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## THE PALESTINIAN QUESTION AND THE ROLE OF ICC

**Dimitris LIAKOPOULOS**

*European Union law, International and European Criminal and Procedural Law in various Universities in US and Europe. Professor of international law. Attorney at Law a New York and Bruxelles.*

*Email: profdl@europe.com*

*ORCID ID: 0000-0002-6803-5774*

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**Abstract.** *This work deals with the latest ruling of the ICC of February 2021 and the situation in Palestine. It also seeks to analyze and give an answer to a series of questions: What is the relative application for the initiation of a search for crimes committed in the territory; When in the neighboring territories have opened for the first time the discussion of statehood according to general international law; What is the role of the Prosecutor of the ICC to open an investigation without the manipulation of countries that wanted to hinder such actions and certainly not to question the commission and the violation of gross violations of human rights; What is the juridical role of the prosecutor? And final what is the position of the pre-trial Chamber with the relative sentences, the fundamental notions of the international general law and of the international criminal justice?*

**Keywords:** *ICC; Palestine; statehood; international recognition; resolutions of the UN General Assembly; art. 53StICC, art. 19 StICC, art. 12 StICC, art. 119StICC, art. 17StICC, art. 21StICC, art. 15 StICC.*

### Introduction

The Palestinian situation as well as the Cypriot one have been the subject of discussion for years after various tensions that are occasionally noticed and without reaching a definitive conclusion of a peaceful solution according to the rules of international law. A step forward in the Israeli-Palestinian situation is certainly the decision of 5 February 2021 by the International Criminal Court (ICC)<sup>1</sup> where for the first time an international court recognized Palestine as a "state party" to the Statute of Rome and that ICC as a competent body to exercise its jurisdiction in the Palestinian Territory Occupied by Israel since 1967<sup>2</sup> and to ascertain the situation of the commission of serious international crimes under the same Statute (StICC) and to decide the related punishment of those responsible. Palestinian territory that does not enjoy the international personality, (following a victorious insurrection) effectively controls part of the territory and does not dispute the subjectivity of an embryonic state, such as that recognized to the Palestine Liberation Organization (PLO) endowed with effectiveness.

Internationalist theories on international or non-international armed conflicts, the role of international law, the use of arms as well as the legal rules on the protection of human rights question the relative use of the ICC position and especially the final result of investigations in the area given that Israel has not been a party of the StICC and that certainly will not be actively cooperating on their side making the situation even more difficult for the foreseeable future.

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<sup>1</sup>See from the past the relative Referral by the State of Palestine Pursuant to articles 13(a) and 14 of the Rome Statute, 15 May 2018. Ref: PAL-180515-Ref (for further analysis see also: D. Liakopoulos, "The referral "power" of ICC Prosecutor according to art. 13 StICC", in *Global Jurist*, 20 (3), 2020) and the sentence of the ICC, Pre-trial Chamber I, Situation in the State of Palestine, ICC-01/18, 5 February 2021.

<sup>2</sup>E. Kontorovich, "Israel/Palestine. The ICC's uncharted territory", in *Journal of International Criminal Justice*, 11, 2013, pp. 994ss.

## The decision of the ICC of February 5, 2021

Indeed, the ICC took up the matter after a Palestinian request to the office of Prosecutor which also included other countries such as the West Bank, East Jerusalem and the Gaza Strip. The application was based on art. 53, par.1 of the Statute of the ICC (StICC)<sup>3</sup> and considered the situation as "the unique history and circumstances of the Occupied Palestinian Territory"<sup>4</sup>. According to art. 53 StICC<sup>5</sup> relating to the Prosecutor's action to open investigations proposed by a Member State or by the United Nations Security Council itself. We can mention this situation (rectius, the jurisprudence) as an extremely elastic situation, which allows the prosecution body to balance the exercise of the punitive pretension with other requirements expressly provided for by the Statute, such as the protection of victims and the seriousness of crimes, or implicitly inferred from the system, such as the compatibility of the procedure with the experiment of national reconciliation processes. In this case, the Pre-Trial Chamber, if it considers that the prejudice to the interests of the prosecutor's alleged justice does not justify the renunciation of the action, can review, even ex officio, the decision of the prosecuting body and obliging him to start an investigation or to prosecute (article 53 paragraph 3 letter b) Statute and Rule 110 RPP)<sup>6</sup>.

Palestine does not exercise full control and its statehood according to general international law<sup>7</sup> does not seem to have been definitively resolved and the Prosecutor had deemed it

<sup>3</sup>As we can just see in the past cases (Katanga, Appeals Judgment on Admissibility (n 41) para 78): "(...) Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. For further details see also: M. Pertile, "The borders of the occupied Palestinian territory are determined by customary law: A comment on the Prosecutor's position on the territorial jurisdiction of the ICC in the situation concerning Palestine", in *Journal of International Criminal Justice*, 2020, 19 (4), pp. 967ss.

<sup>4</sup>M. Pertile, "The borders of the occupied Palestinian territory are determined by customary law: A comment on the Prosecutor's position on the territorial jurisdiction of the ICC in the situation concerning Palestine", *op. cit.*

<sup>5</sup>T. De Souza Dias, "Interests of justice: Defining the scope of prosecutorial discretion in art. 53 (1) (c) and (2) (c) of the Rome Statute of the International Criminal Court", in *Leiden Journal of International Law*, 30 (3), 2017. In particular was stated that: "(...) The Chamber sets forth three guidelines for determining if the jurisdictional standard is met: Thus, the Chamber considers that for a crime to fall within the jurisdiction of the Court, as stated in Article 53, it has to satisfy the following conditions: (i) it must fall within the category of crimes referred to in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*). The latter entails either that the crime occurs on the territory of a State Party to the Statute or a State which has lodged a declaration (...), or be committed by a national of any such State (...) then articulates the guidelines for assessing a "potential case" (...) admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation (...)"

