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The Statehood of Palestine before the International Criminal Court

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INTRODUCTION

Statehood is a cornerstone of international law, embodying the aspirations of people around the world for recognition, sovereignty, and self-determination. The realization of these aspirations has constituted the foundation for the formation of the modern global order following World War I, but, while in certain cases the acquisition of statehood was ensured through a smooth transition; in others, such as the Palestinian one, the situation was quite the opposite. Indeed, Palestine represents an important departure from the tradition of state formation, as “although it is an ancient land, its modern statehood was devised around a conference table far from its shores”.¹ From the years of the British mandate, to the Israeli occupation in some of its territories, to its legal status being put into question with each accession to a new treaty, or recognition received, or request made on its part, the question of whether or not Palestine is a State has become more and more controversial, even more so in light of political considerations often meddling with legal ones.

In this complex context, a debate arose around the Decision of the 5th of February 2021 issued by the Pre-Trial Chamber and confirming the International Criminal Court’s jurisdiction in the territories of Gaza and the West Bank, including East Jerusalem, which had been possible thanks to Palestine becoming a “State party” to the Rome Statute in 2015. The Decision raised concerns on whether the recognition of the ICC jurisdiction implied the recognition of Palestine as a State or not. Therefore, this thesis attempts to shed light on the implications of the Decision on Palestine’s statehood, through a first historical and legal analysis of the Palestinian road to statehood, to then proceed with an analysis of the Decision itself and of the consequent observations carried out by scholars.

The first chapter will analyse the historical background behind the Palestinian claims for statehood from the British mandate to the present day, and the legal one concerning the Montevideo Criteria of statehood and the theories of recognition applied to the case of Palestine. More specifically, particular attention is devoted to the Montevideo Criteria.² They constitute the most common theoretical framework to assess statehood, but they have often been accused of being too western-centric and of being unsuited to the Palestinian case, that due to factors such as the Israeli belligerent occupation, needs a more flexible approach.

¹ John Quigley, *The Statehood of Palestine* (Cambridge University Press 2010).

² A permanent population, a defined territory, an effective and independent government, and the capacity to enter into relations with other States.

The second chapter will begin by providing a general overview of the ICC's structure and objectives, with a specific focus on its jurisdictional requirements and, if satisfied, the consequent path composed of the preliminary examination, the investigation, and the issue of an arrest warrant, that then leads to the Trial. The Decision, which will be analysed in the second part of the chapter, collocates itself at the end of the preliminary examination, but before the beginning of the investigation, as the Prosecutor of the time, Fatou Bensouda, found necessary before moving on to the investigation to seek confirmation from the Pre-Trial Chamber that the Court indeed had jurisdiction, and if yes, on which territories. The reasoning behind the Prosecutor's Request and the answer of the Chamber will be outlined, giving space to the legal basis and merits of the Decision as well as the dissenting opinion of one of the judges.

The 5th of February 2021 Decision confirmed that Palestine is to be considered "the State on the territory of which the conduct in question occurred" within the meaning of Article 12(2)(a) of the Statute and that the ICC has jurisdiction over the territories of Gaza, and the West Bank, including East Jerusalem. The Decision of the Chamber gave rise to a debate among scholars over its legal implications, mostly in light of the controversial context in which the Palestinian statehood is placed. The critical analysis of the Decision will be carried out in the third chapter, by drawing from the scholars' contributions on the matter, which range from providing factors that could mitigate the statehood criteria, namely belligerent occupation and the right to self-determination in the absence of effective control, to explaining why the States' conferral of jurisdiction to the ICC has a colonial premise, thus rendering the Decision a development in Public International Law, to again showing the implications of treating Palestinian statehood in functional terms.

By focusing on the Pre-Trial Chamber Decision, this thesis seeks to clarify its broader implications on the question of Palestinian statehood. By providing the historical context, the legal framework, and the scholarly debates, this work will outline a perspective on how the ICC having jurisdiction on the Palestinian territories and opening an investigation after the Decision collocates itself in the ongoing Palestinian quest for self-determination and a sovereign State.

