (2011), Post-Oslo Peace Initiatives and the Discourse of Palestinian-Israeli Relations UNISCI Discussion Papers, number. 26, pages 27-58.

<sup>54</sup> Percentage Distribution of the West Bank Area by Israeli Occupation Division and Governorate, (2017), Palestinian Central Bureau of Statistics.

<sup>55</sup> Valentina Azarov and Chantal Meloni, (2014), Disentangling the Knots: A Comment on Ambos’ Palestine Non-Member Observer Status and ICC Jurisdiction, Blog of the European Journal of International Law. <https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/>

The response to the previous argument was that it is necessary to<sup>56</sup> address that the Oslo Accords are an Interim agreement applicable for a period of five years, according to Article 1(1) of the Oslo Accords, intending to end the Israeli occupation and establish a State of Palestine within the five-year period. According to that, writers had argued that the Oslo Accords cannot limit the ICC's jurisdiction. Thus, the agreement does not affect the internationally recognized rights of the Palestinian people, such as self-determination and sovereignty.<sup>57</sup>

Palestinian people are protected under the Fourth Geneva Convention, due to being under occupation by Israel, and the Fourth Geneva Convention is mainly based on *jus cogens*. Thus, no treaty or agreement must contain an article that violates *jus cogens* or any international customary law.<sup>58</sup> However, Israel has been violating some fundamental rights of the Palestinians, even though it is protected by international law and the Oslo Accords.

As the most crucial violation by Israel as an occupying power is the forcible transfers of the Palestinian from the occupied territory, as Israel had occupied Palestinian territories and had established settlements in those areas and forced the Palestinian people to leave which is in breach of article 49 of the fourth Geneva Convention,<sup>59</sup> and according to the Rome Statute, such transfer is considered a war crime. By that, Israel is not recognizing the Palestinian territories according to the Oslo Accords and the Green Line,<sup>60</sup> which leads to not recognizing the West Bank and Gaza as a single territorial unit as established in the Oslo Accords.<sup>61</sup>

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<sup>56</sup> Article 1(1) of Oslo Accords (I): "Article 1: Aim of the Negotiation

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338."

<sup>57</sup> (2014), How Can the International Criminal Court Exercise Jurisdiction in the Occupied Palestinian Territory, Master Thesis, University of Bergen.

<sup>58</sup> Article 53, Vienna Convention on the Law of Treaties, 1969.

<sup>59</sup> Article 49, Geneva Convention relative to the protection of civilian persons in time of war, 1949.

<sup>60</sup> Palestine Liberation Organization – Negotiations Affairs Department, (2015), Israel's Breaches of the Oslo Accords, <https://www.nad.ps/ar/media-room/media-brief/خروقات-اسرائيل-لاتفاقيات-وسلو>

<sup>61</sup> Article 31, Declaration of Principles on Interim Self-Government Arrangements, 1993.

The annex of the Oslo Accords stated that there would be a safe passage connecting the West Bank with the Gaza Strip for the movement of persons and goods, except that since 2000, these passages have been closed, and it's a violation of the Oslo Accords and the Geneva Convention.<sup>62</sup> Many more violations are happening that violate the agreement between Palestine and Israel, which overall is null and void for that reason, and it must not limit the ICC's jurisdiction in the situation of Palestine.

To conclude, even though the agreement state directly the territory of Palestine, but it somehow draws the line where does the Palestinian has control over their territory, but due to the settlement expansion in the West Bank, now Israel has more power and control over most of the Palestinian areas, which is illegal in the international law. All this made it harder to have sovereignty over the Palestinian land, and it made the negotiations harder to happen due to the practices by the Israeli Government. Due to that, the negotiation about Jerusalem has been on hold since 1995, and it's getting harder to go back to the negotiation table after all the policies and practices by the Israelis throughout the years.

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<sup>62</sup> Article X Annex I, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip 1995.

## **Chapter Two: Palestine's Day in Court: The ICC's Decision on Occupied Territories**

The Palestinian territories have been a place of prolonged and complex conflict. This chapter examines the decision of the International Criminal Court First Chamber on the Court's jurisdiction in the State of Palestine. This decision, issued in 2021, addressed the crucial question of whether the ICC has territorial jurisdiction on the Palestinian territories to investigate alleged crimes. We will analyze the legal arguments presented by both the Prosecutor and the State of Palestine; the analysis will explore the Chamber's legal reasoning and its implications for the ICC's role in addressing international crimes in contexts of protracted conflict and statehood.

### **2.1 The State of Palestine at the ICC**

Since Palestine became a non-member observer in the United Nations, it has acceded to many conventions, including becoming a party to the Rome Statute. This section will address Palestine's becoming a party to the Rome Statute, the Prosecutor's investigation request, the State of Palestine's acceptance of the ICC's jurisdiction, and the legal arguments presented by both parties.

On January 2<sup>nd</sup>, 2015, Palestine had acceded to the Rome Statute,<sup>63</sup> by formally joining the treaty, Palestine committed to the principles of international criminal justice. It was willing to cooperate with the ICC to pursue justice for victims of international law.<sup>64</sup> Becoming a member of the ICC gives you access to ICC mechanisms to seek justice for the alleged crimes committed within the Palestinian Territories.<sup>65</sup>

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<sup>63</sup> State of Palestine: Accession to Rome Statute of the International Criminal Court, Ref. C.N.13.2015.TREATIES-XVIII.10, 6th of January, 2015.

<sup>64</sup> Article 86, Rome Statute, 1998.

<sup>65</sup> Article 12, Rome Statute, 1998.

Palestine accepted the jurisdiction of the ICC on January 1st, 2015. Under Article 12(3) of the Rome Statute, Palestine has submitted a declaration accepting the ICC's jurisdiction over crimes committed in the occupied Palestinian territories since June 12, 2014. The State of Palestine deposited its instrument of accession with the United Nations Secretary-General, and it entered into force for the State of Palestine on April 1st, 2015.<sup>66</sup>

According to the Rome Statute, the ICC can only exercise jurisdiction over crimes committed after it entered into force;<sup>67</sup> unless a Declaration under Article 12(2) has been made before the entry into force, it alters the temporal scope of the Court. This is the case for Palestine, where they lodged the declaration on 12 June 2014. Still, the Rome Statute entered into force on 1<sup>st</sup> of April 2015, which altered the temporal scope.<sup>68</sup>

Following Palestine's accession and declaration, the ICC Prosecutor initiated a preliminary examination into the situation in Palestine.<sup>69</sup> The objective of a preliminary examination is to collect and assess information to determine whether there is a sufficient basis to believe that crimes falling within the Court's jurisdiction have been committed.<sup>70</sup> The Prosecutor will conduct a thorough assessment of the information gathered and decide whether it meets the criteria to open an investigation.

Palestine formally referred the situation in Palestine to the ICC Prosecutor On 22 May 2018, urging him to open a full investigation into alleged crimes committed in the occupied Palestinian Territories since 13 June 2014.<sup>71</sup> On 20 December 2019, the Prosecutor announced a preliminary examination to assess and determine that all the

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<sup>66</sup> Situation in the State of Palestine : Background, ICC website. <https://www.icc-cpi.int/palestine#:~:text=The%20Rome%20Statute%20entered%20into,Palestine%20on%201%20April%202015>

<sup>67</sup> Article 11(2), Rome Statute, 1998.

<sup>68</sup> Al-Haq Organization, (2015), Al-Haq's Questions and Answers: The Preliminary Examination of the Situation in Palestine, page 3.

<sup>69</sup> The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, Press Release, 16 January 2015. <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-situation>

<sup>70</sup> Article 18 (1), Rome Statute, 1998.

<sup>71</sup> Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, State of Palestine, 15 May 2018.

criteria under the Rome Statute for opening an investigation had been met. The Prosecutor had requested Pre-Trial I for a ruling to clarify the scope of the court's jurisdiction in the situation of Palestine.<sup>72</sup> In January 2020, the Prosecutor made an official request to the Pre-Trial Chamber I for a ruling to clarify the territorial scope in the situation of Palestine.<sup>73</sup>

During the Preliminary Examination, the question of Palestine's statehood was raised. However, for the Prosecutor's Office, Palestine's ability to accede to the Rome Statute was directly tied to its status within the United Nations. Therefore, the General Assembly Resolution 67/19 was seen as the deciding factor in Palestine's ability to accede to the Rome Statute and issue a declaration under Article 12(3).<sup>74</sup>

Palestine's 2014 declaration under article 12(3) was not the first time, the Prosecutor's Office had previously conducted a preliminary examination of the situation of Palestine in 2009, but the Office concluded on 2012 that Palestine's status at the UN as an "observer entity" precluded Palestine from signing or ratifying the Rome Statute,<sup>75</sup> due to the entry into the Rome Statute was through the Secretary-General, who acts as a treaty depository.<sup>76</sup> Still, since Palestine was granted a "non-member observer State" status in the United Nations, Palestine can sign the Rome Statute through the Secretary-General.

The Pre-Trial Chamber in February 2021 issued a decision confirming its jurisdiction over the situation in Palestine. The Chamber ruled that the occupied Palestinian territories, including East Jerusalem, fall in accordance with the Court's territorial

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<sup>72</sup> Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction, ICC website, 20 December 2019. <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>

<sup>73</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, Office of the Prosecutor, ICC-01/18, 22 January 2020.

<sup>74</sup> The Office of the Prosecutor, Report on Preliminary Examination Activities, 2015, para. 52-54, page 12.

<sup>75</sup> *ibid.* para. 48, page 11.

<sup>76</sup> Article 125, Rome Statute, 1998.

jurisdiction.<sup>77</sup> Thus, the Prosecutor had confirmed the initiation of an investigation with regard of the situation in Palestine, and the investigation will cover crimes within the jurisdiction of the Court, for the temporal investigation will cover all crimes committed since 13 June 2014.<sup>78</sup> The decision of the Pre-Trial Chamber I will be discussed further in the next part.

## **2.2 From Filing to Court Decision: History of the Case**

This section will explore the legal foundations upon which the Chamber based its decision, examining the applicable provisions of the Rome Statute, international law principles, and the submissions of States and other entities.

As it was established previously, the Presidency of the ICC according to the memorandum from the Prosecutor regarding the referral of the State of Palestine under articles 13 (a) and 14 of the Rome Statute, had decided to assign the situation in the State of Palestine to Pre-Trial Chamber I,<sup>79</sup> the three Judges assigned to the case of Palestine were Judge Péter Kovács, Presiding Judge from Hungary, Judge Marc Perrin de Brichambaut from France, and Judge Reine Adélaïde Sophie Alapini-Gansou from Benin.<sup>80</sup>

The first decision issued by the Pre-Trial Chamber I focused on how to engage with victims in the situation.<sup>81</sup> The Chamber highlighted that victims crucial to the Court's proceedings, and they have the right to be heard and considered by the Court and to provide effective information.<sup>82</sup>

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<sup>77</sup> Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Pre-Trial Chamber I, ICC-01/18-143, 5 February 2021.

<sup>78</sup> Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, ICC website, 3rd of March 2021. <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>

<sup>79</sup> Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I. Presidency of the International Criminal Court, ICC-011/18/1, 24 May 2018.

<sup>80</sup> Decision on assigning judges to divisions and recomposing Chambers, ICC-01/11-59, 16 March 2018.

<sup>81</sup> Decision on Information and Outreach for the Victims of the Situation, Pre-Trial Chamber I, ICC-01/18-2, 13 July 2018.

<sup>82</sup> Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, Pages 4-5, Para. 8.

Therefore, the Chamber had ordered the Registry of the ICC to establish a system of “public information and outreach activities of the victims and affected communities in the situation in Palestine”, and the Registry must every three months report to the Chamber about the progress of its activities regarding the victims and affected communities in the situation of Palestine.<sup>83</sup> Some Israeli Officials considered this move by the Court "unusual" because it was unprecedented for a Pre-Trial Chamber to engage in active outreach to victims at this stage of the case.<sup>84</sup>

Prior to looking at the legal basis of the Court’s decision, we will establish some fundamental basis for the Court's jurisdiction over the Palestinian Territories according to the Rome Statute. The Prosecutor found that according to Article 53(1) there are acceptable basis to open an investigation into the situation in Palestine.<sup>85</sup>

Thus, the main basis for opening an investigation into the Occupied Palestinian Territories was the acceptance of Palestine's jurisdiction of the Court for the alleged crimes committed in the occupied Palestinian Territories, including East Jerusalem, since June 13, 2014, according to article 12(1) of the Rome Statute.

So, Palestine acceded to the Statue and deposited its instruments of accession in accordance of the Statute<sup>86</sup> and was deposited in United Nation Secretary-General,<sup>87</sup> an

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<sup>83</sup> Decision on Information and Outreach for the Victims of the Situation, ICC-01/18/-2 Page 10.

<sup>84</sup> Raphael Ahren. “These three judges could send Israel to the dock in The Hague”, 9 July 2020, <https://www.timesofisrael.com/these-three-judges-could-send-israel-to-the-dock-in-the-hague/>

<sup>85</sup> Article 53 of Rome Status : “Initiation of an investigation

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.”

