



THE CONCEPT OF STATE IN EXERCISING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: THE PALESTINE SITUATION

MAHDI MOMENI¹ | MOHAMMAD REZA ZAFARI²

1 Corresponding Author, Assistant Professor, Department of Criminal Law and Criminology, Faculty of Law, Payame Noor University, Tehran, Iran.

drmomeni.law@pnu.ac.ir

2 Assistant Professor, Department of Criminal Law and Criminology, Faculty of Law, Payame Noor University, Tehran, Iran.

mr_zafari@pnu.ac.ir

Article Info

Article type:

Research Article

Article history:

Received

25 March 2024

Received in revised form

20 June 2024

Accepted

28 June 2024

Published online

30 June 2024



https://ijicl.com.ac.ir/article_3082.html

Keywords:

State,

Palestine,

General Legal Principles,

Doctrine,

Territorial Jurisdiction.

ABSTRACT

The International Criminal Court (ICC, the Court) enables States to pursue the ideal of international criminal justice without imposing formal conditions. Since only States can become members of the Court, a fundamental question arises: is statehood necessary for the Court to exercise its jurisdiction according to the provisions of public international law? This paper hypothesizes that the primary criterion for the Court is its objectives and the existence of conditions for exercising territorial jurisdiction, even in the absence of clearly defined borders. Employing a descriptive-analytical research method, this study draws upon legal doctrine, international documents, and general legal principles. It examines two perspectives within public international law and international criminal law to critically analyze the decision of Pre-Trial Chamber I regarding Palestine. The findings suggest that in exercising its jurisdiction, the Court operates independently of the rigid criteria traditionally associated with the concept of statehood in public international law.

Cite this article: Momeni, M., & Zafari, M.R. (2024). The Concept of State in Exercising the Jurisdiction of the International Criminal Court: The Palestine Situation, *Iranian Journal of International and Comparative Law*, 2(1), pp: 23-40.



© The Authors

10.22091/ijicl.2024.10542.1094

Publisher: University of Qom

Table of Contents

Introduction

1. The Concept of State in International Law

2. Conditions of Exercising the Jurisdiction of the International Criminal Court

3. The Impact of the Occupation on Palestine's National Sovereignty

4. Legal Identity of Palestine

5. The Prosecutor's View: Statement of March 3, 2021

6. Legal Foundations of the Pre-Trial Chamber's Decision

Conclusion

Introduction

The establishment of the International Criminal Court (ICC, the Court) marks a significant turning point in international relations and developments. The pursuit of international criminal justice has long been a fundamental aspiration of humanity, defined here as the comprehensive provision of justice that ensures no offender can evade accountability under any circumstances, including diplomatic immunity. The Rome Statute of 1998 aligns with this aspiration of human society. Justice serves as a foundational principle guiding the ICC's exercise of jurisdiction.¹

A brief examination of the ICC's Statute reveals that it embodies a synthesis of various legal concepts, including public international law, general principles of criminal law, standards for fair trials, and overarching principles of human rights and humanitarianism. Thus, contemporary interpretation and analysis of any phenomenon within the realm of international criminal law, including the ICC, necessitate a comprehensive approach. This reflects the evolution of the field compared to the traditional theory of international criminal law that prevailed during the Nuremberg trials in 1945 and continued for several decades thereafter. In that era, public international law held exclusive validity, relegating international criminal law to a subordinate status.

Recent developments, including the national criminalization of international crimes and the emphasis on fair trial standards, have propelled the evolution of international criminal law.² Today, international criminal law, particularly as embodied in the ICC, possesses a distinct structure. On one hand, States are recognized as members of the ICC; on the other, individuals are subject to prosecution, trial, and punishment by the Court.

The advancements made by the ICC Statute necessitate clear distinctions between international criminal law and public international law. These differences emerge in terms of definitions, subject matter, aims, and sources. The scope of international criminal law is more specialized than that of public international law. While there are overlapping sources—such as custom, treaties, judicial precedents, and general legal principles—the reliability of these

¹ Kotecha, *The International Criminal Court's Selectivity and Procedural Justice* (2020) 111.

² Momeni, *Principles of Legality of Crimes and Punishments in International Criminal Law* (2021) pp 5-13.



sources varies. The sources of these two fields differ subtly; thus, from a modern perspective, international criminal law is the result of integrating various legal disciplines, particularly public international law, international human rights, international humanitarian law (IHL), criminal law, and criminal procedure.

According to Cassese, we are now confronted with a new legal paradigm. Key issues, including the role of domestic courts in international criminal law, the attention of international courts to national judicial procedures concerning international crimes, and the necessity for international criminal cooperation, must be carefully considered.¹ Cherif Bassiouni describes the contemporary nature of international criminal law as new and hybrid, likening it to the Amazon River.²

Consequently, what is deemed reliable in public international law may not necessarily serve as a source for judicial decisions. For instance, bilateral and regional customs do not hold equal standing. International treaties and documents carry greater significance in international criminal law compared to public international law. Bassiouni argues that this distinction arises from the ability of these legal instruments to more accurately fulfill the principles of legality regarding crimes and punishments.³

It is evident that customary law, particularly in the form of international customary mandatory rules or comprehensive international customs, has the potential to criminalize actions within the realm of international criminal law.⁴ In terms of the hierarchy and importance of sources, customs hold a primary position in public international law, whereas treaties occupy this position in international criminal law.⁵ The prioritization of positive rules over non-codified rules in this domain stems from the influence of criminal law principles in this integrated field.⁶

Like customary law, treaties and instruments that enjoy general acceptance among governments play a decisive role in the scope of international criminal law.⁷ General legal principles are also critically examined within this field, as not all examples of such principles hold the same validity. The Statute of the ICC addresses general legal principles in two key passages: 1) Principles and rules of international law, including the fundamental principles of IHL; and 2) General principles of law derived by the Court from national legal systems worldwide.⁸

Furthermore, Articles 22-33 of the Statute mandate that the Court must observe general principles of criminal law. The scope of international criminal law is more narrowly defined than that of public international law, as it deals specifically with subjects of a criminal nature. Key concepts such as international crimes, international criminal responsibility, and international offenders are central to international criminal law, whereas public international

1 Cassese, *International Criminal Law*, trans Ardeshir Amirrajmand (2017) 19-26.

2 Bassiouni, *International Criminal Law* (2008) 3-39.

3 Bassiouni, *Principles of Legality in International and Comparative Criminal Law' in International Criminal Law* (2008) 95.