1. THE INTERNATIONAL LAW CRITERIA OF STATEHOOD AND THE PROCESS OF RECOGNITION FOR PALESTINE

1.1. Introduction

This chapter is intended to have an introductory nature, whose aim is to set the basis for the following chapters by analysing the historical and legal premises of the complex and debated question of Palestinian statehood. The chapter will be divided into two main sections, the first of which is a historical overview of the Palestinian claims for statehood, starting from the British Mandate after World War I until the present day. The second is instead a thorough analysis of the legal criteria behind the concepts of statehood and recognition under international law, and their application to the Palestinian case, which will allow for a full understanding of the implications and technicalities of this specific case.

1.2. History of the Palestinian claims for statehood

Certain events were essential in determining the actual status of Palestine and its demands for statehood and recognition, starting from the territory now belonging to Palestine and Israel being under the Ottoman Empire until the end of World War I. One of the consequences of the War period was the dissolution of that Empire, whose territory was put under the League of Nations Mandate system, with Great Britain acting as mandatory power. Article 22 of the Covenant of the League of Nations, referring to the “Class A mandates” such as Palestine, stated “(...) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory³(...)”.

Article 22 was aimed at distributing the African and Asian possessions of the defeated powers that were judged as incapable of governing themselves. The possessions were divided into classes A, B, and C based on their location and the level of political and economic development. The division was a compromise between the Allies’ wish to keep the Turkish and German colonies, and the pre-armistice declaration stating that the annexation of the territory was not their aim in the war. Class A mandates comprised the Turkish provinces of Iraq, Palestine,

³ ‘Covenant of the League of Nations’ (*Refworld*, 28 April 1919)
<https://www.refworld.org/legal/constinstr/lon/1919/en/17145>. Accessed 12 February 2024

Syria, and Lebanon. The first two were assigned to Great Britain, and the others to France. Theoretically, the exercise of the mandates was supervised by the League's Permanent Mandates Commission, but it had no way to enforce its decisions.⁴

During the British mandate, one of the most important events regarding Palestine was when British Foreign Secretary Lord Balfour gave the Zionist movement his promise in 1917 to establish a national home for the Jewish people in Palestine⁵. The declaration was the first clash with both the aspirations and natural rights of the Palestinians for nationhood and independence⁶.

After World War II, the situation kept worsening as Great Britain was unable to control its territories, so it decided to go before the United Nations General Assembly⁷, which in turn adopted Resolution 181 on the 29th of November 1947, approving the partition plan. The resolution proposed a comprehensive plan to divide Palestine into separate Jewish and Arab states and to establish the city of Jerusalem as a *corpus separatum* under an international regime administrated by the UN. Following this decision, hostilities broke out between Arab and Jewish communities and continued to escalate after Israel's Declaration of Independence on 14th of May 1948; involving also neighbouring Arab states⁸ wishing to assist Palestine. The Israeli-Arab war ended with Israel detaining much of the territory conferred to the Arab community by the UN partition plan. Later in 1949, the Armistice Agreement was signed between Israel, Egypt, Lebanon, Jordan, and Syria, which set up the "green line"⁹.

Then, in June 1967, after the six-day war, Israel invaded and occupied various territories, which had a crucial impact on the awakening of Palestinian nationalism. Several months following the conflict, in November, the United Nations adopted UN Resolution 242. The resolution's objective was to urge Israel to withdraw from the territories it had seized during the war¹⁰, to establish an enduring peace between the two parties. Subsequently, it served as the foundation

⁴ 'Mandate of the League of Nations' (*Encyclopædia Britannica*) <https://www.britannica.com/topic/mandate-League-of-Nations>. Accessed 12 February 2024

⁵ 'The Balfour Declaration' (*The Avalon Project : Balfour Declaration November 2, 1917*) https://avalon.law.yale.edu/20th_Century/balfour.asp. accessed 12 February 2024

⁶ Pappe I, *The Ethnic Cleansing of Palestine* (2nd edn, Oneworld Publications 2007) 13

⁷ Hereinafter UNGA

⁸ Egypt, Jordan, Iraq, Syria and Lebanon

⁹ Armistice line that served as the de facto border of Israel from 1949 until the Six-Day War of 1967

¹⁰ Sinai Peninsula, the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip

for diplomatic initiatives involving Israel and its neighbouring countries, such as the Camp David Accords with Egypt and the pursuit of a two-state solution with the Palestinians.