<sup>86</sup> Article 125(3), Rome Statute, 1998.

<sup>87</sup> State of Palestine Accession, Depository Notification: C.N.13.2015.TREATIES-XVII.10, 6 January, 2015. <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>

according to that, Palestine has referred the situation to the Prosecutor on 22 May 2018, and specified that "the State of Palestine comprises the Palestinian Territories occupied in 1967 by Israel, as defined by the 1949 Armistice Line, which includes West Bank, including East Jerusalem, and the Gaza Strip",<sup>88</sup> and the Prosecutor considered that the Court's jurisdiction extends to the Palestinian territories that was occupied by Israel during the Six-Days War in 1967, thus the jurisdiction must be according to the "Green Line" or as known as the "Pre-1967 borders."<sup>89</sup>

The Prosecutor's Office preliminary examination into the situation in Palestine concluded that the criteria under the Rome Statute to open an investigation have been met. They found that crimes have been committed or are being committed in the West Bank, including East Jerusalem and the Gaza Strip, and that there are potential cases that would be admissible later in the case.<sup>90</sup>

In its preliminary examination, the Prosecutor primarily focused on alleged war crimes as defined in Article 8 of the Statute. These includes acts such as willful killing and willfully causing serious injury,<sup>91</sup> the use of the distinctive emblems of the Geneva Conventions to intentionally attack objects or persons,<sup>92</sup> and the transfer of Israeli civilians into the West Bank.<sup>93</sup> Also, they observed the crimes concerning using non-lethal and lethal force by the "Israeli Defense Force" against individuals participating in demonstrations near the border fence between the Gaza Strip and Israel, which resulted in the killing of hundreds of Palestinians and the injuries of thousands of others.<sup>94</sup>

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<sup>88</sup> Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute. 15 May 2018. footnote 4, paragraph 9.

<sup>89</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22/01/2020, Paragraph 3.

<sup>90</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22/01/2020, Paragraph 94. See also Report on Preliminary Examination Activities 2020, The Office of the Prosecutor, 14 December 2020, paragraph 220, page 55.

<sup>91</sup> Articles 8(2)(b)(iv), 8(2)(a)(i), 8(2)(a)(iii), 8(2)(c)(i), Rome Statute, 1998.

<sup>92</sup> Articles 8(2)(b)(xxiv), 8(2)(e)(ii), Rome Statute, 1998.

<sup>93</sup> Article 8(2)(b)(viii), Rome Statute, 1998.

<sup>94</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22/01/2020, Paragraph 94. See also Report on Preliminary Examination Activities 2020, The Office of the Prosecutor, 14 December 2020, paragraph 220, page 55.

Although the Prosecutor is no longer required to obtain authorization from the Pre-Trial Chamber to initiate an investigation,<sup>95</sup> due to the circumstances in the Occupied Palestinian Territories the Court there is an importance to decide the jurisdiction of the Court. As this stems from several factors, due to that Palestine does not possess full control over its territory, as the West Bank and Gaza Strip remain under occupation, and East Jerusalem has been annexed by Israel. Furthermore, The Palestinian Authority does not govern the Gaza Strip, and lastly, the question of Palestine's statehood is still a subject of ongoing discussion under international law.<sup>96</sup>

In the Prosecutor request to the Pre-Trial Chamber, the prosecutor mentioned more than once that the Court may permit entities and victims to make submissions and permit submissions of other interested and relevant parties and amici curiae, in accordance with Rule 103.<sup>97</sup>

Thus, the Court had an order on 28 January 2020, setting the procedure and the schedule for submitting an observation. The Court invited Palestine and the victims in Palestine and Israel to submit written observations, and it also appointed counsel from the Office of the Public Counsel for Victims to represent victims in Palestine who do not have any legal representation for the purpose of submitting an observation.<sup>98</sup>

In addition, the Court considering of the complexity of the situation in Palestine and according to the Prosecutor request to under rule 103 and invites States, organizations and persons, amici curiae to submit observation, any observation submitted shall be restricted to the question of jurisdiction that is set in paragraph 220 of the Prosecutor request, which includes:

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<sup>95</sup> Article 15(3), Rome Statute, 1998.

<sup>96</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22/01/2020, Paragraphs 4-5.

<sup>97</sup> Rule 103, Rules of Procedure and Evidence, ICC-ASP/1/3, 2002.

<sup>98</sup> Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28/01/2020, paragraphs 13-15.

*"The Prosecution respectfully requests Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza."*<sup>99</sup>

After receiving submissions from the States, organizations, individuals, and amici curiae and submitting them to the Court, the Court approved most of them, except a few were rejected due to procedural matters.<sup>100</sup> The Chamber received the State of Palestine's observation regarding the request for a ruling on the Court's territorial jurisdiction.<sup>101</sup>

However it came for the Chamber's attention that President Mahmoud Abbas had declared the end of all agreements with Israeli and the American governments, and the end of all commitments identified in these agreements,<sup>102</sup> thus this raised a question by the Chamber's whether it affect any of the Oslo agreements, due to that the Court according to the rule 58(2) of the Rules of Procedures and Evidence<sup>103</sup> had requested Palestine to provide additional information on this statements, and also ordered the Prosecutor and invited Israel to counter to any further information submitted by Palestine.<sup>104</sup>

Due to the Chamber's request, Palestine had provided its observations on the Chamber's request. The Prosecution responded that the Prosecutor did not consider that the statement made by the President of Palestine had any relevance to the status of

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<sup>99</sup> Prosecution requests pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22/01/2020, Paragraphs 220.

<sup>100</sup> Decision on Requests for Variation of the Time Limit for Submitting Observations and Issues Arising out of *Amici Curiae* Observations, ICC-01/18-128, 01/04/2020.

<sup>101</sup> Order requesting additional information, ICC-01/18-134, paragraphs 3-5.

<sup>102</sup> President Abbas declares end to agreements with Israel, US; turns over responsibility on occupied lands to Israel, 19 May 2020. <https://english.wafa.ps/page.aspx?id=vWPVtFa117154132029avWPVtF>

<sup>103</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, 2002.

<sup>104</sup> Order requesting additional information, ICC-01/18-134, page 4.

Palestine as a State Party and the exercise of the Court's jurisdiction in the situation in Palestine.<sup>105</sup>

Following all the requests and submissions, the Chamber had enough information to proceed with the case and decide on the court's territorial jurisdiction in Palestine. In the next part, we will look further into the Court's decision and legal basis, how the Court interpreted it, and how it used the submissions of the entities and individuals to decide on the territorial jurisdiction of Palestine.

### **2.3 Situation in Palestine: Pre-Trial Chamber I Decision**

The whole case of Palestine in the Pre-Trial Chamber I is based on the Prosecutor's Request, and the Prosecutor's point of view is that the territorial jurisdiction of the Court extends to the Occupied Palestinian Territories by Israel during the Six-Day War in 1967, which is the West Bank, including East Jerusalem and the Gaza Strip.<sup>106</sup> However, due to the history and circumstances of Palestine and the question of Palestine's statehood, the Prosecutor sought confirmation from the Court.<sup>107</sup> Thus, the Prosecutor may request a jurisdictional ruling even before the existence of the case.<sup>108</sup>

In his request, the Prosecutor has indicated that the territorial jurisdiction's scope has been guided by Palestine's status in the Rome Statute and the deposition of accession according to Article 125(3). Thus, the Court does not need to carry out another judgment of Palestine's status or its statehood because it was endorsed when Palestine joined the ICC.<sup>109</sup> Yet, an argument was raised that Palestine does not have criminal jurisdiction

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<sup>105</sup> Prosecution Response to "The State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information", ICC-01/18-136, 8 June 2020.

<sup>106</sup> Prosecution Request, ICC-01/18-12, paragraph 3.

<sup>107</sup> Prosecution Request, ICC-01/18-12, paragraphs 5-6.

<sup>108</sup> Article 19(3), Rome Statute, 1988. *And also*, Prosecution Request, ICC-01/18-12, paragraphs 22-23

<sup>109</sup> Prosecution Request, ICC-01/18-12, paragraph 7.

over crimes committed in Area C.<sup>110</sup> However, given the Prosecutor, the Oslo Accords will not be an obstacle to the Court's decision on the territorial jurisdiction.<sup>111</sup>

The Prosecutor's Request also included the legal Memoranda issued by Israel on 20 December 2019, which included that the ICC lacks jurisdiction over the situation of Palestine, and that the accession by Palestine does not settle the question of whether Palestine has sovereignty or not.<sup>112</sup> Israel affirmed that the conclusion of the Prosecutor was based on the General Assembly Resolution 67/19 and the deposition of multilateral treaties in the United Nations Secretary-General, and participation of Palestine in the Court's Assembly, but Israel sees that this is not enough to determine the statehood of Palestine.<sup>113</sup> Israel added that Palestine does not have any key elements of effective territorial control over the West Bank and Gaza Strip.<sup>114</sup>

Lastly, Israel emphasized that the Palestinian entity has no criminal jurisdiction over Area (C), Jerusalem, and Israeli nationals according to the Palestinian-Israeli Interim Agreement of 1995 (Oslo Accords). Thus, it is asserted that the Court cannot legally exercise jurisdiction over the Palestinian territory.<sup>115</sup> However, the ICC has jurisdiction over all people in the Palestinian territory regardless of nationality. Also, Palestine is under occupation by Israel, so the interim agreement between the occupied people and the occupying power can't deny the Palestinian rights under international law.

### **2.3.1 Submissions and Observations to Pre-Trial Chamber I**

As per the request of the Prosecutor and the order of the Court, submissions and observations were submitted by international organizations, States, individuals, and civil institutions according to paragraph 220 of the Prosecutor's Request.<sup>116</sup>

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<sup>110</sup> Prosecution Request, ICC-01/18-12, paragraph 183.

<sup>111</sup> Prosecution Request, ICC-01/18-12, paragraph 183.

<sup>112</sup> Israel Attorney General Memorandum. paragraph 19.

<sup>113</sup> Israel Attorney General Memorandum. paragraph 19.

<sup>114</sup> Israel Attorney General Memorandum, paragraph 32-33.

<sup>115</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 30, page 17.

<sup>116</sup> Paragraph 220 of the Prosecutor Request: "220. The Prosecution respectfully requests Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a)

## 1. Observation on behalf of Palestine

The state of Palestine has submitted an observation as a State Party to the Statute.<sup>117</sup> So, Palestine is entitled to all rights gained by being a State Party under the Statute.<sup>118</sup> Palestine stated that it joined the Rome Statute in accordance with its internationally recognized borders as defined by the 1949 Armistice Lines. The international community, including the United Nations, has referred to the West Bank, including East Jerusalem and the Gaza Strip, as the Occupied Palestinian Territory.<sup>119</sup>

Palestine asserted that the Israeli occupation of Palestine did not affect its territorial integrity, so the Court's jurisdiction concerning crimes committed under occupation by the occupying power is coherent with the right of self-determination of the Palestinian people.<sup>120</sup> Therefore, any agreements between Palestine and Israel that would dismiss the obligation under the Statute will be null and void, because the Statute articles are mainly *jus cogens* and prevail over any legal obligation under an agreement.<sup>121</sup>

## 2. Observations on behalf of Victims

Various observations on behalf of victims were submitted to the Court, and due to the victims' importance in this case, the Court made sure to go through them deeply and include every observation in the decision. Thus, this part will go through the observations.

### I. The Khan Al-Ahmar victims' observation (ICC-01/18-68)

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comprises the West Bank, including East Jerusalem, and Gaza. In doing so, the Chamber is invited to issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days. This time line is based on the timeline for article 15 requests and the similarity of the nature and scope of the present Request and an article 15 request.”

<sup>117</sup> State of Palestine Observation, ICC-01/18-82, paragraph 6.

<sup>118</sup> State of Palestine Observation, ICC-01/18-82, paragraph 8

<sup>119</sup> State of Palestine Observation, ICC-01/18-82, paragraph 29.

<sup>120</sup> State of Palestine Observation, ICC-01/18-82, paragraph 61.

<sup>121</sup> State of Palestine Observation, ICC-01/18-82, paragraph 68.