<sup>6</sup>G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà (eds), "International criminal procedure. Principles and rules", Oxford University Press, Oxford, 2013, pp. 1299-1374.

<sup>7</sup>See in particular: L.A. Aledo, "Le droit international public", Dalloz, Paris, 2021. D. Alland, "Manuel de droit international public", PUF, Paris, 2021. C. Tomuschat, C. Walter, "Völkerrecht", Nomos, Baden-Baden, 2021.

appropriate to exercise his power based on art. 19, par. 3 StICC asking The Chamber for a preliminary examination for a ruling on the scope of the relevant territorial jurisdiction of the ICC on the situation in Palestine<sup>8</sup> to avoid in the future waste of time on research and a final useless decision. In particular, the Chamber confirmed the dissenting opinion of Judge Kovács<sup>9</sup> the relative conclusions of the Prosecutor, ascertaining and verifying that Palestine is a "state party" to the Rome Statute and that the jurisdiction of the ICC extends to occupied Palestinian territory which also includes the West Bank, East Jerusalem and the Gaza Strip<sup>10</sup> and as a consequence the validity of the application submitted. The reasoning followed by the judges, although it was not clear enough in some points, essentially represents an important contribution relating to the general recognition of the statehood of Palestine under general international law. Moreover, regardless of the origin of the *notitia criminis*, art. 19 StICC recognizes the power to raise a question of procedural suitability pursuant to art. 17 StICC (challenge to the admissibility)<sup>11</sup> for only once each and before the beginning of the trial, unless there are exceptional circumstances that justify its promotion after the first hearing. The hearing can be held even when the defendant has renounced the right to appear, or has escaped or is untraceable and all the necessary measures have been taken to ensure its presence and to inform it of the accusations. Thirty days before the confirmation of hearing charges, the indictment, together with the minutes of the evidence on which it is based, is notified to the suspect. For its part, the defense has a duty of disclosure of the evidence that it intends to bring to support its thesis, to which it must comply no later than fifteen days before the date set for the hearing (Rule 121 para 3 and 6 of Statute of Rules of Procedure and Evidence)<sup>12</sup>.

The Chamber addressed three preliminary issues raised by some state parties, such as *curiae* friends and representatives of their victims. The Chamber ruled out the discussion that the Prosecutor's request was political in nature as we have seen in the situation in Afghanistan and beyond and that the ICC is in a position to decide on the matter. On the one hand, the Prosecutor had submitted a specific question of a legal nature, relating to the "territory" over which the ICC could have exercised its jurisdiction pursuant to art. 12, par. 2, lett. a) of the Statute, and on the other hand, any problems of a political nature of the final decision would not in any case cause problems for a ruling on the merits and final<sup>13</sup>. In particular, by letter of articles 12, par. 3 and 14 distinguish between two different cases and it is admitted that through the *ad hoc* acceptance of jurisdiction, a non-state party can restrict the jurisdiction of the Court-*ratione temporis e loci*, but not *ratione materiae* (given the generic reference to the crimes referred to 53StICC) -, with the general limit of the prohibition of "intervention" in international justice according to rule 44 of the related Rules of Procedure and Evidence<sup>14</sup>. Within this spirit,

<sup>8</sup>ICC, Pre-Trial Chamber I, Situation in the State of Palestine, ICC-01/18, requested from the Prosecutor in 22 January 2020, par. 5.

<sup>9</sup>See: ICC01/18-143-Anx1).

<sup>10</sup>ICC, Pre-Trial Chamber I, Situation in the State of Palestine, ICC-01/18, decision of 5 February 2021.

<sup>11</sup>W.A Schabas, *"The International Criminal Court: A commentary on the Rome Statute"*, (2nd ed.), Oxford University Press, Oxford 2016, "(...) prosecutorial decision making does not derive from apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity. According to this approach, a State would be judged on its compliance with the duty to prosecute by an analysis of its motives rather than its actions.

<sup>12</sup>D. Liakopoulos, *"The right of disclosure in hybrid Tribunals"*, in Juris Gradibus, 2016. G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà (eds), *"International criminal procedure. Principles and rules"*, op. cit.

<sup>13</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestin, op. cit., par. 56-57

<sup>14</sup>D. Liakopoulos, *"The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence"*, ed. Maklu, Antwerp, Portland, 2019 (second edition).

the Chamber ruled that, on the basis of another decision of an international nature dating back to 1954 and especially pronounced by the International Court of Justice (ICJ) on the case of the monetary gold principle relating to the Italy v. France<sup>15</sup>, United Kingdom and United States- the adoption of a final decision involving other legal interests of a third country in the proceeding<sup>16</sup>, in our case Israel<sup>17</sup> would not be able to reach a final decision.

Furthermore, the ICC stressed that Israel had not intended to submit comments, as it was invited to do so. The judges also specified that their decision will not be based on a specific solution that refers to the relative dispute between two historical countries (Palestine and Israel) that do not have the relevant jurisdiction to resolve an international dispute<sup>18</sup>. The Chamber also ascertained that it is the competent body to rule on the issue of jurisdiction even before the initiation of a specific case against people who are suspected of having committed crimes of an international nature, despite that art. 19, par. 3StICC, refers expressly to the "preliminary questions on the competence of the ICC and on the admissibility of a case"<sup>19</sup>.