In 1974, the Palestine Liberation Organization¹¹ was granted observer status in the UN, thus marking a pivotal moment in the international acknowledgment of the Palestinian cause and representing a step forward in the Palestinian quest for self-determination and statehood. The observer status allowed the organization to participate in UN deliberations and express its views on multiple matters concerning the Palestinian people while raising awareness and gathering support for its cause. However, the road toward achieving Palestinian statehood remained fraught with challenges.

In 1978, Anwar Sadat, the Egyptian Prime Minister, and Menachem Begin, the Israeli Prime Minister, engaged in negotiations facilitated by then-US President Jimmy Carter at the Camp David presidential retreat in Maryland which led to the notorious Camp David Accords. The negotiations had two outcomes, namely a bilateral peace treaty between Israel and Egypt that led to Israel withdrawing from the Sinai Peninsula in 1982, and unsuccessful autonomy talks for Palestine which ended in 1980, with Palestinians not accepting Israel's limited authority in the Gaza Strip and the West Bank, and Israel refusing to accept the PLO as the legitimate Palestinian negotiator.

In December 1987, twenty years after the occupation began, both the Gaza Strip and the West Bank experienced a spontaneous and widespread popular uprising, commonly referred to as the *intifada*¹² to which Israel put an end with a military intervention.

In 1993, an initial agreement, known as the Oslo I Accord, was reached, marking a significant step towards negotiations. The Accord (formally the Declaration of Principles on Palestinian Self-rule¹³) was negotiated between Israeli Prime Minister Yitzhak Rabin and the leader of the PLO, Yasser Arafat in Oslo; and was then formally signed at the White House in September 1993. The agreement revolved around the establishment of a Palestinian self-governance in the West Bank and Gaza Strip, in exchange for Israel's recognition and assurance of its residents' right to peaceful existence. Furthermore, the DOP called for the creation of the Palestinian

¹¹ Established in 1964 and emerged as the primary representative of the Palestinian people, advocating for their rights and inspirations, including the liberation of Palestinian territories and the establishment of an independent Palestinian state. Hereinafter PLO

¹² In Arab it means "shaking off"

¹³ Hereinafter DOP

Authority¹⁴, a self-governing body with a five-year mandate. The outcome signalled Israel's acknowledgment of the PLO as its legitimate negotiating partner. Subsequent negotiations led to additional agreements to implement the Oslo Accords, including the Gaza-Jericho Agreement¹⁵ and the Oslo II. Signed in September 1995, Oslo II aimed to further clarify the specifics of Oslo I, including the division of the West Bank – excluding Jerusalem and parts of Hebron – into Areas A, B, and C¹⁶. Area A (18%) was an administrative zone under the PA for civil and security matters; Area B (22%) was an administrative zone where the PA only administered civil matters; and Area C (60%) was the zone where Israel maintained full control¹⁷. However, both sides did not respect the terms of the agreements, as Israel exacerbated its settlement expansion, and the PA was not able to stop terrorist attacks by radical Islamist groups¹⁸.

As time passed, a growing realization emerged that despite, and perhaps because of, the Oslo agreements, the ongoing colonization of Palestine persisted unabated, with Israel showing no inclination to facilitate the establishment of an independent Palestinian state.¹⁹

The last attempt to find an agreement for a two-state solution was in 2000 in Camp David, when Bill Clinton was the US president. He attempted to find a compromise, but it was impossible to find common ground on the most delicate issues, such as Jerusalem and Palestinian refugees' right to return. After this failure, the second *intifada* began, but as the first one, the only outcome was a bloodshed even worse than the first one. Tensions began again in 2006 when Hamas²⁰ took power after the parliamentary elections were held, defeating the secular movement of Fatah and generating a conflict between the two parties as they could not agree on power-sharing. The ensuing factional violence led to hundreds of deaths, ultimately dividing the Palestinian Territories into two regions: Gaza, under Hamas rule, and the West

¹⁴ Hereinafter PA

¹⁵ The Treaty provided for Palestinian limited self-rule in the West Bank and Gaza Strip within five years, Israel promised to withdraw partly from Jericho region in the West Bank and from Gaza.