The victims affirmed the Court's territorial jurisdiction over the State of Palestine, the victims raised three primary arguments. First, they contended that Palestine's status as a State Party to the ICC must be interpreted within a legal framework, and not based on a political aspect.<sup>122</sup> Secondly, the Chamber must interpret article 12(2)(a) as coherent with crimes arising from hostilities and Israel's illegal settlement activities.<sup>123</sup> Lastly, articles 21(3), 12(2)(a) of the statute must be interpreted in accordance with the victim's right.<sup>124</sup>

## II. Victims' observation (ICC-01/18-99)

In their observation, the victims asserted that the Chamber should conclude that Palestine accession to the Rome Statute was valid, thereby empowering it as a State Party to refer crimes committed on its territory for an investigation by the Court.<sup>125</sup> Finally, they argued that any interpretation of the Oslo Accords that reduces the protection of victims under the Fourth Geneva Convention or any customary international law must be invalid.<sup>126</sup>

## III. Submission on behalf of child victims and their families (ICC-01/18-102)

The submission provided three arguments. The first is that the Court's finding of territorial jurisdiction must be consistent with the Palestinian people's recognition of self-determination. Second, having an occupying power over Palestine does not prohibit the Court from exercising its jurisdiction. Finally, if the Court decides that it may not exercise its jurisdiction under article 12(2)(a), it contradicts the object and purpose of the Statute.<sup>127</sup>

## IV. Observation on behalf of unrepresented victims (ICC-01/18-105)

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<sup>122</sup> Al-Khan al-Ahmar Victims Observation, ICC-01/18-68, paragraph 19.

<sup>123</sup> Al-Khan al-Ahmar Victims Observation, ICC-01/18-68, paragraph 19.

<sup>124</sup> Al-Khan al-Ahmar Victims Observation, ICC-01/18-68, paragraph 19.

<sup>125</sup> Legal Representative of Victims Submission, ICC-01/18-99, paragraph 3.

<sup>126</sup> Legal Representative of Victims Submission, ICC-01/18-99, paragraph 5.

<sup>127</sup> Defense for International – Palestine Submission, ICC-01/18-102, paragraph 73.

The observation stated that the court should rule in this case according to article 19(3) and the principle of "Kompetenz-Kompetenz" or "competence de la competence", which relies on article 119(1) of the Statute.<sup>128</sup> Furthermore, the question of Palestine statehood was settled by the General Assembly Resolution 67/19 for the purpose of the Statute.<sup>129</sup>

#### V. Observation of victims of Palestinian Terror (ICC-01/18-109-Red)

According to the Attorney General of the State of Israel's Memorandum, this observation emphasized that the Court has no territorial jurisdiction over the situation in Palestine.<sup>130</sup> Thus, if the Court finds that it has territorial jurisdiction, it should also find that the temporal jurisdiction must have been since 1 July 2002 because Palestinians in the West Bank are also Jordanian nationals, and Jordan has been a State Party to the Rome Statute since the establishment of the ICC.<sup>131</sup>

#### VI. Persecution victim's observation (ICC-01/18-110-Red)

From their point of view, the Chamber should dismiss the request and permit the Prosecutor's request without any delay in the situation of Palestine also, that the Chamber must confirm that the territorial jurisdiction of the Court is the West Bank including East Jerusalem, and Gaza Strip, that such territory is recognized by the international community.<sup>132</sup> Thus, according to its obligation, the Court must provide a solution for the violations of international law against the Palestinian Territories' nationals.<sup>133</sup>

#### VII. Submission on behalf of Palestinian Victims Residents of the Gaza Strip

The victims of the Gaza Strip have addressed that Palestine is a State for the purpose of the Statute, and that the Court doesn't need to deliberate on Palestine's statehood for

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<sup>128</sup> Office of Public Counsel for Victims Observation, ICC-01/18-105, paragraph 1.

<sup>129</sup> Office of Public Counsel for Victims Observation, ICC-01/18-105, paragraph 2.

<sup>130</sup> Shurat Hadin – Israel Law Center Observations, ICC-01/18-109-Red, paragraph 55.

<sup>131</sup> Shurat Hadin – Israel Law Center Observations, ICC-01/18-109-Red, paragraphs 56-57.

<sup>132</sup> Legal Representative of Persecution victims, Katherine Gallagher, ICC-01/18-110-Red, paragraph 2. *See also* paragraphs 53-55.

<sup>133</sup> Legal Representative of Persecution victims, Katherine Gallagher, ICC-01/18-110-Red, paragraphs 2 and 57.

any reason other than the Prosecutor's request.<sup>134</sup> They also emphasized that the Court's jurisdiction includes the West Bank, East Jerusalem, and Gaza Strip, and that this is also the territory by state practice that has been recognized according to the 1949 Palestinian borders.<sup>135</sup>

#### VIII. Submission (ICC-01/18-126-Red)

The victims affirm that examining Palestinian statehood according to their exercise of control is not suitable because Palestine is under an occupation.<sup>136</sup> Also, they added that the territory of Palestine has been identified by the United Nations resolution and other legal documents that carry international legal weight; thus, the territory is in accordance with the borders of the Pre-Trial Chamber I 1967 borders.<sup>137</sup> Therefore, the issue of Palestine's statehood does not obstruct with the Court's capability to consider Palestine as a state for the purpose of the Statute and must have jurisdiction over the territories defined as the Occupied Palestinian Territories.<sup>138</sup>

#### 3. Observations on behalf of Amici Curiae

The Chamber has received several observations submitted by amici Curiae. In its decision,<sup>139</sup> the Court did not summarize them, but the Chamber studied them so that the Court could address some arguments raised by Amici curiae. The Chamber has received 22 amici curiae observations that had a point of view that the conditions have not been fulfilled for the Court to exercise jurisdiction over the territory of Palestine. On the other hand, the Court received 21 amici curiae submissions showing that the conditions have been fulfilled.<sup>140</sup>

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<sup>134</sup> Raji Sourani, Counsel; Chantel Meloni, Counsel; Triestino Mariniello; Assistance Counsel Submission, ICC-01/18-112, paragraphs 29 and 35.

<sup>135</sup> Raji Sourani, Counsel; Chantel Meloni, Counsel; Triestino Mariniello; Assistance Counsel Submission, ICC-01/18-112, paragraph 28.

<sup>136</sup> ICC-01/18-126-Red, paragraph 20.

<sup>137</sup> ICC-01/18-126-Red, paragraph 21.

<sup>138</sup> ICC-01/18-126-Red, paragraphs 23-24.

<sup>139</sup> Amici curiae, or " Friend of the Court", submissions are essentially expert opinion which a Court may request on complicated point of view, which is considered to be an important contributor towards the Court's legitimacy

<sup>140</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 51-52.

### 2.3.2 Preliminary Issues

The Chamber had three preliminary issues in the case of Palestine: First, whether the Prosecutor's request is a political matter and non-justiciable; second, Israel's participation in the proceedings; and third, the territory of the state and criminal jurisdiction.

#### 1. Political matter or legal matter

This matter was raised by some amici curiae, States, and representatives of the victims, and the argument was that the case of Palestine is a political matter rather than a legal one. The Israel Forever Foundation has stated in its observation that the Court should not have jurisdiction, because to have jurisdiction, the Court will need to resolve the boundary issue between Palestine and Israel. It will not be suitable, as they also stated that the international community has indicated that the final status of all matters between Palestine and Israel should be resolved through bilateral agreements.<sup>141</sup>

#### 2. Israel's participation in the case

It was argued that the Chamber cannot examine the Prosecutor's request because Israel is not participating in this case, which impacts its territorial sovereignty. They also referred to the "Monetary Gold Principle".

"The Monetary Gold Principle" can be defined as a procedural legal rule that came historical practice of the ICJ, the Court's judgement of 15 June 1954 over the removal of monetary gold from Rome by the Nazis during World War II. The Court ruled that to delve into the merits of the case would be to decide a dispute between Italy and Albania, which the Court could not do without the consent of Albania. Which means that international courts are not competent to settle disputes between states unless those

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<sup>141</sup> The Israel Forever Foundation Submission, ICC-01/18-108-Corr, paragraphs 62-64.

states agree to exercise jurisdiction over the dispute by the Court.<sup>142</sup> This principle had emerged in the case of Palestine because if the Court exercises its jurisdiction over the Palestinian territories, it will expose the crimes by Israel, which is not a State Party to the Rome Statute.

The Prosecutor stated that the issue does not apply in the case of Palestine because the ICC is not settling disputes between states but instead examines the criminal responsibility of individuals, and the Court is not responsible for settling territorial disputes.<sup>143</sup> Also, the Palestinian Bar Association submitted an observation where stated that according to Monetary Gold principle and based on that the borders issue between Palestine and Israel is left for the negotiations under the Oslo Accords, so the Court can't and won't determine the borders of Palestine, the Court will only identify the territories of Palestine with the Pre-defined borders.<sup>144</sup>

On the other hand, according to the Monetary Gold Principle, the State of Uganda stated in its submission that an international Court cannot settle legal interests without the State's consent.<sup>145</sup> For that reason, Uganda recognized that this principle may be applied in exceptional cases, but does not apply to the case of Palestine. Thus, the Court should decline its jurisdiction over the Palestinian territory.<sup>146</sup>

Also, the Israel Forever Foundation has stated that, according to the international law, international Courts should not decide on cases that significantly affect the legal interests of a non-participating party. Thus, if the Court attempted to settle the border issue, Israel would be an essential party in this case.<sup>147</sup>

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<sup>142</sup> Emilie Aamodt. (2016). Palestine's Accession to the Rome Statute: An analysis of the legal issues of investigating the Palestinian Situation. Master Thesis, University of Oslo, page 51, footnote 150. *See also*, International Court of Justice, (1954). "Summary of the Case of the Monetary Gold Removed from Rome in 1943".

<sup>143</sup> Nasser Thabet. (2021). "Monetary Gold principle: What is it and what is its connection to the case of Palestine before the International Criminal Court?". Law of Palestine, pages 6.

<sup>144</sup> Palestinian Bar Association Observation, ICC-01/18-72, paragraph 48.

<sup>145</sup> The Republic of Uganda Observation, ICC-01/18-119, paragraph 8.

<sup>146</sup> The Republic of Uganda Observation, ICC-01/18-119, paragraph 9.

<sup>147</sup> Nasser Thabet. Ibid. page 9. *See also*, ICC-01/18-108-Corr, paragraph 65.

Some have raised the "*pasta tarts*" principle, which is that treaties may have specific indirect effects on non-State parties. However, practice suggests that multilateral treaty arrangements can indeed create legal and political realities that indirectly affect a non-State parties, implying that treaties may have specific indirect effects even on those not formally bound by them legal and political interests.<sup>148</sup>

However, the Court noted that Israel was invited to submit observations but chose not to use the opportunity. Although the Israeli President Netanyahu has commented on the decision to launch a preliminary examination by the Prosecutor, " It is absurd for the ICC to ignore international law and agreements, under which the Palestinians don't have a State and can only get one through direct negotiations with Israel". Noting that, Israel has been preventing Hague officials from visiting the scenes for the alleged crime, and won't collaborate with the UNHRC.<sup>149</sup>

So, the Chamber emphasized that the decision will be limited to the question of jurisdiction and will not determine any of the border disputes between Palestine and Israel. The decision will not determine or impact any legal matter in the situation between Palestine and Israel.<sup>150</sup>

### 3. Territory of state and criminal jurisdiction

The Chamber wanted to identify a difference between a state's territory and the criminal jurisdiction of the Court. The Court stated that the Chamber's territory ruling is only for the intention of identifying the Court's territory jurisdiction and won't have any bearing on Palestinian territory.<sup>151</sup>

Also, the State of Brazil, in its observation, had stated that the Palestinian-Israeli situation is a complex political situation and must be addressed through political

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<sup>148</sup> Robert Cryer. (2015). The ICC and its Relation to Non-States Parties. The Law and Practice of the International Criminal Court, Oxford University Press, Oxford, pp. 260-280, page 260.

<sup>149</sup> Emilie Aamodt. Op.cit. page 78

<sup>150</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 59-69.

<sup>151</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 62.

negotiation between the Palestine and Israel, and initiating an investigation would not serve any interests of justice.<sup>152</sup>

Some critics stated that due to the ongoing political situation between Palestine and Israel, the Court risks undermining peace. They also focused their legal arguments on precluding the Court from opening an investigation in Palestine's territory. Therefore, the Court may risk the peace and the peace process between the parties.<sup>153</sup>

On the other hand, others have argued that the territorial scope of the court's jurisdiction is a legal question, regardless of any political consequences. John Quigley has stated in his observation that the issue of Palestinian statehood is a legal matter. Thus, Palestine being a State has no position on the Palestinian-Israeli situation, and the Court has jurisdiction over the West Bank, including East Jerusalem and the Gaza Strip.<sup>154</sup>

Therefore, if the decision entails any political outcome, they shall not prevent the Chamber from exercising its obligation under the Statute. The Court stated that it would only analyze the relevant facts according to the ICC legal framework, and any potential political consequences would be outside the scope of the Chamber's mandate.<sup>155</sup>

### **2.3.3 Legal Basis of the Decision**

The Chamber called that the Prosecutor's request for a ruling on jurisdiction under article 19(3) of the Statute,<sup>156</sup> but according to the Court, it is not deemed necessary in the context of the proceeding in the case of Palestine,<sup>157</sup> as the Court could use an

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<sup>152</sup> The Federative Republic of Brazil Observation, ICC-01/18-106, paragraph 33.

<sup>153</sup> Mark Kersten. (2020). No Justice Without Peace, But What Peace Is on Offer? Palestine, Israel and the International Criminal Court. *Journal of International Criminal Court*, Oxford University Press, Volume 18, Issue 4, 1014-1015.