4 Momeni, *Op. Cit.* (2021) 151-158.

5 Kriangsak, *International Criminal Law*, trans Behnam Yousefian and Mohammad Ismaili (2004) 102.

6 Faraj Al-Saddah, *Osul al-Qanun (Principles of Law)* (2001) 49.

7 Cassese, *International Criminal Law*, trans Ardeshir Amirrajmand, Hossein Piran, and Zahra Mousavi (2008) 31.

8 Articles 21-33 of the ICC Statute.



law encompasses a broader range of relations between States and international organizations, creating interconnected rules.¹

While natural persons are fundamental subjects in international criminal law, individuals in public international law are often viewed as entities without rights.² Additionally, international criminal law pursues distinct objectives that set it apart from public international law. According to Bassiouni, international criminal law is a composite discipline that includes various components, each serving different purposes. These objectives include the prevention of international crimes, addressing impunity, establishing international criminal justice, and maintaining and restoring international public order.³

Given the significant aims outlined in the ICC Statute, traditional forms and barriers that apply to States do not impact the ICC. Consequently, the Court has the authority to prosecute, try, and punish State leaders, a capability that should be regarded as extraordinary. A careful reading of the Statute suggests that, from a philosophical standpoint, the perspective of natural law holds particular significance. Therefore, the pursuit of justice is central to the Court's goals and functions, influencing the effectiveness of its components and the judges' interpretations of various concepts.

The decision of February 5, 2021, by Pre-Trial Chamber I of the ICC⁴ presents significant advancements. This decision highlights the crucial distinction between the fields of international criminal law and public international law. It posits that even if a government does not meet the requisite conditions of public international law, the ICC Statute can still recognize it as a State—an assertion that applies to Palestine.

1. The Concept of State in International Law

The State is the most significant subject of international law, primarily aimed at regulating relations between States.⁵ However, there is no universally accepted definition of a State in international law. Various legal theorists have proposed differing definitions, leading to considerable debate. Traditionally, a State is defined as an entity capable of being a "player" in the international arena. According to Article 1 of the Montevideo Convention, a State as a person of international law must fulfill the following criteria: a permanent population, defined territory, a government, and the capacity to enter into relations with other States.

There are two main theories regarding the realization of statehood: the constructive theory and the declarative theory. The constructive theory emphasizes the importance of recognition, while the declarative theory asserts that recognition is not necessary. According to the declarative theory, the criteria outlined in the Montevideo Convention are sufficient for establishing statehood; thus, the mere absence of recognition should not prevent a State from exercising its legal rights if it meets these criteria.⁶

1 Bledsoe, *Culture of International Law*, trans Alireza Parsanjad (1996) 20.

2 Cassese, *International Law in an Unconditional World*, trans Morteza Kalantarian (1991) 448.

3 Bassiouni, *International Criminal Law* (2008) 3.

4 ICC-01/18-143

5 E I Daes, *Status of Individual and Contemporary International Law* (United Nations 1992) 56.

6 Delgrande, *An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond* (2021) 15-17.



The 2011 report from the Permanent Committee on the Admission of New Members in the United Nations Security Council (UNSC) regarded the status of Palestine as a controversial issue, primarily due to the lack of effective control over its territory. Conversely, some argue that Palestine can exercise its territorial jurisdiction based on the Palestinian-Israeli agreements.¹ Ultimately, under Resolution 19/67 in 2012, the United Nations recognized Palestine as a non-member observer State.

Evaluating the Palestinian State requires practical considerations. Emphasizing the principle of self-determination strengthens the argument for recognizing Palestine as a State. Additionally, the concept of statehood in the Statute of the ICC should be interpreted in light of the Statute's objectives.²

Thus, the pursuit of justice and the fight against impunity—key purposes of the ICC—should be taken into account. This perspective supports the exercise of the ICC's jurisdiction concerning the Palestinian State.

2. Conditions of Exercising the Jurisdiction of the International Criminal Court

According to Article 12 of the Statute of the ICC, parties accept the Court's jurisdiction over the crimes outlined in Article 5. If crimes within the Court's subject matter jurisdiction are committed on the territory of a State Party or by one of its nationals, they fall under the Court's jurisdiction (Articles 12(1)(a) and (b)).

Additionally, Article 13 States that if a situation is referred by any State Party to the prosecutor, which includes a crime under the Court's jurisdiction, the Court shall exercise its jurisdiction regarding that situation.

Under paragraphs 1 and 2 of Article 12, the Palestinian State has requested the ICC to exercise its jurisdiction concerning crimes committed by Israelis on its territory. Referring to these paragraphs, the Prosecutor has recognized Palestine as a State Party of the Court, thereby granting it the right to submit a complaint to this international tribunal.³

The question of why the Prosecutor has not issued summonses for the principal defendants or warrants for their arrest, as stipulated in Article 53, largely hinges on political considerations and the specific situation of the Palestinian State.