¹⁶ 'Oslo Accords' (*Encyclopædia Britannica*, 29 January 2024) <https://www.britannica.com/topic/Oslo-Accords>. accessed 16 February 2024

¹⁷ 'Areas A, B, C' (*Visualizing Palestine 101*, 23 September 2019) [https://101.visualizingpalestine.org/resources/glossary/areas-a-b-c#:~:text=The%20Oslo%20Accords%20divided%20the,where%20Israel%20maintains%20full%20control](https://101.visualizingpalestine.org/resources/glossary/areas-a-b-c#:~:text=The%20Oslo%20Accords%20divided%20the,where%20Israel%20maintains%20full%20control.). accessed 16 February 2024

¹⁸ Pitta, Michele. *Statehood and Recognition: The Case of Palestine*. 20 Apr. 2018, diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM_Michele_Pitta.pdf. accessed 16 February 2024

¹⁹ Khalidi R, *The Hundred Years' War on Palestine: A History of Settler Colonialism and Resistance, 1917-2017*(Metropolitan Books, Henry Holt and Company 2021) 207

²⁰ Hamas was founded at the beginning of the first Intifada to provide a more militant Islamist alternative to the PLO and advocated that only through the use of force Palestine would be liberated from occupation.

Bank, led by the PA under Fatah. The eruption of conflicts contributed to the intensifying of the Israeli army attacks that persisted until a ceasefire agreement was signed in 2009.

In the years after, a stalemate was reached, made exception for two major air and ground assaults by the Israeli military in 2012 and 2014, and the Hamas attack of the 7th of October 2023, which had as a consequence a disproportionate²¹ Israeli response that is still ongoing and whose nature suggests that it will not cease in the near future. Because of the recent developments, the question of the statehood of Palestine has returned central as the two-state solution is becoming more popular²². Nonetheless, only time will tell if there will be concrete developments in the matter.

Finally, this brief historical overview shows how Palestinian statehood has always been at the heart of the requests of the Palestinian authorities and population throughout the years, but despite frequent attempts to reach an agreement in this regard, contrasting views from both a legal and political standpoint continue to emerge.

1.3. Theories of statehood and recognition concerning the case of Palestine

This section has the aim of analysing the various theories regarding statehood and recognition and applying them to the specific case of Palestine. The debate around finding a satisfactory legal definition of statehood is still ongoing, as each case is very specific and the context keeps changing. First, the Montevideo Criteria for statehood will be analysed and applied to the Palestinian case, as it is the most used approach to define states, however, also criticism of such a method will be provided. Furthermore, the two most notorious theories regarding statehood recognition, namely the constitutive and the declaratory theories will be defined, and their strengths and weaknesses will be laid out. Finally, the process of recognition will be explained thoroughly, and to this effect, particular attention will be given to the distinction between explicit and implicit recognition of statehood, as it is crucial in the unique case of Palestine.

²¹ OHCHR, 'UN Experts Urge the International Community to Step up Pressure to End Crimes, Uphold International Law and Save Lives in Gaza' (*Ohchr.org* 7 March 2024) <<https://www.ohchr.org/en/press-releases/2024/03/un-experts-urge-international-community-step-pressure-end-crimes-uphold>> accessed 14 March 2024; OHCHR, 'UN Human Rights Chief Visits Rafah Border Crossing with Gaza' (*Ohchr.org* 8 November 2023) <<https://www.ohchr.org/en/statements-and-speeches/2023/11/un-human-rights-chief-visits-rafah-border-crossing-gaza>> accessed 14 March 2024.

²² The two-state solution has the support of the United Nations, the European Union, the US, the UK, Germany, China, France, and others.

1.3.1. The Montevideo Criteria of statehood: definition and criticism

On the 26th of December 1933, the Montevideo Convention on the Rights and Duties of States was signed in Montevideo, Uruguay, and defined the criteria for statehood in Article 1, which states: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states²³”

The aforementioned criteria provide a framework for theoretically assessing whether an entity qualifies as a state under international law, and they are widely considered²⁴ as the best-known formulation of the basic criteria for statehood. For the purpose of this thesis, each of the criteria will be analysed thoroughly and then applied to the Palestinian case.