Within this spirit the Chamber established that Palestine is a "State in whose territory the conduct in question occurred", according to art. 12, par. 2, lett. a), and has ascertained its jurisdiction with respect to possible crimes committed and to be verified in the Occupied Palestinian Territory<sup>20</sup>. The majority of the judges interpreted the art. 12, par. 2, lett. a) StICC according to the principle in good faith and based on the context and object and purpose of the Rome Statute<sup>21</sup>- and stated that the term "State" refers to a "State party" to the Statute and without establishing whether it is a State that obtains all the requisites of a State according to the rules of general international law<sup>22</sup>. The Chamber considered the procedure of accession of Palestine to the Statute as plausible and definitive as well as the role of the Secretary General of the United Nations as depositary of the Statute of Rome and also taking into account the positions obtained for years by the United Nations General Assembly relating to the Israeli-Palestinian situation and from which "unequivocal indications must emerge that it considers a certain entity as a State"<sup>23</sup>.

<sup>15</sup>ICJ in 15 June 1954 sentence of the Monetary Gold case (Italy v. France, United Kingdom, United States). In ICJ Reports, 1954, par. 19. previously the absence of the consent of Russia, a non-member state to the society of nations, had led the court to refrain from exercising consultative jurisdiction in the case of the status of Eastern Karelia, concerning a dispute between Russia and Finland. See the advisory opinion of 23 July 1923, in CPJI, Série B, n. 5, par. 7ss. In the same sentence of Monetary Gold, ICJ it would seem to have wished to subordinate the application of the present principle in question to two conditions not simply implicated, but constitute the very object of the requested decision and secondly to the circumstance that the preliminary question involving the interests of the third state has a merely bilateral character. It was therefore considered that in the East Timor case ICJ would not have attributed the necessary importance to the fact that the burning of the legality of Indonesia presence in Timor concerned not only Portugal but the entire international community. See also in argument: J.A. Vos, *"The function of public international law"*, ed. Springer, Berlin, 2018, pp. 298ss. A. Orakhelashvili, *"The competence of the International Court of Justice and the doctrine of the indispensable party. From Monetary Gold to East Timor and beyond"*, in *Journal of International Dispute Settlement*, 2 (2), 2011, pp. 374ss.

<sup>16</sup>For further details and analysis see: D. Liakopoulos, *"The role of not party in the trial before the International Court of Justice"*, ed. Maklu, Antwerp, Portland, 2020.

<sup>17</sup>A.R. Rodriguez-Vila, *"The ICC, the Monetary Gold Principle and the determination of the territory of Palestine"*, in *Opinio Juris*, 2 November 2020.

<sup>18</sup>CC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 60

<sup>19</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 68

<sup>20</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 69

<sup>21</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 91

<sup>22</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 93

<sup>23</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 96. The Chamber recalled in this sense the document relating to the practice of the Secretary General as depositary of international treaties, see: UN Doc. ST/LEG/7/Rev.1, par. 83.

According to art. 125, par. 3StICC, the Rome Statute is open "to all States"<sup>24</sup> and allows the membership of entities whose statehood results from precise decisions of the General Assembly and as a consequence also obtains the requirements of public international law for the recognition of a State. In particular, the ICC was based on Resolution n. 67/19 of 29 November 2012 of the General Assembly of the UN which confirmed the: "Right of the Palestinian people to self-determination and independence in their own State (...) had recognized Palestine as a non-member observer State of the United Nations"<sup>25</sup>. The accession of Palestine as a "State party" to the Rome Statute had occurred in accordance with the provisions of art. 125, par. 3, and regardless of its status under general international law. Furthermore, the judges of the pre-trial Chamber have pre-established that they are not competent to establish the related issues of statehood that may bind the international community from a legal point of view but on the other hand, such recognition did not resolve the historical situation of these two countries. therefore questioning that the Chamber limited itself to establishing that Palestine was a "State party" of StICC<sup>26</sup>.

According to this establishment of Palestine as a "State party", the Chamber decided that the jurisdiction of the ICC would extend as a consequence to the Occupied Palestinian Territory to include the West Bank, East Jerusalem and the Gaza Strip, building upon and repeating once again the Resolution no. 67/19 of the General Assembly, given that the right of the Palestinian people to self-determination<sup>27</sup> and sovereignty has been confirmed both in the State of Palestine and in the Occupied Territory since 1967<sup>28</sup>. The Chamber, as well as other international bodies, among which the ICJ and the Security Council of the UN, not only confirmed the right of the Palestinian people to the right to self-determination, but considered that Israeli settlements in the Palestinian territories occupied since 1967 constitute a grave violation of international law, as well as the main obstacle to the two-state solution<sup>29</sup>. The Chamber stressed that the decision of extending the jurisdiction of the ICC for future checks and searches for the Commission of international crimes also in the Occupied Territory was compatible with respect for internationally recognized human rights, in accordance with the provisions of art. 21, par. 3StICC<sup>30</sup> and in this case the right to self-determination<sup>31</sup>.

The Chamber has not decided anything regarding the "possible" limits to the jurisdiction of the ICC based on the provisions of the Oslo Accords of 1995<sup>32</sup>. Given that some provisions

<sup>24</sup>D. Liakopoulos, "The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence", op. cit.

<sup>25</sup>Par. 98. see also: S. Sakran, "The creation of the non-member observer state of Palestine. A legal analysis of UN General Assembly Resolution 67/19", in Amsterdam Law Forum, 9 (2), 2017, pp. 132ss.

<sup>26</sup>CC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 108.