The Statute of the Court clearly prioritizes justice and the prevention of heinous crimes that violate imperative international rules. In this context, the Court has opted to exercise its jurisdiction over certain international rules, such as diplomatic immunity⁴ and statutes of limitations in criminal matters.⁵ This approach indicates that the Court aims to fulfill the high ideal of justice and combat the impunity of perpetrators of international crimes, rather than becoming entangled in abstract procedural issues.

Consequently, the concept of "State" in the Statute should be interpreted to support the

1 Kadkhodayi and Maqami, *Consequences of constitutionalist interpretation of international law* (2017) 21.

2 Tsilonis, *The Jurisdiction of the International Criminal Court* (2019) <https://doi.org/10.1007/978-3-030-21526-2> 56.

3 ICC-OTP, 'Statement of ICC Prosecutor Fatou Bensouda on the Conclusion of the Pre-Trial Examination of the Situation in Palestine and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction' (20 December 2019).

4 Article 27.

5 Article 29.



prosecution of the most serious international crimes for the international community.¹ The acceptance of Palestine's membership by the Assembly of States Parties of the ICC aligns with this perspective and transcends a purely formalistic view of international issues.

Palestine became a member of the ICC on April 1, 2015, in accordance with the formalities of Article 125(3). After becoming a member, it referred the situation regarding crimes committed in the occupied territories to the Court in 2018.

Among the rights stemming from State membership in the ICC is the ability to prosecute crimes outlined in Article 5 of the Statute, committed within that State's territory or by its nationals. Therefore, under Article 12(2)(a), the ICC has jurisdiction over crimes committed by Israel in Palestinian territories, including the occupied ones. The Prosecutor recognizes the territories occupied since 1967 as part of Palestine, asserting the Court's competence to address these issues due to the Palestinian State's membership.²

According to Article 21(3) of the Statute, the concept of State should be interpreted and applied in accordance with internationally recognized human rights standards, emphasizing the Palestinian people's right to self-determination. Thus, the situation referred by Palestine has been accepted by the ICC, fulfilling the conditions for exercising its jurisdiction as outlined in the Statute.

3. The Impact of the Occupation on Palestine's National Sovereignty

In Resolution 2734 of 1970, titled "Resolution to Strengthen International Security," the United Nations General Assembly (UNGA) States that all governments are obligated to cooperate in accordance with the UN Charter and to refrain from legitimizing the occupation of land resulting from the threat or use of force. Countries must also accelerate the realization of the principle of self-determination and equality of rights for nations through individual and collective measures.

The UNSC's Resolution 217 (20 November 1965) urged countries not to recognize Southern Rhodesia, as its establishment violated international law and the right to self-determination. Similarly, Resolution 312 (1972) condemned the preservation of colonial rule by force as an international crime, calling on Portugal to recognize the right of its territories' peoples to self-determination. Thus, from the perspective of international law, situations resulting from criminal acts should not be recognized in favor of the perpetrators.

Resolution 662 (9 August 1990) by the UNSC rejected Iraq's declaration of annexation of Kuwait, urging the international community not to recognize it. The UNGA reiterated in Resolution 2625 (1970) that acquiring territory through force is illegal and should not be recognized. The international crimes perpetrated against the Palestinian people—such as aggression, genocide, and gross violations of human rights—are undeniable.³

Numerous UNSC resolutions have declared the occupation by the Zionist regime illegitimate and invalid under international law, including Resolutions 54 (1948), 234 (1951), 101 (1953),

1 Article 1.

2 International Criminal Court, *Situation in the State of Palestine*, William Schabas, Opinion in accordance with Article 103 of the Rules of Procedure and Evidence, Case No ICC-01/18 (15 March 2020) 84.

3 Imseis, *State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation* (2020) 909.



106 (1955), 111 (1956), 233 (1967), 702 (1969), 234 (1967), and 252 (1968). Resolutions 237, 271, and 446 have condemned repeated violations of the Geneva Conventions by the Zionist regime, including the expulsion of Palestinians, attacks on civilians, and humanitarian blockades.

The International Court of Justice (ICJ), in its advisory opinion on the construction of the separation wall, stated that such measures aimed at isolating land constitute a clear violation of customary international law and the right to prevent the appropriation of land by force. The appropriation of land through force or coercion lacks legitimacy.¹

On February 25, 2019, the UN Human Rights Council's Commission of Inquiry published a report on crimes committed by Israel in 2018 (A/HRC/40/74). The report confirmed that Israeli armed forces targeted Palestinian civilians, including children and journalists, during protests in Gaza. From March 30 to December 31, 2018, 189 Palestinians were killed, and over 9,000 were injured.²

The commission noted a lack of cooperation from the Israeli regime during the investigation, which hindered the team's access. Palestinian civilians were targeted despite posing no threat to Israeli forces,³ and the use of lethal force was deemed unnecessary and disproportionate, violating human and humanitarian rights standards.⁴

Among the deceased were 35 children, and 940 children were injured. The commission urged the UN Human Rights Council to consider these findings for potential legal action, including through the ICC.⁵ It also recommended sanctions against the perpetrators of these crimes.⁶

The commission advised member countries of the Geneva Conventions and ICC members and non-members to exercise their criminal jurisdiction over the arrest of those responsible for international crimes mentioned in the report.⁷

According to international law, occupation and the use of force to seize territory do not deprive the people of that territory of their national sovereignty and right to self-determination.⁸ Instead, they obligate the occupying power to respect the rights of the occupied population, particularly their right to self-determination and independence. Consequently, Israel cannot deny Palestinians their right to national sovereignty and self-determination, even as it continues to commit international crimes through occupation and aggression. Israeli actions exemplify illegitimate force; while they may create a physical reality, they lack legal legitimacy. Thus, from a legal standpoint, occupation neither confers legal sovereignty nor deprives a State of its sovereignty.

1 *Legal Consequences of the Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004) para 87.

2 *Ibid.*, 93.

3 *Ibid.*, 95.