<sup>154</sup> Professor John Quigley Submission, ICC-01/18-66, paragraph 59.

<sup>155</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 57.

<sup>156</sup> Prosecutor, Request under Regulation 46(3) of the Regulations of the Court, 9 April 2018, ICC-RoC46(3)-01/18-1.

<sup>157</sup> ICC-RoC46(3)-01/18-1, paragraph 28.

alternative legal basis. Still, the Court didn't dismiss the possibility of applying article 19(3).<sup>158</sup>

In this case, the Prosecutor has indicated that there is a reasonable basis to initiate an investigation according to article 53(1) of the Statute;<sup>159</sup> thus, the legal consequences are that the Prosecutor is obligated to begin an investigation according to the Appeals Chamber.<sup>160</sup>

The Court considered that it must determine whether Article 19(3) applies in the case of Palestine.<sup>161</sup> So. The Court has sought firstly for the "ordinary meaning of article 19(3)", especially the first sentence: "the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction".<sup>162</sup> The Court reads this sentence as a general article and defines the matter of a ruling, which is a question of jurisdiction. There is no temporal parameter to request or issue the ruling of the jurisdiction question, and it confirms that its application is not limited to cases arising from a situation.<sup>163</sup>

Afterwards, the Court examined the context of article 19(3) of the Statute, which supported the chamber's interpreting of the meaning. The context of the article was examined through three measures.

First, the article's structure tells the difference between the three procedural measures. Article 19(1) of the Statute states that the Court has jurisdiction in any case brought before it, and Article 19(2) states that a person who has a warrant of arrest or summons to appear in some cases by a particular State can challenge the jurisdiction of the Court.<sup>164</sup>

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<sup>158</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 63.

<sup>159</sup> Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, paragraph 28.

<sup>160</sup> Article 52(1)(a), Rome Statute, 1998.

<sup>161</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 67.

<sup>162</sup> Article 19(3), Rome Statute, 1998.

<sup>163</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 69-70.

<sup>164</sup> Article 19(2), Rome Statute, 1998.

Lastly, article 19(3) gives a specific right for the Prosecutor only.<sup>165</sup> So, these three mechanisms regulate different situations. The scope of application of the mechanism set in articles 19(1) and 19(2) is restricted explicitly to a Case, unlike in paragraph (3) of article 19, it didn't mention a case. Thus, it extends beyond a case.<sup>166</sup> In conclusion, Article 19, through its paragraphs, sets different mechanisms regulating different situations in various stages of the cases.

The Court also addressed Article 19's drafting history, which may help interpret its structure. However, the paragraphs in Article 19 were drafted individually, and the final version of the article was grouped by the different paragraphs and set as one article with different mechanisms for different purposes.<sup>167</sup>

Secondly, the relation between article 15 of the Statute and article 13, which states that an investigation and the process should be conducted on an intact jurisdictional basis as early in the case, is similar to the application of an investigation resulting from a referral of a state member under article 13.<sup>168</sup>

The Prosecutor can initiate a "*proprio motu*" investigation, where the jurisdictional appraisal is reviewed by the Pre-Trial Chamber under article 15(4). The prosecutor can also initiate an investigation by a state referral, and the Pre-Trial Chamber assists the prosecutor in determining the age jurisdiction question if it is doubted, according to Article 13. It is noticeable that no matter how the investigation was initiated, the Pre-Trial Chamber determines the jurisdictional question prior to any case.<sup>169</sup>

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<sup>165</sup> Article 19(3), Rome Statute, 1998.

<sup>166</sup> Christopher Hall, Daniel Nsereko, and Manuel Ventura. (2015). Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case. The Rome Statute of the International Criminal Court: A Commentary, 3<sup>rd</sup> edition, page 874.

<sup>167</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 76.

<sup>168</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 78-79.

<sup>169</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 80.

Thirdly, the basis of the “*principe de l’effet utile*”<sup>170</sup>, the Pre-Trial Chamber is appointed to address question of jurisdiction in case pursuant by article 19(1), 19(2) and 58(1)(a) of the Statute, but article 19(3) would not have a practical effect if it is enforced solely in a case. Therefore, the Prosecutor can request a ruling on the jurisdictional question to determine the scope of the investigation due to the referral of a State Party without delaying judicial examination of the matter of jurisdiction.<sup>171</sup>

At last, the Chamber laid down the object and purpose of the statute. The reason behind establishing the ICC is to hold individuals accountable for the most serious crimes under international law. Still, the Statute binds the Court mandate, so the Court cannot act if the conditions are unmet.<sup>172</sup> So, if the Court has acted without a jurisdictional basis, the ICC mandate will be affected, and such acts will affect the Court’s operations, witnesses, and victims.<sup>173</sup>

For the case of Palestine, the Prosecutor found that there is a reasonable basis to believe that members of the Israeli Defense Forces and Israeli authorities have committed crimes falling within the Court’s jurisdiction, and there are potential cases regarding crimes allegedly committed in the Palestinian Territories.<sup>174</sup>

In this case, it was important to request the Chamber to determine the territorial jurisdiction to proceed further in the proceeding, and the State Parties have an obligation to cooperate with the Court. States not Parties to the Rome Statute have no obligations towards the ICC. Still, the ICC may have jurisdiction over a citizen of a non-party State when the crime is committed in the territory of a State Party to the Statute.<sup>175</sup> Therefore, the ICC is not imposing itself on Israel but merely exercising territorial jurisdiction.

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<sup>170</sup> “*Principe de l’effet utile*” is the applicable fundamental principle of useful effect is that the interpreter of a treaty is not free to adopt a meaning which would result in making parts of the treaty redundant or unnecessary.

<sup>171</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 81-82.

<sup>172</sup> Preamble and article 1, Rome Statute, 1998.

<sup>173</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 84.

<sup>174</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 85-86

<sup>175</sup> Yaser Khakaikheh. (2022). Aggression in Palestine Jurisdictional Limitations of the International Criminal Court. Journal of Legal, Ethical and Regulatory, Volume 25, Issue 1, page 5.

In conclusion, the Court determined that Article 19(3) of the Rome Statute applies to Palestine's current case. Thus, the next part will address the merits of the case presented by the Prosecutor and addressed further by the Chamber in the decision.

### **2.3.4. The Merits of the Case**

As stated in the decision, to reach the merits of the case, the Chamber will look into two main issues. The first issue is to determine whether Palestine is considered a State on the territory where the question occurred. The second issue is to determine the territorial jurisdiction of the Court in Palestine. Also, the Court will address the issue of the Oslo Accords and whether they are relevant in Palestine.

#### **2.3.4.1 Palestine as a State according to Article 12(2)(a)**

The issue was raised by the Prosecutor in his request. The prosecutor sees that due to Palestine's status in the ICC, thus Palestine is considered a State for the purpose of article 12(2)(a).<sup>176</sup> The Prosecutor also indicated that a "State" should be in accordance with the general rules of international law.<sup>177</sup>

The Court under article 12 may exercise either *ratione loci* jurisdiction<sup>178</sup> according to article 12(2)(a) or *ratione personae* jurisdiction.<sup>179</sup> Therefore, the Court must assess whether the Palestine case is within the meaning of article 12(2)(a). For that reason, the Court looked into article 31(1) of the Vienna Convention<sup>180</sup> and interpreted article 12(2)(a).<sup>181</sup>

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<sup>176</sup> Prosecutor Request, ICC-01/18-12, page 56.

<sup>177</sup> Prosecutor Request, CC-01/18-12, paragraph 113.

<sup>178</sup> *Ratione loci*: This refers to jurisdiction based on the geographical location where the events giving rise to the legal dispute occurred, where the parties are located, or where property related to the case is located.

<sup>179</sup> *Ratione personae*: This refers to jurisdiction based on the individuals or entities involved in the case. This may include factors such as citizenship, residency, or legal status.

<sup>180</sup> Article 31(1), Vienna Convention on the Law of Treaties, 1969.

<sup>181</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 91.

## 1. Interpretation of Article 12(2)(a)

The Statute, the Rules of Procedure and Evidence, and the Regulations of the Court did not provide a definition of a "State." Article 12(2) stipulates that the Court's jurisdiction extends to the territory of States Parties; however, it does not mandate a determination of whether the entity in question meets the criteria for statehood under international law.<sup>182</sup>

For that reason, the Court observed that, in accordance with article 31(2) of the Vienna Convention, the interpretation of a treaty must encompass its entire text, including the preamble and annexes.<sup>183</sup> Thus, according to the Court's interpretation, the assessment as to the other preconditions to the Court's exercise of jurisdiction under article 12(2) of the Statute has been fulfilled by the outcome of the accession procedure as outlined in articles 125(3) and 126(2) of the Statute.<sup>184</sup>

Article 125(3) of the Statute provides that the Statute is open to accession by all states, and there are no articles or legal texts that impose any additional criteria for accession to the Statute. According to that, Palestine can accede to treaties that have adopted the "all States" formula, according to the United Nations General Assembly Resolution 67/19 in 2012, which stated the right of the Palestinian people to self-determination and independence in their State and becoming a non-member observer State in the United Nations.

Certain amici curiae have challenged the role of the United Nation Secretary-General in accepting of Palestine's accession to the Rome Statute in his capacity as depositary.<sup>185</sup> They further contended that the Court ought to assess the validity of Palestine's accession as a prerequisite to determining whether Palestine qualifies as a

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<sup>182</sup> Pre-Trial Chamber I Decision , ICC-01/18-143, paragraphs 92-93. *See also* ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, page 136.

<sup>183</sup> Article 31(2), Vienna convention, 1969.

<sup>184</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 95-99.

<sup>185</sup> European Centre for Law and Justice Observation, ICC-01/18-70, paragraph 8.

“State” under article 12(2) of the Statute.<sup>186</sup> However, the Court stated that it does not have the authority to challenge the validity of Resolution 67/19, which recognized Palestine as a non-member observer State and allowed Palestine to accede to the Statute.<sup>187</sup>

## 2. Palestine’s accession to the Rome Statute

Palestine has acceded to the Statute in accordance with article 125(3) of the Statute, submitted its instrument of accession, and became the 123rd State Party of the ICC. Following the accession, Palestine had an active role in the Assembly, where it participated in proposals and discussions regarding the crime of aggression, and adopted resolutions.<sup>188</sup>

In the submissions by the amici curiae in this case, seven States Parties had stated in their submission arguing that Palestine cannot be considered a State for the purpose Article 12(2)(a),<sup>189</sup> however these states remained silent during the accession process of Palestine and had not challenged the accession before the Assembly of the ICC. On the other hand, several submissions supported Palestine’s participation as a State Party concluding that the objective of determining territorial jurisdiction is to enable the Court to exercise its criminal jurisdiction over the Palestinian territories.<sup>190</sup>

Thus, regardless of Palestine’s status under international law, Palestine followed the correct procedure of accession to the Statute. Given the Court, when the condition for accession of the Statute is fulfilled and enters into force for the State Party, the State agrees to subject itself to the terms of the Statute. So, the Court can’t challenge the entry into force of the statute for accession to the Statute, except for the settlement of a dispute by the Assembly of States under article 119(2) of the Statute.

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<sup>186</sup> Todd F. Buchwald and Stephan J. Rapp Submission, ICC-01/18-83, paragraphs 10-11.

<sup>187</sup> Professor William Schabas Submission, ICC-01/18-71, paragraph 14.

<sup>188</sup> Resolution adopted by the Assembly of States Parties during the Eighteenth Session, 2 to 7 December 2019, World Forum, The Hague.

<sup>189</sup> The seven States Parties are Czech Republic, Austria, Australia, Hungary, Germany, Brazil and Uganda.

<sup>190</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 101.

In conclusion, the Chamber determined that interpreting Article 12(2)(a) means that a "State" in that context refers to a State Party to the Statute. The Court established that the preconditions for it to exercise jurisdiction under Article 12(2) must be assessed in line with the accession procedure outlined in Articles 12(1), 125(3), and 126(2) of the Statute. This interpretation is consistent with the Court's purpose of establishing individual criminal responsibility for committed crimes.

Palestine has properly acceded to the Rome Statute through the established procedure outlined, thereby acquiring the right to exercise its legal entitlements and to be treated equivalently to any other State Party within the ICC framework. The Chamber recognized the State of Palestine's standing under international law, primarily on the basis of its recognition by over 130 states and its non-member observer state status at the United Nations. Consequently, the Chamber concluded that the Rome Statute applies to Palestine as a State Party, notwithstanding its non-full membership status within the United Nations.

Therefore, Palestine qualifies as a State for the purpose of Article 12(2)(a). The Chamber explicitly clarified that the Court's findings do not influence matters of international law arising from the situation in Palestine that fall outside the Court's jurisdiction. By ruling on its territorial jurisdiction, the Court is neither adjudicating a border dispute between Palestine and Israel nor preempting the question of future borders.<sup>191</sup>

#### **2.3.4.2 Territorial jurisdiction of the Court**

The second issue arising from the Prosecutor's request, concerning the determination of Palestine's territory for defining the Court's territorial jurisdiction; this issue is inseparably to the first issue discussed in the previous part.