<sup>27</sup>Self-determination as developed by the practice of the UN (Articles 1, para. 2, 55 and 56), by a series of resolutions from the General Assembly of the UN as a rule of general international law or a fundamental principle of international law or a rule of ius cogens; and also by the ILC itself which since 1966 has included it in the exemplary list of mandatory regulations. For further analysis see also: L.A. Aledo, "Le droit international public", op. cit., D. Alland, "Manuel de droit international public", op. cit., W. Kälin, A. Epifany, M. Caroni, J. Künzli, B. Pirker, "Völkerrecht", Stämpfli Verlag, Bern, 2022.

<sup>28</sup>CC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 117

<sup>29</sup>See Resolution of the Security Council n. 2334 (2016) of 13 December 2016

<sup>30</sup>D. Liakopoulos, "Justicia dura: anatomía e interpretación en la exclusión de la responsabilidad penal individual en la justicia penal internacional", in Revista Electrónica de Estudios Penales y de la Seguridad, 2019, n. 4. R.J.A. Morales, "Definición de los crímenes internacionales y responsabilidad penal internacional", ed. Jurídicos Olejnik, Santiago de Chile, 2020.

<sup>31</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 122-123

<sup>32</sup>We speak about "Oslo I" and "Oslo II" accords signed by Israel and the Palestine Liberation Organization (PLO) (as representative of the Palestinian people) on 13 September 1993 and 28 September 1995. In the text of the

of these Agreements limit the jurisdiction of the Palestinian Authority to palestinians and/or not israelis in the West Bank and Gaza Strip and that Palestine could not delegate its jurisdiction to the ICC. The Chamber has included and interpreted that the Oslo Accords do not affect the jurisdiction of the ICC and that any issues created could have been raised by the interested and participating States in accordance with art. 19StICC-relating to preliminary questions concerning the competence of the ICC and the admissibility of a legal and non-political case-rather than in relation to a debate on the jurisdiction of the ICC which is connected to the initiation of an investigation by the Prosecutor of the ICC<sup>33</sup>.

The decision of the pre-trial Chamber opens the discussion between the notion of statehood in Palestine and the use of judges in the relative decision between "State" under general international law and "State party" of the StICC<sup>34</sup>. In particular, long before the decision of the pre-trial Chamber the judges doubted, that Palestine could be considered a "State party" to the Statute of Rome without being a "State" under general international law. If on the one hand Palestine is a fully-fledged "State party" in the ICC system-in reality what the pre-trial Chamber has clearly confirmed-on the other hand the notion of its statehood is part of the broader process aimed at achieving it. A decision that is placed alongside (and against) other factors aimed at operating in the opposite direction. Factors such as recognition by other States of the International Community, various sentences and decisions of different judicial bodies at the international level, resolutions by international organizations, etc. Factors which, although they are not constitutive of statehood, that is in themselves sufficient to qualify an entity as a State recognized in all respects by the international community, influence and contribute to determining the process of formation of the entity as such.

In addition to this spirit, art. 15 (1) StICC that clearly authorises the prosecutor to exercise prosecutorial discretion. However, paragraph (3) of the same article contains an obligatory language enforcing the prosecutor to proceed with the investigation. The ICC has not made any clear judgment on this question, and the matter is still debated;With respect to the selection of admissible cases, the StICC are silent. However, there is an explicit and common consensus among commentators and authors that the prosecutor has an implicit power to reject any case on the basis of "the interests of justice", in particular "relative gravity", whatever the trigger mechanism is. The OTP has just published a new policy document on the selection of cases and confirmed that it has broad prosecutorial discretion when selecting among legally worthy admissible cases. The paper particularly sets three criteria for this selection, namely: the gravity of the crimes, the degree of the responsibility of the alleged perpetrators<sup>35</sup>, and the potential charges;The prosecutor sits at the critical juncture of the efficiency and sufficiency of the ICC

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treaties, in whose Preamble, it was reported: "The Government of the State of Israel and the PLO Team" (see, Declaration of principles on interim self-government arrangements and The Government of the State of Israel and the Palestine Liberation Organization; The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. In particular par. 2 of art. 1 "Oslo II", it was provided that: "(...) once Israel had ceased the occupation, the administration of Gaza and the West Bank it would have been transferred to the Palestinian National Authority "). For further details see also: J. Quigley, *"The Oslo accords. More than Israel deserves"*, in American University International Law Review, 12 (2), 1997, pp. 289ss. I. Malik, *"Analysis of the Oslo accords"*, in Strategic Studies, 21 (2), 2001, pp. 136ss. Y.AL. Khudayri, *"Are the Oslo accords still valid? For the ICC and Palestine it should not matter"*, in Opinion Juris, 12 June 2002.

<sup>33</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 129

<sup>34</sup> S. Talmon, *"Germany publicly objects to the International Criminal Court's ruling on jurisdiction in Palestine"*, in GPIL-German Practice in International Law, 11 February 2021.

<sup>35</sup> D. Liakopoulos, *"International standards and responsibility competition according to the International Criminal Court: Anatomy, interpretation, proposals"*, in Revista Eletrônica de direito Penal e Política Criminal-UFRGS, 6, 2018.

at furthering its institutional goals. Whilst the prosecutor is required to maintain the sufficiency of the ICC as a legal body, which works independently without concrete prescriptions, she is required as well to make the work of the ICC efficient and capable of achieving its institutional aims. Whilst the first stands for the value of independence, the latter refers to the value of discretion. The strict commitment to the legal rules does not necessarily render the work of the ICC efficient. The ICC is not yet an ideal resort to address all sorts of atrocities, and that its ability to deliver justice is considerably limited. There are often legitimate political questions that are necessary for making the work of the ICC efficient at furthering its institutional goals<sup>36</sup>.