4 *Ibid.*, 99, 103.

5 *Ibid.*, 126.

6 *Ibid.*, 127.

7 *Ibid.*, 128.

8 Ronen, *Palestine in the ICC: Statehood and the Right to Self-Determination in the Absence of Effective Control* (2020) 909.



3.1. Reasons for the Survival of Palestinian Sovereignty and Its State

3.1.1. UNSC Resolutions

The UNSC does not recognize the Israeli settlements established in the occupied territories since June 1967, as stated in Resolution 2334 (2016). This resolution differentiates between the land of Israel and the occupied territories of Palestine.

3.1.2. European Court of Justice Ruling

In a November 2019 decision, the Court of Justice of the European Union ruled that Israel cannot label products from Israeli settlements in the occupied territories as "Israeli." Instead, products must indicate their actual place of production,¹ as these territories are not under Israeli sovereignty but merely under its occupation.

3.1.3. ICJ Opinion

In the case concerning the separation wall, the ICJ affirmed the Palestinian people's right to self-determination as an *erga omnes* right, meaning it is enforceable against anyone infringing it (Legal Consequences of the Wall in the Occupied Palestinian Territory, para. 87-88). According to public international law, land seizure is prohibited, and occupation does not nullify the right to self-determination, which is a mandatory rule recognized by the international community.

3.1.4. European Commission Statement

In November 2015, the European Commission issued an interpretative note at the request of 16 EU foreign ministers, stating it does not recognize Israeli sovereignty over the occupied Palestinian territories, including the Golan Heights, the Khatri border, and the Gaza Strip.²

3.1.5. Support for an Independent State

Numerous UNSC resolutions emphasize the necessity of establishing an independent Palestinian State.

3.1.6. Condemnation of Israeli Actions

Various UNSC resolutions classify Israel's actions in the occupied territories as violations of the Geneva Conventions, constituting international crimes (including Resolutions 242, 237, 271, and 446).

3.1.7. Principle of *Ex Injuria Jus Non Oritur*

This principle asserts that illegal acts, such as arbitrary occupation, have no legal effect. It is invoked against the denial of national sovereignty and the right to self-determination.³ This principle was cited in Secretary of State Stimson's 1932 statement regarding Japan's conquest of Manchuria.⁴ Multiple UN resolutions, including Resolution 2734 (1970), emphasize that occupation through force is legally ineffective.⁵

1 European Court of Justice, 'Document' <http://curia.europa.eu/document.jsf?jsessionid=32> & 52.

2 EUR-Lex, 'Legal Content' <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF>.

3 Ibid, 950.

4 US Department of State, 'Milestones: The Mukden Incident' <http://history.state.gov/milestones/1921-1936/mukden-incident>.

5 Pierre-Meyer de Puy, *Considerations about the International Crime of the State*, trans Ali Hossein Najafi Abrandabadi (1991) 449-486.



3.1.8. Recognition of Palestinian Statehood

While the international essence of Palestine as a State may be distorted by ongoing occupation, numerous UNSC resolutions do not recognize the Israeli occupation or its legal effects, thereby preserving the legal nature of the Palestinian State.

4. Legal Identity of Palestine

The contemporary history of Palestine, particularly since the early 20th century, is closely tied to the aftermath of World War I and the disintegration of the Ottoman Empire under the Allied powers. Before World War I, Palestine was part of the Ottoman Empire, characterized by a majority Muslim population coexisting peacefully with Jewish and Christian minorities.¹

In this context, Theodor Herzl's book, *Jewish State*, proposed the establishment of a Jewish agency. The First Zionist Congress in 1897, held in Basel, Switzerland, declared its goal to create a homeland for the Jewish people in Palestine, asserting that this would be guaranteed under international law.²

With the outbreak of World War I, Britain, France, and Russia fought against the Ottoman Empire. Following the Sykes-Picot Agreement (May 16, 1916), Palestine came under British control.³ After the war, the League of Nations placed Palestine under British trusteeship, obliging the UK to administer the territory in a manner that would lay the groundwork for an independent State. However, this administration coincided with an influx of Jewish settlers.⁴

It is important to note that the system of trusteeship did not strip Palestine of its sovereignty; sovereignty over a territory under trusteeship belongs to its original inhabitants.⁵ The representative system aimed to expedite the independence of these territories, as outlined in Chapter 11 of the UN Charter.

With the Jewish immigrant population rising to 32% and the purchase of Palestinian land, the UK referred the Palestine issue to the United Nations in 1946. The UNGA approved the partition resolution (GA Resolution 181) on November 29, 1947, allocating 43% of Palestinian land to a proposed Palestinian State, 56% to a Jewish State, and 1% to Jerusalem (to be overseen by the UN Trusteeship Council).

Less than six months later, on May 14, 1948, the Israeli government declared its establishment. A critical question arises: Does the UNGA resolution possess the legitimacy to assign one State's territory to another? The UNGA's powers are defined by the UN Charter, which suggests that it lacks the authority to transfer sovereignty or ownership of a nation's territory,⁶ especially without a referendum involving the affected population. Consequently, the partition resolution lacks binding force and should be viewed as a recommendation rather than a legal mandate.

¹ Sepehri Ardakani, *Taking a Look at the History of Palestine* (2004) 15.

² Sokolow, *History of Zionism*, trans Davood Heydari (1998) 386.

³ Majid Safa Taj, *Comprehensive Culture of Philosophers* (2007) 84.

⁴ Koechler, *The Right of the Palestinian People to Self-Determination; The Basis of Peace in the Middle East*, trans Mohammad Habibi (2000) 75.

⁵ *The Origins and Evolution of the Palestine Problem 1917-1988* (prepared for, and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations 1990) 56.

⁶ *Ibid*, 78.