The Court reaffirms that disputed borders does not preclude a State from becoming a Party to the Rome Statute, and therefore cannot impede the Court's exercise of its

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<sup>191</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 109-113.

jurisdiction.<sup>192</sup> In defining its territorial jurisdiction in the case of Palestine, the Court referred to the status of Palestine in the United Nations, as established by Resolution 67/19. This resolution recognized the right of self-determination for the Palestinian people and the independence of the State of Palestine within the territory occupied since 1967.<sup>193</sup>

In resolution 67/19, the General Assembly emphasized the necessity for the Palestinian people to exercise sovereignty over their territory, and affirmed that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains a military occupation.<sup>194</sup> So, the Court, according to the General Assembly Resolution 67/12 and the relevant Security Council resolutions, the Chamber had concluded that the Court's territorial jurisdiction in the situation of Palestine is the territories occupied by Israel since 1967, in particular the West Bank, including East Jerusalem, and the Gaza Strip.<sup>195</sup>

The Court in this issue highlighted article 21(3) of the Statute that states that the application of this article must be consistent with human rights of international law, and the Appeals Chamber in a decision on a challenge Infront of the Chamber stated " human rights underpin the Statute; *every aspect of it including the exercise of jurisdiction of the Court*".<sup>196</sup>

Due to this, the Court recalled that the right of self-determination is outlined in the Charter of the United Nations, the International Covenant on Civil and Political Rights,

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<sup>192</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 115.

<sup>193</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 116.

<sup>194</sup> United Nation, General Assembly, Status of the Occupied Palestinian Territories, including East Jerusalem, A/RES/58/292, 6 May 2004, paragraph 1.

<sup>195</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 117-118, pages 51.

<sup>196</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge of the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, paragraphs 87-88.

and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>197</sup>

The ICJ advisory opinion concerning the constructing the wall in the Occupied Palestinian Territory affirmed that the right of self-determination holds “*erga omnes*” status.<sup>198</sup> The Court had linked this principle to the situation in Palestine, leading the Chamber to note that the Palestinian right to self-determination within the Occupied Palestinian Territories is recognized by international bodies. Specifically, the ICJ referred to the right of the Palestinian people for self-determination as outlined in the Israeli-Palestinian Interim Agreement, and highlighted the risk of the demographic alteration in the Occupied Palestinian Territories due to the wall construction.<sup>199</sup>

The General Assembly also addressed in various resolutions concerning the Palestinian People’s right to self-determination in the Occupied Palestinian territories in accordance with the Green Line.<sup>200</sup> Also, the Security Council resolution calls on states not to recognize the acts of breach of International Law on the Palestinian Territories by the Israeli measures aiming to alter the demographic composition, character, and status of the Palestinian territory occupied since 1967, including East Jerusalem.<sup>201</sup>

In conclusion, the Chamber determined that the right of self-determination is an internationally recognized human right, which applicable to the Palestinian people within the Occupied Palestinian Territories.<sup>202</sup> Therefore, in the Chamber's view, the

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<sup>197</sup> *The principle of equal rights and self-determination of Peoples*, United Nation General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV), page 123.

<sup>198</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion , 9 July 2004, I.C.J Reports 2004, page 136, paragraph 144.

<sup>199</sup> ICJ Report 2004, op.cit, page 136, paragraphs 118, and 122.

<sup>200</sup> General Assembly Resolution 2672 (XXV), A/RES/2672 (XXV), 1970, part C, paragraph 1; General Assembly Resolution 3236 (XXIX), A/RES/3236, 1974, paragraph 1; General Assembly Resolution 3376, A/RES/3376 (XXX), 1975 , paragraph 2; General Assembly Resolution 72/14, A/RES/72/14, 2017, paragraph 24; General Assembly Resolution 73/19, A/RES/73/19, 2018, paragraph 22.

<sup>201</sup> United Nation, Security Council Resolution 2334, 2016, S/RES/2334.

<sup>202</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 122, page 55. *See also* ICC-01/18-77, paragraphs 9,12.

Court's territorial jurisdiction in the situation in Palestine encompasses the territories occupied by Israel since 1967, a scope consistent with the right of self-determination and predicated on Palestine's accession to the Statute.<sup>203</sup>

### 2.3.4.3 Oslo Accords

Due to the submissions received in this matter, the Court preferred to address the relevance of the Oslo Accords in the present case. The Court noted that the Oslo Accords contained several clauses that limited the territorial and functional jurisdiction of the Palestinian Interim Self-Government Authority. Specifically, the agreement stipulated that Palestinian jurisdiction would apply to all persons except Israelis,<sup>204</sup> and the criminal jurisdiction of the Palestinian Authority would cover offenses committed by Palestinians and non-Israelis within the territory.<sup>205</sup> However, according to the agreement, the "territory of Palestine" was defined as West Bank, excluding Area C, and the Gaza Strip, excluding settlement and military installation area.<sup>206</sup>

Observations submitted to the Chamber regarding the Oslo agreements presented two points of view. On one hand, certain victims<sup>207</sup> and amici curiae<sup>208</sup> invoked the principle of "*nemo dat quod non habet*" rule, asserting that Palestine lacked the capacity to confer jurisdictional powers upon the Court that it did not fully possess. Conversely, the Prosecutor,<sup>209</sup> Palestine,<sup>210</sup> and various victims<sup>211</sup> and amici curiae

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<sup>203</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 123.

<sup>204</sup> Article XVII(2)(c) of Oslo Accords, 1993.

<sup>205</sup> Article I(1)(a) of Annex IV, Protocol Concerning Legal Affairs, Oslo Accords.

<sup>206</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraphs 124-125.

<sup>207</sup> Israel Law Center Observation, ICC-01/18-109-Red, paragraph 55.

<sup>208</sup> Czech Republic Submission, ICC-01/18-69, paragraphs 10-13; European Centre for Law and Justice Observation, ICC-01/18-70, paragraphs 50-53; International Association of Jewish Lawyers and Jurists Observation, ICC-01/18-98, paragraphs 75-83, ICC-01/18-98 paragraphs 49-50; Federal Republic of Germany Observation, ICC-01/18-103, paragraphs 26-29.

<sup>209</sup> Prosecutor Request, ICC-01/18-12, paragraphs 183-186.

<sup>210</sup> State of Palestine Observation, ICC-01/18-82, paragraph 64.

<sup>211</sup> Legal Representative of Victims Submission, ICC-01/18-99, paragraphs 106-118; ICC-01/18-112, paragraphs 48-54; Gilles Devers Observation, ICC-01/18-120, paragraphs 10-28; Addameer Prisoner Support and Human Rights Association Observation, ICC-01/18-123, paragraphs 22-27.

contended that the Oslo Accords would not impede the Court's jurisdiction,<sup>212</sup> although it might impact the mechanism of cooperation with the Court.<sup>213</sup>

The Court referenced article 97 of the Statute, which mandates consultation with the Court if issues arise that impede or prevent the execution of requests for international cooperation or judicial assistance.<sup>214</sup> Furthermore, article 98 of the Statute precludes the Court from proceeding with requests for surrender or assistance that would compel a requested State to act inconsistently with its obligation under international law, including those associated to diplomatic immunity of a third party or international agreements requiring the consent of a sending State for the surrender or its nationals.<sup>215</sup>

These provisions serve to accommodate potential conflicts between a State Party's international law obligations and its duties under the Statute.<sup>216</sup> Thus, the Court determined that arguments concerning the Oslo Agreements in the context of Palestine are not relevant to its decision on territorial jurisdiction, and thus the Chamber would not further address these arguments in the case.

### **2.3.5 Decision of the Court**

The Chamber finds that its conclusion in this decision is limited to defining the territorial parameters of the Prosecutor's investigation. The ruling is without prejudice to any international law matters arising from the situation in Palestine that do not fall within the Court's jurisdiction.

The Court emphasized that the conclusions in this decision pertain to this current stage of the proceeding. Thus, when the Prosecutor submits an application to issue a

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<sup>212</sup> Palestinian Bar Association Observation, ICC-01/18-72, paragraphs 39-48; International Association of Jewish lawyers and jurists Observation, ICC-01/18-98, paragraphs 49-50; Popular Conference for Palestinian Abroad Observation, ICC-01/18-100, paragraphs 74-78; League of Arab States Observation, ICC-01/18-122, paragraphs 56-57.

<sup>213</sup> Prosecutor Request, ICC-01/18-12, paragraph 185.

<sup>214</sup> Article 97, Rome Statute, 1988.

<sup>215</sup> Article 98, Rome Statute, 1988.

<sup>216</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, paragraph 127.

warrant of arrest or summons to appear<sup>217</sup> or a State or a suspect submits a challenge,<sup>218</sup> the Chamber will examine further questions of jurisdiction that may arise.

The decision further clarified that the determination of an entity as a State Party to the Rome Statute does not necessitate an assessment of whether that entity fulfills the conditions of statehood under general International Law.<sup>219</sup>

For these reasons, the Chamber concluded that Palestine is a State Party to the Statute, qualifies as a State for the purposes of Article 12(2)(a) of the Statute, and that the Court's territorial jurisdiction extends to the territories occupied by Israel since 1967. However, this findings were accompanied by a partly dissenting opinion from Judge Péter Kovács, and a partly separate opinion from Judge Marc Perrin de Brichambaut.<sup>220</sup>

#### I. Judge Péter Kovács's partly dissenting opinion

The Judge agreed with the decision on the Prosecutor's request; however, he concluded the applicability of article 19(3) for different reasons. First, the contextual interpretation of article 19(3) of the Statute, he noted that the contextual understanding of the article applies only once a case has been defined by a warrant of arrest or summons to appear.<sup>221</sup> Thus, the Judge concluded that Article 19(3) can be applied when the proceeding has reached the stage of a case identified by the Prosecutor.<sup>222</sup>

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<sup>217</sup> Article 58, Rome Statute, 1998.

<sup>218</sup> article 19(2), Rome Statute, 1998.

<sup>219</sup> Rachel Sweers. (2021). The Decision on the Situation in Palestine Issued by Pre-Trial Chamber I of the International Criminal Court: Reflecting on the Legal Merits. *Hungarian Yearbook of International Law and European Law*, volume 9, no.1, page 295.

<sup>220</sup> Pre-Trial Chamber I Decision, ICC-01/18-143, page 60.

<sup>221</sup> Partly Separate Opinion of Judge Perrin De Brichambaut, ICC-01/18-143-Anx2, paragraph 3.

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<sup>222</sup> Partly Separate Opinion of Judge Perrin De Brichambaut, ICC-01/18-143-Anx2, paragraph 4-5, page 2.

Fn. 11

Secondly, a discrepancy emerged in the timing of the Prosecutor's 9 April 2018 request and her current request. Concurrently, the Prosecutor sought to advance to the second phase of the preliminary examination in the "*situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*", despite the absence of a State Party referral in that context. whereas the Chamber had to rule in the "*situation of Palestine*" request by the Prosecutor at the initial stages of the preliminary examination to decide on the jurisdictional question that arises out of the investigation by the Prosecutor that shall be opened once the Court confirms the jurisdiction of the Court.<sup>223</sup>

While these potential cases are presently deemed admissible, the Prosecutor's assessment of the admissibility of certain prospective cases concerning alleged crimes committed by members of the Israeli Defense Forces remains ongoing.

Thirdly, the preliminary examination yielded the identification of potential cases, establishing a reasonable basis to believe that members of the Israeli Defense Forces, Israeli authorities, and Palestinian Armed Groups have perpetrated crimes falling within the Court's jurisdiction. While these potential cases are presently deemed admissible, the Prosecutor's assessment of the admissibility of certain prospective cases concerning alleged crimes committed by members of the Israeli Defense Forces remains ongoing.<sup>224</sup>

Lastly, the binding nature of the Chamber's decision. The Prosecutor had affirmed that the chamber's decision would only assist in future deliberations concerning any preliminary examination. Thus, according to the Judge's opinion, the Prosecutor had excluded the decision's binding character, which would be equivalent to an advisory opinion.

However, the Prosecutor proceeded with the preliminary examination and submitted a request for authorization to initiate an investigation, consistent with Article 15 of the Statute. So, the Judge asserted that the Prosecutor is under a legal duty to open an investigation in Palestine, provided that Palestine has satisfied the condition stipulated

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<sup>223</sup> Partly Separate Opinion of Judge Perrin De Brichambaut, ICC-01/18-143-Anx2, paragraph 8-10, page 3-4.