In this sense, the same decision of the pre-trial Chamber recognized that Palestine is a State party to the Statute of the ICC and can be considered one of the other related factors that contribute to the acquisition of statehood of an entity under general international law. Some contradictions come from the reasoning that the pre-trial Chamber has found in our opinion a "solution" that has taken into account the dynamic perspective of statehood. The incompetence of the pre-trial Chamber has shown a certain weakness in ruling on the validity of the procedure for joining Palestine to the StICC and in establishing the requirements of statehood under general international law. The ICC has tried to give a "recognition" of not only political but also legal value, as a de facto process in favor of statehood. Politically significant and still "insufficient" from a legal point of view since the problem is not exhausted in it is an area of essentially customary law such as international law in which there is no precise and instantaneous moment in which the state in the sense of international law comes into existence. The ICC according to our opinion has not committed a general recognition (*uti universi*) which tends to correspond to the existence of the requisites of effectiveness and independence but a specific one as a sort of "certification" of statehood of a decisive nature because it "incorporates" and expresses the "attitude" of a plurality of States belonging to the StICC to give a partial element of the effectiveness and independence of an aspiring State that has suffered continuous injustices for many years and both victims of gross violations must be protected and this role has been definitively attributed at the ICC.

### **"State party" and STICC. Validity and competence of the ICC**

The pre-trial Chamber included in its decision the relative competence to rule on Palestine's accession procedure to the StICC. In particular, if Palestine could be considered a "State in whose territory the relevant conduct occurred according to art. 12, par. 2, lett. A) StICC, the pre-trial Chamber has decided that the meaning of the term allows to interpret the term "State" in the sense of "State party" to the Rome Statute and that it is not necessary to establish compliance with the relevant requirements of statehood under general international law (...) "<sup>37</sup>. The position was based on the relevant rules and provisions of the Statute, in particular those concerning the procedure of accession of a State. The pre-trial Chamber has established, through the notification of filing by the Secretary General which is limited, "(...) to give effect to the practice of the General Assembly, from which unequivocal indications must emerge in the sense that it considers a certain entity as a State (...) "<sup>38</sup>. The General Assembly may allow an entity to access the Statute<sup>39</sup> and, in the case of Palestine, Resolution no. 67/19 in which the

<sup>36</sup>D. Liakopoulos, "*Schutz des angeklagten im Strafverfahren*", in International and European Union Legal Matters, working paper series, 2013.

<sup>37</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 93.

<sup>38</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 96

<sup>39</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 97

right of the Palestinian people to self-determination and independence in their own State was reaffirmed and the relative status of a non-member observer State of the United Nations was recognized. Within this spirit, the pre-trial Chamber observed that it is not the relevant body, indeed it has no competence either to review the outcome of the accession procedure, or to contest the validity of the Resolution of the General Assembly<sup>40</sup> and as a consequence that the procedure of accession of Palestine was concluded in a "correct and regular" way<sup>41</sup>. The pre-trial Chamber also decided that when a State joins the StICC it meets the requirements and automatically comes into effect for the new State. The only way to contest the validity of membership is through the Resolution of a dispute within the Assembly of States parties, in accordance with the provisions of art. 119, par. 2, of the Statute<sup>42</sup>, namely: "(...) Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court (...)". Declarations submitted pursuant to article 12 of the StICC considered to be part of the judicial functions of the ICC<sup>43</sup>.

The pre-trial Chamber specified that it is not the competent body to rule on the validity of the accession procedure and this accession has been completed correctly and regularly in accordance with the provisions of the StICC. The reference to art. 119, par. 2, as the only instrument of contesting the validity of a State's membership, it is emphasized that the pre-trial Chamber would not be competent to decide on an interstate dispute and on the validity of the membership of a State party to such a dispute. The possibility is not excluded that the issue also arises before the ICC in the context of a dispute relating to its judicial functions, on which the ICC is certainly competent in accordance with the provisions of art. 119, par. 1. According to art. 119, par. 1 StICC<sup>44</sup> any dispute relating to the judicial functions of the ICC will be resolved by the latter, where, "pursuant to par. 2, a dispute between the States parties relating to the interpretation or application of the Statute, will be referred to the Assembly of the States parties (...)"<sup>45</sup>. An interstate dispute must be addressed within the Assembly of States parties, it does not mean that it is necessary or not for the validity of an accession procedure to go before the ICC and with the obligation or not of the ICC to pronounce it. Within this spirit, the pre-trial Chamber and the provisions of art. 119, par. 1 StICC confirmed that Palestine had acceded to the Statute in a correct and regular way.

The positions of the Chamber can be interpreted and find a broader basis of justification in their reasoning in a dynamic perspective of statehood. The competence of the Assembly of States parties to resolve any dispute between the States on the validity of the accession procedure has not prevented the pre-trial Chamber from ascertaining the regularity of Palestine's accession and establishing the exercise of its jurisdiction in the Occupied Palestinian Territory. The pre-trial Chamber considered the recognition of Palestine's right to statehood given that 138 States had expressed their opinion in Resolution no. 67/19 of the General

<sup>40</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 99

<sup>41</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 102

<sup>42</sup>ICC, Pre-trial Chamber I, Situation in the State of Palestine, op.cit., par. 102

<sup>43</sup>W.A Schabas, *The International Criminal Court: A commentary on the Rome Statute*, op. cit.

<sup>44</sup> M. Vagias, *"The territorial jurisdiction of the International Criminal Court"*, Cambridge University Press, Cambridge, 2014, pp. 90ss. D. Liakopoulos, *"Autonomy and cooperation within the International Criminal Court and United Nations Security Council"*, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020. M. Cormier, *"The jurisdiction of the International Criminal Court over nationals of non-States parties"*, Cambridge University Press, Cambridge, 2020, pp. 95ss. D. Liakopoulos, *"Types of international cooperation and legal assistance in the ICC"*, in *Revista de Derecho Ciencias Sociales y Politicas*. Universidad San Sebastián, n. 25, 2019, pp. 104ss.