Moreover, acquiring land through war and aggression is devoid of legal legitimacy. The UN Charter, particularly Article 8, ensures that the rights of nations under trusteeship remain unchanged. Article 22 of the Covenant of the League of Nations stipulates that Palestine should become an independent nation after the trusteeship period. Thus, the partition resolution violated the Palestinian people's right to self-determination.

Following the partition, Zionist forces attacked Palestinian Arabs, seizing additional territory and extending control from the initially proposed 56% to 78% of Palestinian land. Various UNSC resolutions—such as 242 (1967), 338 (1973), 1397 (2002), 1515 (2003), and 1850 (2008)—emphasize the necessity of establishing two independent States: Israel and Palestine. Furthermore, UNSC Resolution 605 (1987) acknowledged the Palestinians as a distinct nation and recognized the West Bank and Gaza Strip as Palestinian territory.

The Palestinian National Council, in Algiers on November 15, 1988, declared the formation of a Palestinian State with Jerusalem as its capital. From the perspective of international law, a State must possess certain constituent elements: a permanent population, defined territory, a government, and the capacity to engage in relations with other States. Sovereignty, as an independent entity managing its own affairs, is foundational to these elements.

Considering the situation of Palestine, it can be concluded that Palestine meets these criteria as an independent country under international law. However, two important points must be noted:

1. The expulsion of people from their homeland does not negate the condition of a permanent population. This expulsion is an illegal act, constituting a crime of aggression as outlined in the ICC Statute, and thus has no legal effect.
2. The absolute certainty of State borders—meaning the absence of territorial disputes—is not a prerequisite for statehood.¹

Additionally, the Camp David Agreement between Egypt and Israel in 1978 recognized self-government in the West Bank and Gaza Strip. UN Resolution 19/67 of 2012 acknowledged Palestine as a non-member observer State. Recently, on May 10, 2024, 143 UN member countries recognized the State of Palestine as an independent country. This resolution calls on the UNSC to favorably consider Palestine's request for observer member status among the 194 UN member States.²

This recognition by the United Nations and the supporting governments affirms the status of the Palestinian State. According to public international law, Palestine fulfills the necessary conditions for the ICC to exercise its jurisdiction in investigating and prosecuting crimes committed within its territory.³

Therefore, while the Palestinian State may not possess all the attributes and rights of a fully recognized State, it is nonetheless regarded as a State in international law.

1 Michael Akehurst, *Modern International Law*, trans. Mehrdad Sayedi (Daftare Khadamate Hoquqiye Bayn al-Melali 1998) 27.

2 United Nations, 'Document A/67/L.28' <www.un.org/ga/search/view_doc.asp?symbol=A/67/L.28>.

3 Heinsch and Pinzauti, *To Be (A State) or Not to Be?: The Relevance of the Law of Belligerent Occupation with Regard to Palestine's Statehood Before the ICC* (2020) 928.



5. The Prosecutor's View: Statement of March 3, 2021

On March 3, 2021, Ms. Bensouda, the ICC Prosecutor, stated her positive assessment of the legal conditions necessary for the ICC to exercise jurisdiction over crimes committed in the Occupied Territories.¹ She acknowledged potential challenges, such as limited resources and a heavy workload, but emphasized that these do not hinder the Court's obligations.

According to the ICC Statute, when a member State refers a situation to the prosecutor's office and there is a reasonable basis for initiating an investigation, the prosecutor is required to act. Initially, the prosecutor informs all member States that typically have jurisdiction over these crimes. The Statute mandates the prosecutor to conduct a thorough investigation to clarify the facts and evidence, determining whether individual criminal responsibility exists.

The prosecutor has conducted a pre-trial assessment of the Palestinian situation for approximately five years, engaging with various stakeholders and holding meetings with representatives from both Palestinian and Israeli authorities. A central issue remains the Court's jurisdiction over Palestine, which the prosecutor is expected to clarify. On December 20, 2019, she announced her intention to apply to the Pre-Trial Chamber for an investigation.²

The Court can exercise its criminal jurisdiction regarding Palestine, encompassing Gaza, the West Bank, and East Jerusalem. Border disputes do not affect the Court's jurisdiction; such matters should be resolved between Palestinian and Israeli officials, not the ICC. The extent of the Court's territorial jurisdiction is crucial to fulfilling the Statute's objectives.

Palestine is a member of the Rome Statute, thereby requiring the prosecutor to initiate an investigation into the situation. The prosecutor believes there is a reasonable basis for the Court's jurisdiction to begin an investigation. It is the Court's duty to prevent crimes specified in the Statute, irrespective of the perpetrator. The prosecutor's office intends to focus on the most prominent accused individuals and those with the greatest liability while remaining attentive to the victims impacted by the ongoing violence.

The prosecutor recognizes the concerns of member States regarding crimes that threaten global peace and security and appreciates the opportunity for cooperation with both the Palestinian State and the Israeli regime to achieve justice through national and international measures.

UNGA Resolution 19/67, adopted on December 4, 2012, affirms the Palestinian people's right to self-determination and the independence of the Palestinian State within the 1967 Occupied Territories. Additionally, the judges of the Court have determined that the 1995 Oslo Accords do not restrict Palestine's accession to the ICC. The prosecutor argues that the Oslo Accords complement the Fourth Geneva Convention and do not invalidate the rights of the Occupied Territories.

The preconditions for exercising the Court's jurisdiction have been established in accordance with various provisions of the Statute, confirming the ICC's authority regarding Palestine.³ Following Palestine's application for membership on January 2, 2015, the prosecutor considers

¹ ICC-OTP, *Statement of ICC Prosecutor* (March 2021).

² ICC-OTP, *Statement of ICC Prosecutor* (20 December 2019).