The first element is a defined territory, which means that in order to fulfil this criterion, a state must effectively possess and control a territory, however, there is no rule requiring contiguity of the territory of the state²⁵. Moreover, an important aspect to bear in mind is that according to international law, for the criterion to be met, it requires the entity to have effective possession of and control over the territory in question, which means that only in exceptional circumstances does it allow governmental entities that have lost effective control over the territory to survive as international entities for some time²⁶.

The second element is a permanent population living in the territorial entity. As for the first criterion, there is no minimum limit for the number of people constituting the population. More specifically, a permanent population has been defined as “[a]n aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds or be different in colour.”²⁷ and need not be restrictively defined so as to be

²³ ‘Montevideo Convention on the Rights and Duties of States’ (*Montevideo Convention on the Rights and Duties of States*) <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>, accessed 16 February 2024

²⁴ See James Crawford, ‘The Criteria for Statehood in International Law’ (1977) 48 *British Yearbook of International Law* 93. Malcolm Shaw, *The Subjects of International Law* (6th edn., Cambridge University Press 2008) 195–264 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FB97C7E401D96D284E51BEB1887E4D1F/9780511841637c5_p195-264_CBO.pdf/subjects_of_international_law.pdf.

²⁵ Crawford J, *The Creation of States in International Law* (Oxford University Press 2007), ch 2, 47

²⁶ Cassese A and others, *Cassese’s International Law* (Oxford University Press 2020)

²⁷ Lawrence O and Lauterpacht H, *International Law: A Treatise* (Longmans, Green and Co 1955), 118

deemed permanent, nor does it need to be located in one specific place for a specific duration of time²⁸.

The third element, that is, the government, as Crawford argues, is “the most important single criterion of statehood, since all the others depend upon it”²⁹. Theoretically, defining what classifies as government is quite simple, however, the problem arises when that definition is applied to practical cases. In this regard, the government of a state must not only exist as an authority, but also wield effective control within its territory, while maintaining independence from other states.

Finally, the last element is the capacity to enter into relations with the other states. Concerning this aspect, there is a debate on the question of whether it should be considered as a criterion for statehood or a consequence of it. The latter view has prevailed at the moment, and the idea behind it is that if an entity meets the first three criteria, then it can be defined as a state, and can therefore enter into relations with other States. Moreover, this ability is not constant, as it depends on the situation of each State³⁰.

To conclude, there are three structural elements, namely government, population, and territory, which are interconnected and connected to the rest of the world, through two fundamental principles, specifically effectiveness and independence³¹. To this effect, an explanation of the two factual concepts will now be provided. With the term “effectiveness” it is meant that a government has to exercise effective control over the territory and the population that lives within it. Whereas for “independence” it is implied that the state is sovereign, so it can exercise governmental powers over the territory in an exclusive way. According to the expression used by the sole arbitrator Max Huber in the *Palmas Island* case³², “sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.”³³ Nonetheless, there are some cases in which the independence criterion is not met, such as

²⁸ Epstein P, ‘Behind Closed Doors: Autonomous Colonisation in Post United Nations Era-the Case for Western Sahara’ (2009) 15 Annual survey of international & comparative law

²⁹ Crawford J, *The Creation of States in International Law* (Oxford University Press 2007), ch 2, 56

³⁰ *Ibidem*, 61

³¹ Cassese A and others, *Cassese’s International Law* (Oxford University Press 2020) , 81

³² *ibidem*

³³ *Island of Palmas Case (Netherlands/United States of America)*, 838

puppet states, which despite having met all the criteria, are in fact controlled by another state through the government.

Currently, the Montevideo Criteria do not seem sufficient to assess whether an entity can be considered as a state or not, given that some considerations, such as political ones, are omitted. At the same time, it is difficult to delineate a different definition of state, as the meaning of it often depends on the context, and no case is the same as another. Along with doubts concerning the appropriateness of the Montevideo Criteria, one of the most posed questions is whether recognition should be considered an essential requirement for statehood or a confirmation of a pre-existing factual situation.³⁴ Finally, another very frequent concern is that the Montevideo Criteria may be considered as reflecting a Western-centric understanding of statehood, which does not always take into consideration non-Western perspectives on governance and sovereignty. For instance, indigenous communities may have traditional forms of governance and territorial control that differ from the Westphalian model of statehood³⁵.