<sup>45</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 103.



Assembly. The pre-trial Chamber stressed that the States parties to the Statute themselves had not raised negative comments or imposed clauses when Palestine joined the StICC and that no controversy had arisen within the Assembly of States parties to the pursuant to art. 119, par. 2. The clarifications of the pre-trial Chamber to underline the absence of disputes by the States, despite the relative power to lodge disputes, no one in any case had not referred to the Assembly of States parties the relative historical controversy regarding the accession of the Palestine.

Indeed the pre-trial Chamber was based on Resolution n. 67/19 which considered it as decisive in order to recognize the relative status of Palestine as a State party to the Statute. The pre-trial Chamber underlined the effects in general, noting that it has radically ("drastically") changed the practice of the Secretary General regarding the acceptance of the terms of accession of Palestine to various international treaties<sup>46</sup>. The effect of the Resolution of the General Assembly was not limited within the spirit of the recognition of Palestine as a State party to the Statute of Rome, but intense and extended to any other treaty that contains the formula "all States" or "any State" of which the Secretary General is depositary<sup>47</sup>.

The recognition of the right to statehood provided for in Resolution n. 67/19 is a different recognition given that it effectively and unilaterally respects the existing States of the international community towards an entity that satisfies the requirements of statehood and/or that aspires to become a new State and differs from that form of "collective recognition and informal" from admission to the United Nations. The pre-trial Chamber, on the basis of a consolidated practice of the Secretary General, attributed the precise effect of allowing an entity that aspires to become a State to accede to an international treaty. The recognition-whether of a unilateral or of collective nature-does not have constitutive value of statehood, nor a resolution of the United Nations General Assembly, of a non-binding nature, could establish that a certain body satisfies the requirements of statehood under the general international law, nor can it maintain that a Resolution adopted with 138 votes in favor and reaffirming the right of a people to self-determination and independence in a State, is devoid of any legal effect for the purposes of its statehood. Not only can such a Resolution be interpreted as expressing the will of a certain number of States to follow the path of a particular entity towards statehood. It is precisely this will that is manifested in the context of the General Assembly and allows to qualify the effect of the "State party" to an international treaty, albeit limited to the application of that treaty. The pre-trial Chamber made its status conditional on the recognition of its right to statehood by the General Assembly and/or by a substantial part of the states of the international community represented in it.

The pre-trial Chamber regarding the implicit recognition of Palestine manifested by the same States parties to the StICC recalled that the Secretary General in the role of the depositary also informs the States parties to notify the deposit of the instrument of accession of a new State and that none of them they (with the exception of Canada) had contested the accession of Palestine<sup>48</sup>. The pre-trial Chamber noted that the seven States parties that had submitted observations in the proceedings on jurisdiction in the Occupied Palestinian Territory argued that Palestine could not be considered as a state for the purposes of art. 12, par. 2, lett. a) StICC

<sup>46</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 98

<sup>47</sup>L. Badaågård, M. Klamverg, "The gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court", in Georgetown Journal of International Law, 48, 2017, pp. 640 (noting that "Office of the Prosecutor (OTP) policy and strategy straddles law and politics at multiple levels and describing the evolving relationship with domestic processes"). In argument see also: M.A. Newton, "A synthesis of community-based justice and complementarity", in C.D. Vos, S. Kendall, C. Stahn (eds), Contested justice: The politics and practice of International Criminal Court interventions, Cambridge University Press, 2015, pp. 122ss.

<sup>48</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 100

and there were in fact no objections at the time of Palestine's accession, nor that other states had contested the validity within the Assembly of States parties<sup>49</sup>.

The will of the pre-trial Chamber has confirmed the meaning that recognition can assume for the purposes of explicitly manifested statehood-as in the case of the Resolution of the General Assembly-and when it is inferred from a determined behavior of the States, as we have seen in case of the absence of objections by the States parties to the Statute to the accession of Palestine.

### **"Statehood" of an entity under general international law**

The pre-trial Chamber examined the related arguments regarding its incompetence to establish precisely whether an entity can be considered a State under general international law. The pre-trial Chamber stated that it cannot pronounce on the validity of the accession procedure and would confirm the notion/term "State" referred to in art. 12, par. 2, lett. a) StICC, and which does not refer to a state under general international law. The pre-trial Chamber is competent and has also admitted its competence to review the membership procedure and to determine whether an entity meets the requirements of statehood under general international law. The pre-trial Chamber is incompatible with the provisions of the Statute<sup>50</sup>. In the same sentence that we are referring to, the pre-trial Chamber noted that the provisions of the Statute allowed to establish whether Palestine was a State party and that it was not necessary to resort to other sources of international law as provided for in art. 21, par. 1, lett. b) StICC and to establish whether an entity adhering to the Statute complies with the requirements of statehood under general international law<sup>51</sup>. A statement that seems to implicitly admit that in the event that it cannot be possible to resolve the question of the status of Palestine on the basis of the Statute, the ICC could take into account "other sources of international law"<sup>52</sup>, we refer to the rules of customary law, to determine if Palestine could be considered a State.