³ *Ibid.*



Palestine a member of the ICC, affirming the Court's competence under Article 12, paragraph 1 of the Statute. Thus, a separate position on Palestine is unnecessary.¹

However, an opposing viewpoint argues that Palestine lacks sovereign State status, making it ineligible for ICC membership.² This formalistic interpretation appears to legitimize the occupation and contradicts the ICC's goals of justice and the right to self-determination of the Palestinian people, violating fundamental principles of human rights and IHL.

Mrs. Bensouda, in her statement on March 3, 2021, emphasized three key points regarding the jurisdiction of the ICC over the situation in Palestine:

A. Palestine as a State: The prosecutor referenced Article 12, paragraphs 1 and 2 of the ICC Statute, indicating that Palestine is recognized as a State Party. Consequently, it has the right to bring a complaint to this international tribunal.

B. Investigating Crimes Regardless of Perpetrators: The prosecutor affirmed that crimes outlined in the statute must be investigated, and justice should be administered irrespective of the nationality of the perpetrators.

C. Territorial Disputes Are Not an Obstacle: The existence of territorial disputes does not prevent the recognition of a State.

6. Legal Foundations of the Pre-Trial Chamber's Decision

The legal basis for the Pre-Trial Chamber's decision (ICC-01/18, Decision on Jurisdiction in Palestine, February 5, 2021) regarding Palestine's referral includes several key factors:

- Invocation of the ICC Statute's provisions.
- Recognition of Palestine's membership in the ICC.
- Affirmation of Palestine's right to self-determination and independence.
- Distinction between the ICC's functions and certain criteria of public international law.

The Pre-Trial Chamber stated that the decisive criterion is the provisions of the Statute, as outlined in Article 21, paragraph 1. There is no need to consider secondary sources, including principles of public international law.³

According to Article 12, paragraph 2(a), the ICC's territorial jurisdiction over Palestine is established based on where the crime occurred.⁴ Article 125, paragraph 3, specifies that the Statute is open for accession by all States, and this accession is significant regardless of international challenges.

The term "State" in the Statute is interpreted in its ordinary sense, not strictly as defined in public international law.⁵ Article 126, paragraph 2, states that the Statute becomes enforceable for a new member from the first day of the month following the sixtieth day after the deposit of accession instruments.⁶

1 Mariniello and Meloni, *Foreword: Litigating Palestine before the International Criminal Court* (2020) 882.

2 *Ibid.*, 6.

3 *Ibid.*, 87.

4 *Ibid.*, 90-91.

5 *Ibid.*, 89, 95.

6 *Ibid.*, 89.



The UNGA's Resolution 19/67 (2012) recognizes the Palestinian people's right to self-determination and independence. Consequently, Palestine can join treaties open to all governments, including the Rome Statute.¹

Disputes among members of an international treaty, according to Article 77 of the Vienna Convention on the Law of Treaties, should be settled by the Assembly of States Parties. If unresolved, they may be addressed by international judicial authorities like the ICJ.

In Article 119(2) of the ICC Statute, the Assembly of States Parties determines the mechanism for resolving member disputes. Since disputes regarding Palestine's accession have not been addressed by the Assembly, it cannot be claimed that Palestine lacks the right to membership.²

Palestine formally joined the ICC on January 2, 2015, and became a member State on April 1, 2015, making it the 123rd member.³ Most member States, except Canada, have not opposed Palestine's membership.⁴ However, Australia, Austria, Brazil, the Czech Republic, Germany, Hungary, and Uganda expressed concerns about the ICC's jurisdiction over Palestine, arguing that Palestine is not a State and that Israel is not a member.

Despite these objections, Palestine's active participation in the ICC confirms its membership.⁵ Palestine was officially listed as a member State during the 14th session of the Assembly of States Parties.

At the 16th session of the Assembly of States Parties, the venues for the 17th to 19th sessions were determined, and Japan and Palestine were elected as members of the Asia-Pacific group.⁶ During this session, Palestine proposed a discussion on the crime of aggression and raised other issues for consideration in the 17th session. This right to request discussions is reserved exclusively for member States.⁷

Palestine has paid its membership fee, which has been accepted by the Court since its accession to the ICC.⁸ The Palestinian government's cooperation in approving resolutions from the Assembly of States Parties further supports its membership.

Regardless of Palestine's status under public international law, its accession to the ICC Statute followed the proper procedures.⁹ According to the Pre-Trial Chamber, Palestine fully complied with the conditions outlined in Article 125 of the Statute. The Chamber emphasized that it would be inconsistent to allow Palestine to become a member while denying it the legal benefits of that membership.¹⁰

The Statute's primary goal, as stated in Article 1, is to combat the most egregious international crimes that concern the global community, regardless of the perpetrator's nationality or

1 Ibid, 98-99.

2 Ibid, 95, 99.

3 Ibid, 97, 98,100.

4 Ibid, 101.

5 Ibid, 908-909; McIntyre, *The ICC, Self-Created Challenges and Missed Opportunities to Legitimize Authority Over Non-States Parties* (2021) 540.

6 ICC-01/18, Pre-Trial Chamber I, *Decision on the Jurisdiction in Palestine* (5 February 2021) para. 100.

7 Ibid, 100.

8 Ibid.

9 Ibid.

10 Ibid, 102.



immunity. Consequently, the Court's territorial jurisdiction is defined to establish individual criminal responsibility and achieve justice.¹

A teleological interpretation of the Statute requires a comprehensive consideration of its provisions to avoid undermining any part of it. Thus, it is not necessary for a crime to occur entirely within a State's territory according to public international law.² Instead, the focus should be on the purpose of the Statute, which centers on individual criminal responsibility rather than State actions.

The Court does not claim competence over complex governmental issues in international law. To fulfill its objectives and conduct trials, it is unnecessary to identify the specific government involved.³ Therefore, the concept of the State is less significant than the crimes and the individuals who commit them. This distinction is a key difference between public international law and international criminal law.