<sup>224</sup> Partly Separate Opinion of Judge Perrin De Brichambaut, ICC-01/18-143-Anx2, paragraph 11-12, page 4-5.

in article 53(1) of the Statute. Following this conclusion, the Judge sees that the Prosecutor ought to notify all States Parties if their obligation to cooperate with the Court, as laid down in part IX of the Statute.<sup>225</sup>

In conclusion, Judge Peter's partly separate opinion was consistent with the decision by the Pre-Trial Chamber I. The judge arrived at that conclusion for some different reasons than the Court, but in the end, the Judge concluded that determination of jurisdiction in accordance with article 19(3) of the Statute may be made in these specific proceedings.

## II. Judge Marc Perrin de Brichambaut's partly separate opinion

Judge Marc submitted a separate opinion in the decision on the situation in Palestine, as the Judge did not agree with the majority's conclusion regarding the merits (the first and second issues). Therefore, Judge Marc appended a dissenting opinion to the Majority Decision, in which he elaborates on his position on the merits and the analysis that should have been followed by the Court.

Thus, he concludes that neither the Majority's approach nor its reasoning is appropriate for addressing the question before the Chamber. From his perspective, the decision lacks a legal basis in either the Rome Statute or International Law.<sup>226</sup>

In his opinion, he critically examined the legal value of the United Nations Resolution, given that the decision was predicated on General Assembly Resolution 67/19.<sup>227</sup> He further addressed the importance and legitimacy of relying on international law when assessing the impact of international legal instruments on the situation "*sub judice*",<sup>228</sup> particularly as the Majority Decision was based on the interplay between article 12(2)(a), article 21(2)(a) and article 125(3) of the Statute.<sup>229</sup> Nevertheless, the

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<sup>225</sup> Partly Separate Opinion of Judge Perrin De Brichambaut, ICC-01/18-143-Anx2, paragraph 13-15, page 6-7.

<sup>226</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraphs 1-3.

<sup>227</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 5.

<sup>228</sup> *sub judice*: means is being studied or decided in a law Court at the present time.

<sup>229</sup> Articles 12(2)(a), 21(2)(a), and 125(3), Rome Statute, 1988.

Judge remained convinced that other articles, such as article 21(1)(b) and article 21(1)(c) of the Statute,<sup>230</sup> were relevant to the case. He implies that even though Article 21 of the Statute establishes a hierarchical structure, judges should not terminate their analysis solely at Article 21(1)(a) merely because it ostensibly provides an immediate answer to the matter at hand.<sup>231</sup>

The separate opinion also addressed the Montevideo criteria of a "State" and General Assembly Resolution 67/19. It also examined the Oslo Accords more thoroughly and raised a question of why the Court did not consider them.<sup>232</sup>

The opinion pointed out that a detailed analysis of the applicability of the Monetary Gold Principle would not be necessary to issue a ruling.<sup>233</sup> The opinion finds no reason to nullify the Palestinian accession and recapitulates that "Palestine is a State Party, despite its current international legal situation, and thus can perform its rights and obligations under the Rome Statute."<sup>234</sup>

In conclusion Judge Marc perspective is that the geographical scope of the Prosecutor's investigative authority extends to the West Bank, East Jerusalem and Gaza Strip. However, this scope is subject to the prevailing legal coordinates, necessitating consideration of the specific legal regimes applicable to Areas A, B, C, and East Jerusalem, as defined by the Oslo Accords.<sup>235</sup>

He further elaborated that in areas A and B in Palestine, the Prosecutor may proceed with the investigation. However, he recommended the conclusion of an agreement with Israel according, pursuant to article 87(5)(a) of the statute, to optimize the conditions of the investigation.<sup>236</sup> Regarding area C and East Jerusalem, and with due

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<sup>230</sup> Articles 21(1)(b) and 21(1)(c), Rome Statute, 1988.

<sup>231</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraphs 97-99.

<sup>232</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 336.

<sup>233</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 276.

<sup>234</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 267.

<sup>235</sup> article XVII, Oslo II, Annex IV.

<sup>236</sup> Judge Péter Kovács' Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 374, sub-paragraph i.

consideration for the Oslo Accords, the Prosecutor may only proceed with the investigation if the conditions stipulated in article 12(3) of the Statute are met, with an exception if the circumstances outlined in rule 1(b) of Annex IV of the Oslo Accords are met.<sup>237</sup> Ultimately, Judge Marc expressed that, absent of the cooperation of directly interested States (especially Israel), and given the highly politicized nature of the situation in Palestine, the Prosecutor would face significant challenges in preparing a trial-ready case.<sup>238</sup>

To conclude the Decision, it was agreed unanimously that Palestine is a State Party to the Statute. By majority, Judge Kovács, dissenting, decided that Palestine qualifies as a State for the purpose of article 12(2). Lastly, and by majority, Judge Kovács, dissenting, agreed that the Court's territorial jurisdiction extends to occupied territories by Israel in 1967, which are the West Bank, including East Jerusalem, and the Gaza Strip.

It can be said that the Chamber's decision is well-established, given that it is based on some previous decisions made by other international organizations such as the United Nations and the International Court of Justice. The Chamber decision rests upon the proposition that Palestine constitutes a "State", and has acceded to the Rome Statute through its procedural framework, thereby acting in accordance with the accession requirements for a State Party. Thus, Palestine is deemed entitled to exercise its privileges under the Statute and be treated equivalent to any other State Party.

## **2.4 Temporal Jurisdiction of the Court**

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<sup>237</sup> Judge Péter Kovács 'Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 374, sub-paragraph iii.

<sup>238</sup> Judge Péter Kovács 'Partly Dissenting Opinion, ICC-01/18-143-Anx1, paragraph 378.

Palestine in 2015 submitted two legal documents for the ICC: a membership application and a declaration under Article 12(3).<sup>239</sup> However, Palestine's declaration of accepting the jurisdiction of the ICC in 2015 was not the first time that Palestine lodged a declaration. In July 2009, Palestine submitted a declaration to the ICC under article 12(3) of the Rome Statute, which gave the Court temporal jurisdiction over crimes committed in the Palestinian territories since July 1<sup>st</sup>, 2002.<sup>240</sup>

While the International Criminal Court's (ICC) temporal jurisdiction is generally limited to States Parties to the Rome Statute, Article 13(2) permits non-member States to grant the Court "ad hoc" jurisdiction over crimes committed within their territories. Furthermore, the Statute stipulates that the Court's temporal jurisdiction is not retroactive for new member States, meaning jurisdiction typically extends only to crimes committed after their membership enters into force. Nevertheless, a new State Party desiring to confer temporal jurisdiction prior to its membership may do so by lodging a declaration under Article 12(3), specifying the intended temporal scope.<sup>241</sup>

However, the Court can exercise "*rationae temporis*" in accordance to article 11(2) of the Statute, which allows for jurisdiction over alleged crimes committed after the Statute's entry into force on 1<sup>st</sup> of July 2002.<sup>242</sup> Jurist Antonio Cassese has stated that new State Parties to the Statute may accept the Court's jurisdiction prior to ratifying the Statute, provided such acceptance occurs after the Rome Statute's entry into force.

Due to the 2015 declaration under article 12(3) of Palestine, the temporal jurisdiction of the Court is not when Palestine's membership went into force; according to the declaration, it is 12 June 2014. In accordance with the time frame of the 2015

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<sup>239</sup> Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014.

<sup>240</sup> Palestine, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009.

<sup>241</sup> Sofie Hogestol, (2015), Palestinian Membership of the ICC: A Preliminary Analysis. *Nordic Journal of Human Rights*, Volume 3, No. 3, page 195.

<sup>242</sup> Article 11(2), Rome Statute, 1998.

declaration, it was obvious that Palestine wanted to investigate the crimes committed during the 50-Day War in Gaza.<sup>243</sup>

The United Nations had appointed a committee to investigate the crimes committed in the 50-Day War in Gaza, which the report concluded that various serious violations of the Humanitarian Law and International Human Rights were committed, and some of the violations may count as war crimes.<sup>244</sup> Noting that Israel rejected the findings of the committee and issued its report on the 50-Day War, the report by Israel concluded that Israel did not commit any war crimes in the Gaza Strip during the War.<sup>245</sup> Nevertheless, the Prosecutor confirmed in a statement that she would focus the preliminary examination on crimes alleged to have been committed during the 50-Day Wars.<sup>246</sup>

However, General Assembly Resolution 67/19 is the primary legal base of the Court's decision on the matter of territorial jurisdiction, which influenced the temporal jurisdiction matter. A question may be raised about why Palestine didn't extend the temporal jurisdiction in 2002 or 2012. In the writer view, if Palestine lodges a declaration to extend the temporal jurisdiction to 2002, may raise a legal issue, that due to that Palestine was not considered a "State" nor had a State status in the United Nation, may lead for arguments that in that time Palestine is not a state, thus can't lodge a declaration to give the ICC territorial jurisdiction over the Palestinian territories.

Palestine can lodge a declaration under article 12(3) to extend the temporal jurisdiction of the Court to 2012, the year Palestine was granted a non-member observer state in the United Nations, without raising any issues because the Chamber based its decision on resolution 67/19, which granted Palestine a state status in the UN.

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<sup>243</sup> Sofie Hogestol, (2015), Palestinian Membership of the ICC: A Preliminary Analysis. *Nordic Journal of Human Rights*, Volume 3, No. 3, page 199.

<sup>244</sup> United Nation Human Rights Council, (2015), Report of the Independent Commission, A/HRC/29/52, paragraph 74.

<sup>245</sup> Oren Dorell, (2015), Israel: U.N. Report on Gaza War is Biased, USA Today.

<https://www.usatoday.com/story/news/world/2015/06/22/israel-reaction-to-un-human-rights-report-gaza/29115263/>

<sup>246</sup> Peter Beaumont, (2015), ICC Urges Israel to Cooperate in Inquiry into Possible Breaches in Palestine, *The Guardian*. <https://www.theguardian.com/law/2015/may/13/icc-urges-israel-to-cooperate-in-inquiry-into-possible-breaches-in-palestine>

In conclusion, Palestine initial declaration under article 12(3) differs from its second declaration in 2015 concerning the ICC's temporal jurisdiction. The first declaration constituted an "*ad hoc declaration*" acceptance of jurisdiction for alleged crimes committed since 1<sup>st</sup> of July 2002, representing the earliest date within the Court's potential jurisdiction. Conversely, the second declaration did not extend the temporal jurisdiction either to the date Palestine achieved non-member observer status in the UN or to 2002 as in the first declaration; instead, it only extended jurisdiction for a period of four months preceding the submissions of its ICC membership

It is important to note that, according to the basis addressed before, Palestine still can lodge a declaration to the ICC to extend the temporal jurisdiction of the Court to any prior time Palestine desires, but in particular to 2012, when Palestine was granted a non-member observer status in the United Nations.

## **2.5 Challenges Arising from the Court's Decision**

This part will assess the potential consequences of the Chamber's decision for the State of Palestine, including its implications for ongoing negotiations and the pursuit of justice for alleged victims of international crimes. Also, potential challenges may arise when pursuing the investigation.

Like any international organization, the ICC has institutional interests that need to be protected, but most importantly, the ICC needs the States' cooperation to collect evidence and enforce arrest warrants.<sup>247</sup> However, without cooperation from the State, the Court cannot conduct searches and seizures as needed, as the Court depends on the State to enter particular territory and collect evidence, acquire safety for the staff, and compel witnesses to appear before the Court.<sup>248</sup> In the case of Palestine, the Prosecutor

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<sup>247</sup> Saeda Adem. (2019). Perspectives on the Intervention of the ICC in Palestine, Palestine and the International Criminal Court. International Criminal Justice Series, volume 12, pages 207-208

<sup>248</sup> Bert Swart. (2002). The Rome Statute of the International Criminal Court: A Commentary. Oxford University Press, page 1539. *See also*, Christopher Stone. (2015) Widening the Impact of the International Criminal Court: The Prosecutor's Preliminary Examination in the Larger System of

used the symmetric approach, which focused on both parties in the conflict, but it may create practical difficulties in completing investigatory tasks.<sup>249</sup>

Given Israel's status as non-party State in the ICC, challenges are anticipated regarding its endorsement to the Court's decision and its cooperation with the ongoing investigation. Israel asserts that the Court lacks jurisdiction over the situation and Israel will not cooperate.<sup>250</sup> Despite Palestine's willingness to cooperate, the Prosecutor faces impediments in accessing certain territories due to the absence of Israel's collaboration. Even if the Prosecutor relies on submissions from States and NGO's, the enforcement of arrest warrants in subsequent stages is likely to remain difficult.<sup>251</sup>

However, the debates about the ICC intervention in Palestine and the potential investigation have pointed out issues other than the potential impacts on an effort to negotiate peace between Palestine and Israel, such as the legal arguments that Palestine is considered a State for the purpose of the Rome Statute. However, these arguments are aimed at supporting Israel's campaign to undermine the Court and preclude the Court from opening an investigation.<sup>252</sup>

As the Israeli Ministry of Foreign Affairs stated that, Israel considers that the Israeli-Palestinian conflict can only be resolved by direct negotiations of the parties, and that the conflict needs a negotiations process not a criminal process, lastly the Rome Statute's purpose to promote peace and justice, but according to Israel the ICC is allowing to politicalize the situation and intervene in circumstance where the Court lack jurisdiction.<sup>253</sup>

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International Criminal Justice, *The First Global Prosecutor: Promise and Constraints*. University of Michigan Press, page 288.