Within this contradiction we can say that it seems to us that an explanation can be found in the more general circle of the reasoning of the pre-trial Chamber and in a dynamic and not static perspective of statehood. It is appropriate to reiterate in the sense that the ICC has not excluded even implicitly to ascertain the regularity of an accession procedure when this is necessary to resolve a matter for the purpose of exercising its functions. The affirmation of the pre-trial Chamber regarding the complexity and political nature of statehood assumes importance, the Statute precludes the power to decide on the latter and in particular that the ICC "is not constitutionally competent to establish issues of statehood that are binding on the international community (...)"<sup>53</sup>. The pre-trial Chamber did not exclude the possibility of taking into consideration other sources of international law, to establish and interpret whether an entity can be considered a State party, and within its own competence to decide on the statehood of an entity with binding effects for the international community. The possibility of resorting to "other sources of international law" pursuant to art. 21, par. 1, lett. b) StICC can be understood in the light of the more general reasoning of the pre-trial Chamber, in the sense that the ICC has not precluded the power to take into account the factors of general international law, even if they are not constitutive of statehood, influence the formation process of a state. The ICC

<sup>49</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 101

<sup>50</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 103

<sup>51</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 111

<sup>52</sup> C. Tomuschat, C. Walter, "Völkerrecht", op. cit.

<sup>53</sup> ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 108

cannot establish that an entity is a State in the sense of general international law with a decision that binds all States of the international community. On this basis, it can be assumed that the pre-trial Chamber considered that "it was not necessary to refer to other sources of international law as those data of the practice that affect the statehood of Palestine, and in particular the recognition of its right to statehood in a Resolution of the General Assembly, they formed the basis of the accession procedure, in the sense of determining the validity of the accession of Palestine to the Statute (...)"<sup>54</sup>. The pre-trial Chamber noted that the question submitted by the Prosecutor could be resolved with reference to the StICC and that there was no need to refer to other sources of international law. The fact remains that the pre-trial Chamber could refer to general international law-and the related factors of the ends of statehood-with effects limited to the Statute.

Statehood or not, the problem remains that the pre-trial Chamber had as its purpose the punishment of the commission of crimes punishable by international justice and in particular by international courts and moreover the protection of victims and the persecution of persons who have committed serious violations according to the international criminal law. The divide between the aim of bringing criminal justice to perpetrators at any cost and the aim of reaching peace by abandonment may just end with neither justice nor peace delivered to both victims and perpetrators. The tension between these two values is still yet to be sorted out. The impotent enforcement mechanisms that the ICC holds make the ability of the ICC as a main international protector of victims highly questionable, in particular that the ICC has achieved little since its operation in 2002. That means, that the ICC should abandon its proceedings whenever its ability to deliver its own justice is not possible. In fact, based on the practice of the Prosecutors of the ad hoc Tribunals, the ICC prosecutor is required to analytically and carefully examine potential effects and ability of the Court, before intervening in a certain situation. Although this is not an easy task, as the ICC prosecutor cannot predict every single circumstance of the future, however, there are still different strategies that the prosecutor can follow in case it appears that the Court's approach is not workable.

Explicitly, Article 53 StICC requires the prosecutor to consider the voices of victims before proceeding with her investigation or prosecution. This particular factor is highly crucial to changing the type of the decision the prosecutor may make. If the local voices of a certain conflict favor a certain form of alternative other than the ICC, then the prosecutor is highly required to respect this particular demand. The Uganda situation has shown a typical example, where the majority of voices favored the peace demands ahead of justice. Even more to the point, the majority of Ugandans sought the local justice mechanism to replace the ICC. In such a scenario, the Prosecutor should have stepped back and allowed for the local alternatives to take place. Any potential failure of the prosecutor, therefore, to respond to every side of the argument does not mean that the prosecutor is in a crisis. The persistent criticism is a healthy phenomenon and does not nullify the good mission that the Court, and, in particular, and in particular all the actions that the prosecutor has conducted so far. On the contrary, the dyadic criticisms helped us to find why the prosecutor faces criticisms, and also pushed us to look for solutions for some dyadic arguments. It is true that some dyadicisms cannot be resolved due to the strong legal arguments that each side uses, however, there has often been means to reduce others<sup>55</sup>.

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54 ICC, Pre-trial Chamber I, Situation in the State of Palestine, op. cit., par. 109

55D. Liakopoulos, "International Criminal Court: Impunity status and the situation in Kenya", in International and European Union Legal Matters, 2014.

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## Concluding remarks

The pre-trial Chamber considered Palestine a State party to the StICC and inserted itself into the dynamic and not static perspective of statehood. This configured as a data, that contributes to the statehood of Palestine, despite the fact that the ruling is clearly limited to the application of the StICC and for the specific purpose of allowing the exercise of its jurisdiction over crimes committed in the Occupied Palestinian Territory. The reasoning that has been followed demonstrates the importance attributed to the will of the existing States of the international community to support the statehood of an entity that aspires to become a State, both when this is expressed expressly and in concrete case, also through a Resolution of the General Assembly of the United Nations, and when it can be implicitly deduced, for the lack of contestation of statehood through the instruments provided by the StICC itself. The decision of the pre-trial Chamber allows us to observe how recognition, although not a constitutive element of statehood, can produce the relative effect of recognizing an entity as subject of international law in relative areas and for specific purposes, and this even when compliance with the requirements of its statehood provided for by general international law is still doubtful and/or opposed by part of the international community.

The decision of the pre-trial Chamber can be considered as a further datum of the practice which, together with others, actually affects the statehood of Palestine. In the Resolution of the General Assembly no. 67/19 it should be emphasized that the non-admission to the United Nations as a member state did not prevent Palestine from being admitted to UNESCO as a full-fledged State on 31 October 2011, about a month after the request submitted to the United Nations. In recent years, Palestine has begun to "behave" internationally just like a State, such as when it complained about its alleged violations in interstate disputes. The reference is to the appeal filed in 2018 to the United Nations Committee on the Elimination of Racial Discrimination against Israel for alleged violations of the 1965 Convention and to the one against the United States before the ICJ, invoking the violation of the Vienna Convention on Diplomatic Relations of 1961<sup>56</sup>, regarding the transfer of the US embassy from Tel-Aviv to Jerusalem. In fact, the United Nations Committee has recognized the statehood of Palestine for the purpose of exercising its jurisdiction in the dispute it has submitted to the ICJ and has not yet ruled on merit<sup>57</sup>.