1.3.2. The Montevideo Criteria and Palestine

As Professor Quigley affirms in his book “The Statehood of Palestine”, “the issue of Palestine statehood can only be analysed against the background of the generally applied standards for statehood. The Montevideo criteria are said to provide those standards, but even if they are relevant to Palestine under occupation, they have not been applied rigorously by the international community in making determinations about statehood. In practice, “global elites have interpreted these criteria quite flexibly.” This statement, if anything, understates the reality. Entities whose conformity to the Montevideo Criteria is highly questionable are routinely accepted as states.”³⁶ This affirmation has ensuing considerations to delve into, such as the weight that political decisions have on the recognition of an entity as a State, meaning that there might be a double standard originating from power dynamics rather than an unbiased legal one.

When inspecting the Palestinian case, it is possible to notice that the defined territory criterion is indeed met. Despite many parts being contested with Israel, Palestine has settled borders,

³⁴ Pitta, Michele. *Statehood and Recognition: The Case of Palestine*. 20 Apr. 2018, diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM_Michele_Pitta.pdf, accessed 21 February 2024

³⁵ The Westphalian model arose from the treaty of Westphalia in 1648, and it refers to the idea of a system of sovereign states. Also, all states were considered to be equal in rights and obligations.

³⁶ Quigley J, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010), ch. 19, 236

and the “green lines”, which are accepted by a great part of the international community to be a legitimate partition between Palestinian and Israeli territory, prove such a statement. At the same time, some critics argue that the borders are instead fragmented, however, as outlined by Crawford, “the territory of a state in international law does not require contiguity”.³⁷

As for the second criterion, the existence of a Palestinian people has never been brought into question, and the international community has recognized multiple times the Palestinian community, therefore no debate can arise in this regard.

The third criterion is the presence of an effective government, but it is a very difficult aspect to assess, because the PLO has been recognized as the sole representative of the Palestinians by the UNGA through resolution 67/19, but after the 2006 victory of Hamas at the elections, the internal situation has become more complex, and risks derailing the efforts made until now towards the affirmation of the State of Palestine.

Critics argue that specifically external and border security, which are key aspects in assessing a government, are still under Israeli authority and have not been transferred to the Palestinian Authority (PA). This situation contributes to the uncertainty around the effectiveness and the independence of the Palestinian government. However, it should be noted that the effectiveness of a government is not necessarily determined by the possession of all competencies by a governing entity. The Interim Agreement's allocation of responsibilities to the PA reflects Palestinian governance capability, with the PA assuming essential governmental duties like the judiciary, the police force, and legislative and executive functions, which encompass crucial sectors such as education, tourism, culture, social welfare, and taxation.³⁸

1.3.3. Theories of recognition of statehood and their application to the Palestinian case

The current framework guiding international regulations on the procedures of state recognition is characterized by a profound dilemma. While a basic set of legal principles concerning recognition forms the basis of legal discussions, recent trends indicate a separation from these norms, rewarding political expediency to the detriment of legal standards. This variation becomes notable in the ongoing debate between certain scholars who support the declaratory

³⁷ Crawford, *The creation of States in International Law*, 47

³⁸ William T. Worster, “The exercise of jurisdiction by the ICC over Palestine”, *American University International Law Review* 26, no. 5 (February 2012): 1167.

theory, and others who support the constitutive one. These two theories are entirely antithetical, thus a detailed description of the two will be now provided.

1.3.3.1. The declaratory theory

The declaratory theory affirms that for an entity to become a state it must fulfil the legal statehood criteria as required by international law and, in particular, as they are laid out in the Montevideo Convention. Hence, what is needed is a fixed territory, an effective government, and a permanent population. Once all these criteria are met, recognition is just a mere acknowledgment of its existence³⁹. Article 3 of the Montevideo Convention states that “the political existence of the state is independent of recognition by other states”⁴⁰, while Article 6 provides that “the recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law”⁴¹

The articles therefore show that recognition of a new state in this case is “merely a political act recognizing a pre-existing state of affairs”⁴². This approach is the favoured one in contemporary doctrine and legal practice. Its significant success stems from prioritizing objective legal elements over political arbitrariness, therefore it prevents the states from determining the legal status of an entity according to their political interests⁴³.