<sup>249</sup> Saeda Adem. *Ibid.* Page 209.

<sup>250</sup> Marissa Newman. (2014). Israel announces it won't cooperate with UN Gaza probe. *The Times of Israel*. <https://www.timesofisrael.com/israel-announces-it-wont-cooperate-with-un-gaza-probe/amp/>

<sup>251</sup> Saeda Adem. *Ibid.* Page 209.

<sup>252</sup> Mark Kersten. (2020). *ibid.* Page 1004.

<sup>253</sup> Israel Ministry of Foreign Affairs, *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"*, 20 December 2019, [https://www.gov.il/BlobFolder/news\\_the\\_international\\_criminal\\_courts\\_lack\\_of\\_jurisdiction\\_over\\_the\\_so\\_called\\_situation\\_in\\_palestine/he/the\\_international\\_criminal\\_courts\\_lack\\_of\\_jurisdiction\\_over\\_the\\_so\\_called\\_situation\\_in\\_palestine.pdf](https://www.gov.il/BlobFolder/news_the_international_criminal_courts_lack_of_jurisdiction_over_the_so_called_situation_in_palestine/he/the_international_criminal_courts_lack_of_jurisdiction_over_the_so_called_situation_in_palestine.pdf)

According to writers, it is not clear whether the judges at the ICC will give the Office of the Prosecutor the approval to investigate alleged crimes committed in Palestine, because the situation in Palestine will be under a new Prosecutor. Even if an investigation opens, according to the practical history of the Court, it will take years before any arrest warrants are issued. Also, they see that in the absence of any peace or peace offer, there is no risk of the ICC undermining any peace process or the peace between Palestine and Israel.<sup>254</sup> There is also the risk that any ICC action might be postponed by the Security Council, in order to restart the peace process between Palestine and Israel.<sup>255</sup>

It is necessary to be aware of the political and legal challenges that may still arise due to the decision of the Court. Even though the Court is an independent international organization and does not answer to its state parties, it relies on its members' funding. Thus, investigating a situation such as the Palestinian situation will raise political challenges between the States members or non-State members and the ICC. Due to the number of cases in front of the ICC, the Court's budget is stretched, thus any potential cause makes the ICC concerned about what may happen.<sup>256</sup>

The Court relies on states parties to fulfill their obligations under the Rome Statute, such as cooperation or assistance requests, because the Office of the Prosecutor may investigate independently, but the operational practices are carried out by the members of the ICC.<sup>257</sup>

In Palestine, Israel can deny international investigators and observers access to the territory. The ICC investigators assume that they are likely to restrict physical access to evidence, witnesses, and victims, which are the key elements of any criminal investigation.<sup>258</sup> Even if the Prosecutor relies on information obtained from civil

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<sup>254</sup> Mark Kersten. (2020). Ibid. Page 1015.

<sup>255</sup> Valentina Azarova. (2015). Palestine's Day in Court? The Unexpected Effects of ICC Action. Al-shabaka policy brief, alshabaka the Palestinian Policy Network, page 11.

<sup>256</sup> Pearce Clancy and Richard Falk. (2021). The ICC and Palestine: Breakthrough and End of the Road. *Journal of Palestine Studies*, page 6.

<sup>257</sup> Articles 89 and 91, Rome Statute.

<sup>258</sup> Pearce Clancy and Richard Falk. Ibid. Page 7.

society, interviews with the victims, and any available information, these reports and information are not part of a criminal investigation and may not work in all crimes.

For example, in the case of illegal Israeli settlements in the West Bank and East Jerusalem, most of the documents are available in the public domain and are valuable for the Prosecutor. Still, in cases involving military force, it won't be easy to gather all the information and evidence needed for the case. Some writers see in theory that it could have a direct cooperation with the State of Palestine and task it with collecting evidence in the Palestinian Territories where they have access. Still, in the realistic matter, it will be hard because the Oslo Accords obstructed Palestine's capability to cooperate with the Court.<sup>259</sup>

However, the Oslo Accords are one of the most important legal challenges that the case will face during its stages. Even though the Pre-Trial Chamber I did not take the Oslo Accords seriously, I did so only for the sake of completeness.

In view of writers, they believe there are legal reasons that the Oslo Accords are in the past and do not affect the present time. Although the Court held the Oslo Accords irrelevant for the purpose of establishing the Court's territorial jurisdiction, but it may be raised in further stages.<sup>260</sup>

The other issue in accordance to Oslo Accords is that the Palestinian Authority is unable to exercise criminal jurisdiction over Israeli nationals, thus it is clear that the Palestinian authorities cannot assist in the apprehension of Israeli suspect, or even arrest an Israeli military or civilian official, so a question was raised by the writers as how to arrest would be carried out.<sup>261</sup> Some critics had argued that the ICC should not intervene in the situation in Palestine, because it may ruin prospects for peace between Palestine and Israel, and the ICC investigation in Palestine it may impact peace processes and negotiations.<sup>262</sup>

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<sup>259</sup> Pearce Clancy and Richard Falk. Ibid. Page 8.

<sup>260</sup> Richard Falk, "Israel: Is This the Beginning of the End of Apartheid?" Middle East Eye, 18 May 2021, <https://www.middleeasteye.net/opinion/israel-palestine-apartheid-beginning-end>.

<sup>261</sup> Pearce Clancy and Richard Falk. Ibid. Pages 7-8.

<sup>262</sup> Mark Kersten. Ibid. Page 1002.

However, there are some challenges the ICC faces now due to the open investigation in the case of Palestine. Firstly, the States Parties cooperation in implementing the issue warrants, as the ICC has no enforcement mechanism of its own and it entirely reliant on the cooperation of State Parties.

As the issuance of arrest warrants against Israeli Officials has exposed a division in the international commitment to justice. The Rome Statute is clear in regard of the State Party obligation in the cooperation with the ICC.

The general obligation of State Parties states in Article 86 of Rome Statute stating that all State Parties shall cooperate fully with the Court's investigations and prosecute crimes within its jurisdiction.<sup>263</sup>

As for Article 89 of the Statute, it explicitly states that State Parties that receive a request from the court to comply with request to arrest and surrender of a person for whom a warrant of arrest has been issued.<sup>264</sup> In conclusion, an ICC arrest warrant transforms the wanted individual into a person who is legally requires to be detained if they be on the territory of any State Party.

Due to the arrest warrants against Israeli Officials, the reaction to the warrants has been divided, several European Countries such as Hungary, Czech Republic, Belgium and others have been publicly contested the warrant and expressed publicly that the Israeli Officials will not be detained on their territories,<sup>265</sup> and some other counties affirmed their support and the necessity of enforcing the warrants.<sup>266</sup>

Another form of non-cooperation, is opening the airspace of the country for Israel, as when a State Party implicitly indicates that it will not execute the warrant, which

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<sup>263</sup> Article 86, Rome Statute.

<sup>264</sup> Article 89, Rome Statute.

<sup>265</sup> PM: Belgium 'would not arrest Netanyahu either', Belga News Agency, 4/4/2025, <http://prez.ly/h4id>

<sup>266</sup> Turkiye, Arab world, most European countries welcome ICC arrest warrants for Israel's Netanyahu, Gallant, 25 November 2024, <https://www.aa.com.tr/en/middle-east/turkiye-arab-world-most-european-countries-welcome-icc-arrest-warrants-for-israels-netanyahu-gallant/3403166#:~:text=A%20spokesperson%20for%20Keir%20Starmer,and%20the%20Netherlands%20C%20among%20others.>

grants the wanted individual de facto immunity within its territory, which allows them to fly freely over their territory.<sup>267</sup> This case scenario was seen by Hungary, as after the issue of the arrest warrants for the Israeli Officials, the Hungarian Prime Minister invited the Israeli Prime Minister Benjamin Netanyahu to visit, stating that the warrant would not affect in Hungary.<sup>268</sup> Another case, where Belgian Prime Minister expressed that Netanyahu would “likely to not be detained” if he was on Belgian soil.<sup>269</sup>

Secondly, the external pressure the faces the ICC from the United States and some European Countries due to the investigation of the Palestinian Case.

The United States, which is not a State Party to Rome Statute, has opposed the ICC’s assentation of jurisdiction over the nationals of non-member States as in this case the Israeli Officials in Palestine.<sup>270</sup> Thus, the US pressured the ICC through direct sanctions on ICC Personals, which were the two prosecutors Fatou Bensouda and Karim Khan, two deputy of the Office, six court judges, and United National special rapporteur on the situation of the Human Rights in the Palestinian territories.<sup>271</sup>

These sanctions were enforced by the US Department of the Treasury’s Office of Foreign Assets Control (OFAC), were they freeze the assets of the ICC personals in the US, and visa and entry ban for the officials and their immediate families.<sup>272</sup>

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<sup>267</sup> Max Du Plessis. (2025). Pinochet, Bashir, Putin, Netanyahu, Gallant, Herzog: Immunities for High Officials – the Importance of Getting State Practice Right, *The European Journal of International Law*.

<sup>268</sup> Jon Henly. (2024). Hungary invites Netanyahu to visit as world leaders split over ICC arrest warrant. <https://www.theguardian.com/world/2024/nov/22/hungary-invites-netanyahu-to-visit-as-world-leaders-split-over-icc-arrest-warrant>

<sup>269</sup> Parliamentarians for Global Actions, *International Justice Update – April 2025*. See also, Belgium would likely not arrest Israeli PM Netanyahu – De Wever. (2025). <https://www.brusselstimes.com/1520493/belgium-would-likely-not-arrest-israeli-pm-netanyahu-de-wever>

<sup>270</sup> Foundation for Defense of Democracies (FDD). (2025). No jurisdiction over the United States or Israel’: Trump Signs Executive order sanctioning International Criminal Court.

<https://www.fdd.org/analysis/2025/02/06/no-jurisdiction-over-the-united-states-or-israel-trump-signs-executive-order-sanctioning-international-criminal-court/#:~:text=Trump%20stated%20that%20the%20ICC,or%20a%20member%20of%20the>

<sup>271</sup> Human Rights Watch. (2025). Human Rights Watch Briefing Note for the Twenty-Fourth Session of the International Criminal Court Assembly of States Parties.

<https://www.hrw.org/news/2025/11/19/human-rights-watch-briefing-note-for-the-twenty-fourth-session-of-the-international#:~:text=Since%20February%2C%20the%20US%20government,and%20three%20leading%20Palestinian%20human>

<sup>272</sup> Nina Moraitou-Politizi and Adam Keith. (2025). Questions and Answers: U.S. Sanctions on the International Criminal Court, Human Rights First.

Another form of external pressure is cutting funds to the ICC or threatening to cut funds by the United States and some European countries.

Even though the US is not a State Party to the Rome Statute, but the US voluntarily contributes for certain ICC activities,<sup>273</sup> but the US House of Representatives passed an Act that any US funds for the ICC would be rescinded and any future money for the Court would be prohibited.<sup>274</sup>

On the other hand, the European countries no direct cut of funds happened, but some main contributors to the ICC had publicly criticize about the Palestinian case, which lead to believe that they may influence the Assembly of States Parties to push for zero budget growth for the specific Palestinian investigation.<sup>275</sup>

The Hungarian withdrawal from the ICC can be seen as an indirect funding cut to the International Criminal Court, as their withdrawal was due to the Palestinian Case and investigation and the issuance of the arrest warrants for the Israeli Officials.<sup>276</sup>

Lastly, the issue of double standards of the States is one of the most serious challenges that faces the ICC, as many critics and human rights organizations argued the different treatment between the investigation in the situation in Palestine compared

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<sup>273</sup> Coalition for the International Criminal Court, United States.

<https://www.coalitionfortheicc.org/country/united-states#:~:text=In%202013%2C%20the%20US%20Congress,or%20tribunal%2C%20including%20the%20ICC.>

<sup>274</sup> OHCHR, UN experts urge US Senate to reject International Criminal Court sanctions bill passed by House of Representatives, 10/01/2025

<https://www.ohchr.org/en/press-releases/2025/01/un-experts-urge-us-senate-reject-international-criminal-court-sanctions-bill>

<sup>275</sup> Francesc Torres. (2024). The Budgetary instrumentalization of International Criminal Court.

ELCANO. [https://www.realinstitutoelcano.org/en/commentaries/the-budgetary-instrumentalisation-of-international-criminal-](https://www.realinstitutoelcano.org/en/commentaries/the-budgetary-instrumentalisation-of-international-criminal-justice/#:~:text=The%20year%202015%20marked%20a,Basic%20Size'%20core%20budget%20needs.)