That certain types of recognition in limited contexts and for specific purposes are in no way constitutive of the statehood of Palestine, there is no doubt that they play a significant role in the process of forming a State. Statehood is not recognized even in these limited areas, and it would be indications in the sense of not wanting to consider Palestine as a State of the international community. It can be assumed that such recognitions take on even more importance in a case, like that of Palestine, in which the element of statehood is the subject of the controversy concerning control over the Occupied Palestinian Territory. And in relation to the assumption of a clear and widespread position, which was also expressed by the Security Council, in the sense that the Israeli settlements constitute a violation of international law. Failure to control these territories and failure to comply with the requirement of effective

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<sup>56</sup> D.B. Hollis, *"The oxford guide to treaties"*, Oxford University Press, Oxford, 2020. M. FITZMAURICE, P. MERKOURIS, *"Treaties in motion. The evolution of treaties from formation to termination"*, Cambridge University Press, Cambridge, 2020, pp. 282ss.

<sup>57</sup> A. Imseis, *"On membership of the United Nations and the State of Palestine: A critical account"*, in *Leiden Journal of International Law*, 34(4), 2021, pp. 862ss.

government over a territorial community is the consequence of an objective situation of military occupation exercised by Israel since 1967 and deemed illegitimate under international law. Illegitimacy that has been clearly expressed in important international contexts given that in fact Israel continues to occupy the Palestinian territories and how the use of armed violence of all kinds, with its dramatic consequences, continues to occur periodically. And it is precisely by taking into account the foregoing that the relevance of international legal instruments can be considered which, despite failing to prevent illegitimate situations from continuing to occur, in fact "press" for this objective to be achieved and in some cases manage to allow achieve significant results. The decision of the ICC, in recognizing the statehood of Palestine, albeit for the sole purpose of applying the Statute of Rome, has in fact "opened" the will of various States of the international community to consider it as a State despite the absence of a generalized consensus of States of the international community. Thanks to this decision which made it possible through a legal instrument such as that of the StICC - that the ICC was able to start investigations, on March 3, 2021, into possible crimes of an international nature committed in the Occupied Palestinian Territory. The actions of ICC in itself cannot stop the use of gun violence, but they may act as a deterrent and, if nothing else, lead to the punishment of those responsible for international crimes committed in the course of that violence.

We can say that the Palestinian choice was to "jurisdictionalize" the relative question of self-determination through effective exceptions of international law and in particular through the jurisdiction of the ICC, it seems taking into account the relative risks, this strategy may be successful in the near future and with the ultimate aim of frightening the Israeli authorities. The ICC has not denied the effectiveness of the State of Palestine is solely due to the occupation (of parts) of its territory and therefore to the Commission of international crimes by the Israeli authorities, it would explain the continuous reaction that all these months from last February until today Israel and its allies continue with various ways of being counterproductive and disregarding an international peace process. Within that spirit are vital to the success of the ICC furthering its institutional aims, including justice, peace and security, and recommending the OTP to follow them, given the current circumstances in which the ICC works. The decision to initiate investigations or proceed with prosecutions are not only contingent on the legal criteria of the Statute. There are always extra-legal factors and political circumstances necessary for the exercise of meaningful prosecutorial missions. The engagement of the prosecutor in the particularities of situations and cases is very important for enforcing meaningful justice that the ICC itself may not be able to do. The consideration of extra-legal factors is essential for the viability, efficacy, efficiency, and independence of the ICC. The consideration of these political circumstances within the decision making-process is important because these kinds of political considerations are intrinsic to international justice.

The development of the international criminal law, *rectius* justice and the jurisprudence of international prosecutors all contributed to developing the role of an international prosecutor, as a new international player within the international legal arena and international politics. For instance, when the prosecutor stops the criminal proceedings, using her discretionary power, based on "the interests of justice", the prosecutor, in fact, may be addressing other values, such as stability or peace-related considerations. The prosecutor's new roles emerge during this process besides her main mandate in delivering justice. Accordingly, the current international Prosecutor can/should exercise a multitude of roles in order to promote those values. With the establishment of the ICC, we have begun to see a dramatic development in the idea of the prosecution in terms of both the legal level and practical level. It is a multi-functional prosecution. The creation of the ICC witnessed a formal emergence of a new sense of prosecution, where the role of the prosecutor has been formally widened, accordingly. Article

53 StICC was a product of the historical development of the exercise of the discretionary power by the previous prosecutors. Although this form of power was not clear enough either theoretically or practically in the work of the Military Tribunals, it was clear enough in the practice of the Special Criminal Tribunals. With the arrival of the ICC, we have begun to see that these developments have been embedded in the law<sup>58</sup>.

According to our opinion, the consideration of peace processes (a political influence) on the basis of "the interests of justice" can be accounted for only when such processes are associated with some sort of justice mechanisms. This is often the case when international justice of the ICC is not attainable due to some obstacles, then other justice mechanisms might be more meaningful and needed. The use of the apologist considerations as a tool to achieve the utopian end, which is justice, in its broad sense, is the approach that may legitimately help justify the consideration of political factors. As the prosecutor is expected to be independent, respecting the rule of law when exercising her discretion, she is also expected to be flexible, as discretion is in nature a power that stands outside the law. The prosecutor may need to give weight to considerations that are not warranted in law. The ignorance of one of these premises posed the prosecutor in the dyadic criticisms.

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