However, this theory has also its drawbacks, starting from the problematic implications of using only the Montevideo Criteria to assess whether an entity is a state or not. Another issue is the absence of mechanisms under international law for authoritatively estimating whether an entity fulfils the factual criteria for statehood. Finally, the declaratory theory does not look at the manner in which the entity has acquired the necessary requirements, which is preoccupying, given that States can therefore come into existence through grave violations of international

³⁹ Ryngaert C and Sobrie S, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia* (2011) 24 *Leiden Journal of International Law*, 469

⁴⁰ ‘Montevideo Convention on the Rights and Duties of States’ (*Montevideo Convention on the Rights and Duties of States*), article 3 <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>, accessed 22 February 2024

⁴¹ *Ibidem*, article 6

⁴² Dixon M, McCorquodale R and Williams S, *Cases & Materials on International Law* (Oxford University Press 2016)

⁴³ Brandon R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999), 128

law.⁴⁴ State practice responds to such events by not granting recognition to these entities, but still, the idea of “statehood as a fact” might be seen as confusing facts with the law.⁴⁵

1.3.3.2. The constitutive theory

According to the constitutive theory, an entity becomes a state only when it is recognized as such, hence making recognition a *conditio sine qua non* for statehood⁴⁶. Consequently, the recognition of statehood is not based on factual criteria as it happens instead in the deliberative theory but rather relies on the more practical aspect of considering an entity as a state only if other states recognize it. It is quite easy to identify the difficulties of such an approach, as many are the questions that arise, such as how many states are enough for the recognition to be given, or what should be the criteria that the States have to consider when they decide whether to recognize another State or not.

The constitutive theory has a normative value, in contrast with the declaratory one which has instead none. This crucial difference is surely difficult to overcome, but some scholars have attempted to do so by proposing a third system in which statehood is seen in terms of effectiveness, hence making recognition a way to increase effectiveness itself. More specifically, this third theory revolves around the idea of considering recognition as both constitutive, in the sense that it creates stately relations between the recognizing and the recognized state, and declaratory, since it does not, by itself confer statehood to the entity⁴⁷.

All in all, it is worth mentioning that each case is so specific that the debate that has arisen around the recognition of States sometimes fails to capture the specificities of each situation because the theories cannot explain all the cases. This shows us that in order to at least attempt to grasp the concept of recognition, one should bear in mind both the theoretical framework,

⁴⁴ Pitta M, ‘Statehood and Recognition: The Case of Palestine’ (*Academia.edu*, 1 January 2018), 6 https://www.academia.edu/72596420/Statehood_and_Recognition_the_Case_of_Palestine. accessed 22 February 2024

⁴⁵ Ryngaert C and Sobrie S, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia* (2011) 24 *Leiden Journal of International Law*, 470

⁴⁶ J. Dugard and D. Raic, *The Role of Recognition in the Law and Practice of Secession*, in M. Kohen (ed.), *Secession: International Law Perspectives* (2006), 97.

⁴⁷ Ryngaert C and Sobrie S, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia* (2011) 24 *Leiden Journal of International Law*, 471

without which international law would lose its status as “law”, and the state practice, without which international law would lose its effectiveness and, eventually, its legitimacy.⁴⁸

1.3.3.3. Application of the theories to the Palestinian case

As mentioned before, the constitutive and declaratory theories are both inadequate if taken alone, as they have flaws that render their application to particular cases of presumed statehood, such as, and not limited to, the Palestinian one, quite fallacious. The constitutive theory has as its main problem the fact that it regards recognition as a *conditio sine qua non*. The relation between recognition and the Montevideo Criteria is a difficult one, given that if only the latter is used and the entity satisfies the criteria, then it is a state, whereas if only the former is used, it might render the criteria less relevant if there is a large number of states recognizing the entity as one of them, despite it not satisfying all the requirements. A way to reconcile these two approaches is through the criterion of the “capacity to enter into relations with other states”, which would render recognition necessary to demonstrate the satisfaction of the Montevideo Criteria.⁴⁹

In international practice, States sometimes withhold recognition to pressure the entity into undertaking certain actions. This is easily visible in the case of Palestine, as some States⁵⁰ would be ready to recognize it as a State, but at the same time, they insist they will do so only when Palestine negotiates a settlement with Israel⁵¹, thus rendering recognition a political weapon in the hands of the more powerful states that put their needs before anything else. Still, recognition could be a powerful tool in the hands of Palestine, as 145 States now recognize the State of Palestine, but what stops it from being enough is the question of independence, considering Israel’s prolonged unlawful occupation of East Jerusalem, the West Bank, and Gaza.