The essential issue is whether a crime defined in the Statute, which violates international public order, occurred within a member State's territory. This determination is crucial for establishing individual criminal responsibility and enables the prosecutor to initiate an investigation.⁴

To avoid misunderstandings, the Pre-Trial Chamber clarifies that its findings do not pertain to issues of international law arising from events in Palestine that fall outside the Court's jurisdiction. The Chamber does not prejudge matters of public international law regarding Palestine's status, nor does it seek to rule on territorial jurisdiction or international border disputes.⁵

In conclusion, the Pre-Trial Chamber asserts that Palestine's accession to the ICC followed the procedures defined in the Statute.

In addition, the Assembly of States Parties has accepted Palestine as a member during its meetings. As a result of this accession, Palestine can utilize the legal effects of the statute as a member State. Furthermore, Palestine's membership is not subject to the disputes outlined in Article 119, paragraph 2. Therefore, Palestine is recognized as a member of the ICC and, consequently, as a State.

For the purposes of Article 12(2)(a) of the statute, Palestine's accession resolves any questions regarding its status.⁶ It can be asserted that all crimes under the jurisdiction of the ICC—including genocide, war crimes, crimes against humanity, and crimes of aggression—have been repeatedly committed against the Palestinian people by the Zionist regime. The extensive killing of Palestinians over many years, the occupation of their land through force and threats, and the expulsion of people from their homeland are well-documented globally.

The crimes committed by the Zionist regime against Palestinian civilians during peaceful

1 Ibid, 104,106.

2 Ibid, 106.

3 Ibid, 93, 104.

4 Ibid, 108.

5 Ibid, 113

6 Ibid, 112.



demonstrations in Gaza in 2018, as well as numerous violations since October 7, 2023, continue in Gaza and recently in the West Bank.¹

The Court is composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division, and a Pre-Trial Division; (c) The Office of the Prosecutor; (d) The Registry. According to Article 15 of the statute, the prosecutor can initiate an investigation based on information regarding crimes within the Court's jurisdiction. If the prosecutor concludes that there is a reasonable basis for an investigation, they must obtain permission from the Pre-Trial Chamber. Additionally, Article 14 of the ICC statute allows any member State to refer a situation involving one or more crimes within the Court's jurisdiction to the prosecutor.

Following Palestine's membership in the ICC in 2015 and its complaint against Israel regarding the 2018 crimes in Gaza, the Prosecutor announced on March 3, 2021, that Palestine is a member State of the ICC and has the authority to refer the situation to the Court. Consequently, it is now the responsibility of the ICC prosecutor to undertake the necessary measures for investigation and prosecution, in accordance with the statute, so that criminal proceedings can commence.

Conclusion

Based on the analysis of the concept of statehood in the Statute of the International Criminal Court (ICC) and the first Pre-Trial Chamber's decision on February 5, 2021, the following points can be concluded:

1. From the perspective of international law, the establishment of the occupying Israeli regime does not negate the legal existence of Palestine.
2. The principles concerning the illegitimacy of occupation and the non-transfer of ownership of occupied territories indicate that the occupation of Palestinian territories since 1967 does not eliminate Palestine's legal status. The International Court of Justice reaffirmed this in its decision, stating that the territory of Palestine corresponds to the borders established before the 1967 occupation, confirming the undeniable existence of a Palestinian State.
3. There is no doubt about the existence of the Palestinian State; even in uncertain circumstances, its existence must be acknowledged.
4. While the State of Israel was established in 1948, the United Nations did not vote to dissolve the sovereignty of Palestine. Instead, it divided the land, raising questions about the legitimacy of this division rather than the legitimacy of the pre-existing Palestinian State.
5. Multiple resolutions, including UNGA Resolution 19/67 (2012), have implicitly recognized the Palestinian State.
6. According to the ICC Statute, illegal occupation constitutes a crime of aggression. International crimes cannot confer legal legitimacy upon perpetrators, nor can occupation extinguish the legitimate existence of a State. Thus, the Palestinian State retains legal

¹ Human Rights Council, *Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory* (25 February 2019).



legitimacy despite the damage inflicted by Israeli occupation. This is supported by repeated condemnations of the Israeli regime by various international bodies, including multiple UNSC resolutions.

7. Although the ICC has stated it will not rule on territorial disputes or complex governmental issues, its actions in exercising jurisdiction over crimes committed in Palestinian territories effectively recognize the Palestinian State and strengthen its legal identity.
8. The ICC's engagement with the situation in Palestine not only addresses criticisms regarding its focus on African cases over the past two decades but also reinforces the Court's commitment to achieving justice at the international level. Moreover, it enhances the recognition of Palestinian sovereignty within the international community, making the acknowledgment of the Palestinian State more significant.



References

Books

- Akehurst, Michael, *A Modern Introduction to International Law* (Routledge 1989).
- Bassiouni, M Cherif, *International Criminal Law* (Vol 1, 3rd edn, Martius Nijhoff Publishers 2008).
- Bassiouni, M Cherif, *Principles of Legality in International and Comparative Criminal Law in International Criminal Law* (Vol 1, 3rd edn, Martius Nijhoff Publishers 2008).
- Bledsoe, Robert L and Boleslaw A Boczek, *International Law Dictionary* (ABC-Clio Inc 1987).
- Cassese, Antonio, *International Criminal Law* (Oxford University Press 2008).
- Cassese, Antonio, *International Law in an Unconditional World* (Oxford University Press 1989).
- Crawford, James, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006).
- Daes, E I, *Status of the Individual in Contemporary International Law* (United Nations 1992).
- Kittichaisaree, Kriangsak, *International Criminal Law* (Oxford University Press 2001).
- Momeni, Mahdi, *International Criminal Law* (Payam Noor University Press 1400). [In Persian]
- Momeni, Mahdi, *Principles of Legality of Crimes and Punishments in International Criminal Law* (Mizan Publishing 2013). [In Persian]
- Sepehri Ardakani, Ali, *Seiri dar tarikhe felestin: Taking a Look at the History of Palestine* (Mirathe Mandegar Publishing 2004). [In Persian]
- Sokolow, Nahum, *History of Zionism* (Adamant Media Corporation 2001).
- Taj, Majid Safa, *Farhange Jame'e Felestin: Comprehensive Encyclopedia of Palestine* (Safir Ardehal Publishing 2007, Vol II). [In Persian]
- The Origins and Evolution of the Palestine Problem 1917-1988* (prepared for and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, United Nations 1990).
- Tsilonis, Victor, *The Jurisdiction of the International Criminal Court* (Springer Nature Switzerland AG 2019) <https://doi.org/10.1007/978-3-030-21526-2>.