<justice/#:~:text=The%20year%202015%20marked%20a,Basic%20Size'%20core%20budget%20needs.>

<sup>276</sup> Ozge Karsu. (2025). Hungary Announces Withdrawal from International Criminal Court. American Society of International Law. [https://www.asil.org/ILIB/hungary-announces-withdrawal-international-](https://www.asil.org/ILIB/hungary-announces-withdrawal-international-criminal-court#:~:text=The%20announcement%20was%20made%20during,arrest%20warrants%20for%20Israeli%20officials.)

<court#:~:text=The%20announcement%20was%20made%20during,arrest%20warrants%20for%20Israeli%20officials.>

for the last situation the ICC looked into which is the situation in Ukraine and the invasion of Russia.

The double standard is obvious in three main areas. Firstly, the ICC's prosecutorial response and resource allocation between the two situations.

As in the case of Palestine, the prosecutor opened an investigation in 2021 but the first arrest warrants were in 2024,<sup>277</sup> even though there were a lot of documentation and escalations in Palestine which is the war in Gaza.<sup>278</sup> Also, the case of Palestine in the ICC had received one of the lowest budget allocations for the investigations.<sup>279</sup>

On the other hand, the situation in Ukraine there were an immediate response to act, as the Russian invasion was in 02/2022. A month later, an investigation was opened, and it took the prosecutor took only one year to gather evidence and issue an arrest warrants for the Russian president and officials.<sup>280</sup> Also, the Ukraine situation in the ICC received a large budget and significant contribution from the European Countries.<sup>281</sup>

Secondly, the diplomatic support and the reaction of the United States and European Countries in regard of the arrest warrants. In regard, for the arrest warrants for the Israeli officials the US had opposed the warrants and claimed that the ICC lacks jurisdiction in this case.<sup>282</sup>

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<sup>277</sup> International Criminal Court. Situation in the State of Palestine ICC-01/18. <https://www.icc-cpi.int/palestine>

<sup>278</sup> Triestino Mariniello. (2024). The ICC Prosecutor's Double Standards in the time of an Unfolding Genocide. *Opinio Juris*. <http://opiniojuris.org/2024/01/03/the-icc-prosecutors-double-standards-in-the-time-of-an-unfolding-genocide/#:~:text=In%202023%2C%20Khan%20allocated%20the,fourth%20of%20the%20budget%20of>

<sup>279</sup> (2022). The 2023 Budget – The True Test of State Parties' Support for the ICC. *Human Rights in International Justice*. <https://hrij.amnesty.nl/the-2023-budget-the-true-test-of-state-parties-support-for-the-icc/>

<sup>280</sup> International Criminal Court. Situation in the State of Ukraine ICC-01/22. <https://www.icc-cpi.int/situations/ukraine>

<sup>281</sup> (2022). The 2023 Budget – The True Test of State Parties' Support for the ICC. *Human Rights in International Justice*. <https://hrij.amnesty.nl/the-2023-budget-the-true-test-of-state-parties-support-for-the-icc/>

<sup>282</sup> Antony Blinken, Secretary of United States. (2024). Press Conference. US Department of State. <https://2021-2025.state.gov/secretary-antony-j-blinken-remarks-to-the-press-20/>

Also, the European countries such as Hungary and Belgium publicly by statements from officials of the country questioning the legitimacy of the arrest warrants and some even questioned the Court's jurisdiction and stating clearly that they will not enforce the warrants within their territories.<sup>283</sup>

However, regarding the arrest warrants for the Russian president and officials the United States supported the warrants and urged the State Parties of Rome Statute to comply,<sup>284</sup> and the European countries they were united in affirming their legal obligations by Rome Statute, and arrest the officials if they enter their territories.<sup>285</sup> Thus, The Russian President had travel restrictions following the arrest warrant, as their international travels was curtailed by some ICC State Parties.<sup>286</sup>

Thus, the differential response to the International Criminal Court's procedures and actions are enforced only when they align with the geopolitical interest of powerful nation.

In conclusion, the situation in Palestine is complicated, which will raise complications and challenges. Some are legal issues, such as whether Palestine fulfils the condition to be a State and gives the ICC jurisdiction over the Palestinian territories. Also, a political and diplomatic challenges were raised relating to the arrest warrants and procedural actions for the investigation in the situation of Palestine, and the double standard that was shown that affects the case.

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<sup>283</sup> Aljazeera. (2024). World reacts to ICC arrest warrants for Israel's Netanyahu, Gallant. <https://www.aljazeera.com/news/2024/11/21/world-reacts-to-icc-arrest-warrants-for-israels-netanyahu-gallant#:~:text=Hungarian%20Prime%20Minister%20Viktor%20Orban,Iran>

<sup>284</sup> (2023). House Resolution supports ICC Arrest warrants for Putin and Lvovabelova. Press Release. [https://quigley.house.gov/media-center/press-releases/house-resolution-supports-icc-arrest-warrant-putin-lvova-belova#:~:text=The%20resolution%20also%20supports%20the,atrocities%20crimes%20committed%20in%20Ukraine. See also, Emma Graham-Harrison and Pjotr Sauer. \(2023\). Joe Biden hails decision to issue ICC arrest warrant against Vladimir Putin. https://www.theguardian.com/world/2023/mar/18/biden-hails-decision-icc-arrest-warrant-against-putin#:~:text=The%20US%20president%2C%20Joe%20Biden,saying%20it%20was%20justified](https://quigley.house.gov/media-center/press-releases/house-resolution-supports-icc-arrest-warrant-putin-lvova-belova#:~:text=The%20resolution%20also%20supports%20the,atrocities%20crimes%20committed%20in%20Ukraine. See also, Emma Graham-Harrison and Pjotr Sauer. (2023). Joe Biden hails decision to issue ICC arrest warrant against Vladimir Putin. https://www.theguardian.com/world/2023/mar/18/biden-hails-decision-icc-arrest-warrant-against-putin#:~:text=The%20US%20president%2C%20Joe%20Biden,saying%20it%20was%20justified)

<sup>285</sup> European Union. Russia/Ukraine: Statement by the High Representative following the ICC decision concerning the arrest warrant against President Putin. [https://www.eeas.europa.eu/eeas/russiaukraine-statement-high-representative-following-icc-decision-concerning-arrest-warrant-against\\_en](https://www.eeas.europa.eu/eeas/russiaukraine-statement-high-representative-following-icc-decision-concerning-arrest-warrant-against_en)

<sup>286</sup> Human Rights Watch. (2024). Tajikistan: Arrest Putin ICC Members should not Welcome Fugitives, News release. <https://www.hrw.org/news/2025/10/08/tajikistan-arrest-putin#:~:text=In%20August%202023%2C%20Putin%20was,and%20Russia—in%20Johannesburg>

## **Conclusions**

This thesis aimed to establish the legal basis of the Pre-Trial Chamber I decision regarding the territorial jurisdiction of the Court over the situation in Palestine, and how did the legal base of the decision had affected the temporal jurisdiction.

The Chamber rendered its decision in accordance with General Assembly Resolution 67/19, adopted in 2012, which conferred upon Palestine non-member observer State Status. On the basis of the resolution, the Court concluded that Palestine constitutes a State for the purpose of Articles 12 and 13 of Rome Statute.

Thus, the Court had reached a decision according to the 67/19 Resolution, that the territorial jurisdiction of the Court extends to the West Bank, including East Jerusalem and Gaza Strip. So, the Prosecutor may start the investigation in that territory.

Due to the important role that the General Assembly Resolution played in the decision, and it affected the temporal jurisdiction of the Court for Palestine. Prior to 2015, Palestine had lodged a declaration in 2009 with a temporal jurisdiction in 2002. However, in the current case Palestine only lodged declaration with a temporal jurisdiction from June 2014.

But Palestine still has a chance to lodge a declaration adjusting the temporal jurisdiction of the Court to 2002, but in this case a legal issue may arise due to the fact the Palestine was not recognized as a State and do not fulfill the conditions of State according to the International Law.

Also, Palestine can lodge a declaration to adjust the temporal jurisdiction to 2012, to the time that Palestine became a non-member Observer State, and considered a State in the International Community, and Palestine started to become a member party of many international treaties and becoming a member of different international organization.

## **Findings:**

1. Despite not being a full member of the United Nation, Palestine's recognition as a non-member observer state and its accession to the Rome Statute provide a satisfactory basis for its recognition as a State Party to the Statute according to articles 12 and 13, thus it granted Palestine the right to refer situations to the ICC.
2. The International Criminal Court's jurisdiction encompasses the territories occupied since 1967, in particular West Bank, including East Jerusalem and Gaza Strip. This jurisdictional scope was established in accordance with General Assembly Resolution 67/19, as this resolution played a crucial role in the Pre-Trial Chamber Decision, which proved pivotal in the Pre-Trial Chamber's decision by affirming Palestine's capacity to accede to international treaties.
3. The legal basis of the Court's decision had an effect on the temporal jurisdiction of the court. According to Palestine's declaration accepting the jurisdiction of the Court is since June 12<sup>th</sup>, 2014. Nevertheless, Palestine can accept jurisdiction of the Court further than June 2014 according to the principle of *ad hoc declaration* in accordance with the Rome Statute.
4. Oslo Accords outline agreements on governance and jurisdiction between Palestine and Israel, but these agreements are interim agreements and not a permanent agreement. Noting also that some provisions of Oslo Accords are not compatible with *jus cogens*, so they are invalid according to the Fourth Geneva Convention.

## **Recommendation**

1. It is essential that Palestine reevaluates the temporal jurisdiction in the declaration lodged in 2015 and submit a new declaration under article 12(3). This

revised declaration should extend the timeframe to encompass alleged crimes committed prior to June 2014, specifically reaching back to 2012, the year Palestine attained non-member observer State status with the United Nations.

2. Palestine should form an official team of the Ministry of Foreign Affairs and the Ministry of Justice, to allow all individuals to submit complaints against crimes committed by the Israeli occupation, and must support Human Rights Organization in securing documentation of the occupation crimes.
3. Due to lack of cooperation of Israel, Palestine should find ways to ensure that the Prosecutor Office can conduct its investigation on the Palestinian territories, either through Palestinian committees or international committees such as the United Nation.

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## الولاية القضائية الإقليمية والزمنية للمحكمة الجنائية الدولية في حالة دولة فلسطين

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### ملخص

في عام 2012، منحت فلسطين صفة مراقب غير عضو في الأمم المتحدة وفق قرار للجمعية العامة رقم 67/19، وكان لذلك القرار آثار قانونية مثل انضمام فلسطين للمنظمات الدولية وانضمامها للاتفاقيات الدولية. في عام 2015، انضمت فلسطين دولة طرف في نظام روما الأساسي لمحكمة الجنائية الدولية، ووفق المادة (3)12 من نظام روما، قبلت فلسطين اختصاص المحكمة الجنائية الدولية بشأن الجرائم المزعومة المرتكبة على الأراضي الفلسطينية.

عام 2019، أعلن المدعي العام للمحكمة الجنائية الدولية بالاستنتاج التي توصلت إليه من خلال الدراسة الأولية للوضع في فلسطين، وأقر أن فلسطين تستوفي كافة المعايير لقيام تحقيق في حالة فلسطين، ولكنه طلب من المحكمة بإصدار قرار بشأن نطاق اختصاص المحكمة في الوضع في فلسطين. بحيث في عام 2021، قررت الدائرة التمهيدية الأولى أن ولاية المحكمة في حالة فلسطين، تمتد إلى الأراضي الفلسطينية المحتلة من قبل إسرائيل منذ عام 1967، والتي تتمثل في الضفة الغربية والقدس الشرقية وقطاع غزة، إلا أن المحكمة أعربت أن الحكم لم يحدد ما إذا كانت فلسطين استوفت شروط لتكون دولة وفقاً للقانون الدولي العام، أو بشأن الحالة ما بين فلسطين وإسرائيل، فقد قامت المحكمة بتحديد فقط نطاق عمل المحكمة في حالة فلسطين.

لذلك، فإن مكتب المدعي العام للمحكمة ملزم بفتح تحقيق في الوضع في فلسطين بشأن الجرائم المزعومة وفق لنظام روما، ويجوز للمدعي العام توسيع أو تعديل هذه الجرائم طالما مرتبطة في

حالة فلسطين. فترمز الأطروحة على الأساس القانوني الذي اتخذته الدائرة التمهيدية الأولى للمحكمة الجنائية الدولية، وأثر تركيز الدائرة على قرار الجمعية العام 67/19 في تحديد الوضع في فلسطين كدولة، بحيث أن بعض الدول والمؤسسات المدنية أعربت أثناء الدراسة الأولية أن فلسطين لا تعتبر دولة، وأيضاً مسألة أن إسرائيل ليست دولة طرف في نظام روما الأساسي، فإنها يمكن الا تمنح إسرائيل للمحكمة أي ولاية قضائية على الجرائم المرتكبة على الأراضي الفلسطينية.

الكلمات المفتاحية: المحكمة الجنائية الدولية، نظام روما الأساسي، قرار الجمعية العامة 67/12،

الدائرة التمهيدية الأولى.