Articles

- Delgrande, Joe, 'An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond' (2021) *Journal of International Law and Politics* October.
- Heinsch, Robert and Pinzauti, Giulia, 'To Be (A State) or Not to Be?: The Relevance of the Law of Belligerent Occupation with Regard to Palestine's Statehood Before the ICC' (2020) 18 *Oxford Journal of International Criminal Justice* 927.
- Imseis, Ardi, 'State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation' (2020) 18 *Oxford Journal of International Criminal Justice* 905.
- Kadkhodayi, Abbasali and Maqami, Amir, 'Consequences of Constitutionalist Reading of International Law' (2017) 48 *Journal of International Law* 38. [In Persian]
- Koechler, Hans, 'The Right of the Palestinian People to Self-Determination; The Basis of Peace in the Middle East' (translated by Mohammad Habibi) (2000) *Quarterly Journal of Palestinian Studies* Summer No 4, 75.
- Kotecha, Birju, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 *Oxford Journal of International Criminal Justice* 107.
- Mariniello, Triestino and Meloni, Chantal, 'Foreword: Litigating Palestine Before the International Criminal Court' (2020) 18 *Oxford Journal of International Criminal Justice* 881.
- McIntyre, Gabrielle, 'The ICC, Self-Created Challenges and Missed Opportunities to Legitimize Authority Over Non-States Parties' (2021) 19 *Journal of International Criminal Justice* 511.
- Ronen, Yael, 'Palestine in the ICC: Statehood and the Right to Self-Determination in the Absence of Effective Control' (2020) 18 *Oxford Journal of International Criminal Justice* 947.

Documents

- ICC-01/18-143, Pre-Trial Chamber I, 'Decision on the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine' (5 February 2021).
- ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Pre-Trial Examination of the Situation in Palestine and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction' (20 December 2019).
- ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, on the Situation in Palestine: Summary of Pre-Trial Examination Findings' (3 March 2021).
- International Criminal Court, 'Referral by the State of Palestine Pursuant to Article 13(a) and 14 of the Statute' (15 May 2018).



- International Criminal Court, 'Situation in the State of Palestine: Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine' (No ICC-01/18, 22 January 2020).
- International Criminal Court, 'Situation in the State of Palestine: William Schabas, Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence' (Case No ICC-01/18, 15 March 2020).
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (9 July 2004).
- Montevideo Convention on the Rights and Duties of States* (26 December 1933).
- Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory* (25 February 2019, A/HRC/40/74).
- Rome Statute of the International Criminal Court* (17 July 1998).
- United Nations General Assembly, *Resolution 181 II (1947)*, *Report of the Ad Hoc Committee on the Palestinian Question* (29 November 1947).
- United Nations General Assembly, *Resolution 2625 (1970)*, *Declaration on Principles of International Law Concerning Friendly Relations* (XXV).
- United Nations General Assembly, *Resolution 2734 (1970)*, *Declaration on the Strengthening of International Security* (16 December 1970).
- United Nations Security Council, *Resolution 101 (1953)*, *S/3139/Rev.2* (24 November 1953).
- United Nations Security Council, *Resolution 106 (1955)*, *S/3378* (29 March 1955).
- United Nations Security Council, *Resolution 111 (1956)*, *S/3538* (19 January 1956).
- United Nations Security Council, *Resolution 217 (1965)*, *S/RES/217* (20 November 1965).
- United Nations Security Council, *Resolution 233 (1967)*, *S/RES/233* (6 June 1967).
- United Nations Security Council, *Resolution 2334 (2016)*, *S/RES/2334* (23 December 2016).
- United Nations Security Council, *Resolution 237 (1967)*, *S/RES/237* (14 June 1967).
- United Nations Security Council, *Resolution 242 (1967)*, *S/RES/242* (22 November 1967).
- United Nations Security Council, *Resolution 252 (1968)*, *S/RES/252* (21 May 1968).
- United Nations Security Council, *Resolution 270 (1969)*, *S/RES/270* (26 August 1969).
- United Nations Security Council, *Resolution 271 (1969)*, *S/RES/271* (15 September 1969).
- United Nations Security Council, *Resolution 311 (1972)*, *S/RES/311* (4 February 1972).
- United Nations Security Council, *Resolution 446 (1979)*, *S/RES/446* (22 March 1979).
- United Nations Security Council, *Resolution 54 (1948)*, *S/902* (15 July 1948).
- United Nations Security Council, *Resolution 662 (1990)*, *S/RES/662* (9 August 1990).

Websites

- Curia.europa.eu, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=pp:32&52>.
- EUR-Lex, <http://eur-lex.europa.eu/legal-content/en/txt/>.
- International Criminal Court, <https://asp.icc-cpi.int>.
- U.S. Department of State, <http://history.state.gov/milestones/1921-1939/mukden-incident>.