1.3.4. The process of recognition of Palestine within the international community

All things considered, in the future Palestine could meet the basic requirements that are listed in the Montevideo Convention, even if in the case of the government it could be argued that it is just a partial fulfilment. Nonetheless, Palestine continues to put significant effort into finding

⁴⁸ H. Lauterpacht, *Recognition in International Law* (1947), 427.

⁴⁹ Quigley J, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2010), ch 18, 227

⁵⁰ Mostly European states

⁵¹ *ibidem*

a more concrete basis for its claims of statehood with the aim of attaining full recognition by the international community. In this regard, now Palestine enjoys recognition from 145 states, holds membership in international organizations such as UNESCO⁵² and the ICC⁵³, and participates in multiple international treaties and conventions.

In September 2011, Abbas submitted a formal request to the then-Secretary General Ban Ki Moon asking the UN to admit Palestine as a full member. Two months passed without answers, as the SC had stated it was unable to make a recommendation, given the high probability of the US vetoing the proposal. Abbas accepted this impasse and submitted a downgraded request to the GA for admission to the UN as a non-member observer state. His decision led to Resolution 67/19, adopted in November 2012 with a huge majority. From a practical point of view, the new status of Palestine did not bring any major changes, however, from a symbolic standpoint, it was crucial because it could be conceived as a *de facto* recognition of the sovereignty of the state of Palestine, and it was also able to make the question of the Palestinian statehood central again.

Concerning the debate⁵⁴ that arose, it is important to mention that statehood and membership to the UN and other international organizations are two separate issues, as there are examples of situations in which recognized States are not members of the UN or accessed a long time after being recognized as such and members of the UN that at the time of their admission did not fulfil the Montevideo Criteria⁵⁵. What instead remains true is that admission to international organizations indeed is seen as a confirmation of statehood, therefore providing an official collective recognition of the entity within the international community.

Palestine is, therefore, the perfect example for this, not only for Resolution 67/19 but also for all the occasions in which it has expressed commitment to respect obligations and principles

⁵² '36th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization' (2012) <<https://unesdoc.unesco.org/ark:/48223/pf0000215084>> accessed 11 March 2024.

⁵³ 'Depositary Notification of Accession to the Rome Statute by the State of Palestine' (2015) <<https://www.icc-cpi.int/news/state-palestine-accedes-rome-statute>>.

⁵⁴ There are two viewpoints on the UN's actions: 1. Some argue that the UN's actions represent a formal recognition of the State of Palestine. For proof see Dapo Akande, 'Palestine as a UN Observer State: Does This Make Palestine a State?' (*EJIL: Talk!* 3 December 2012) <<https://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/>>; 2. Others argue that the UN's actions were symbolic and do not constitute a collective international recognition of Palestinian statehood. For proof see J Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood' (2013) 12 Chinese Journal of International Law 19; Shadi Sakran, 'The Creation of the Non-Member Observer State of Palestine: A Legal Analysis of Un General Assembly Resolution 67/19' (2017) 9 Amsterdam Law Forum 131.

⁵⁵ Switzerland despite having been a state for a long time before, accessed the UN only in 2002. Whereas for the second situation, Ukraine is an example of a state that was not one when it was among the founders of the UN in 1945, showing that the Montevideo criteria apply now, but were not a requisite for founding states.

of the UN charter, the Universal Declaration of Human Rights, the four Geneva Conventions, the 1907 Hague Resolutions and many more. Also, Palestine became a full member of UNESCO in 2011, showing yet another time that the only real obstacle remaining is the political implications that its recognition as a State would reveal.

1.3.5. Explicit and implicit recognition of statehood

The Montevideo Convention provides a portrayal of different typologies of recognition, thus including both explicit and implicit acts. As stated in Article 7, “The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing a new state.”

On one side, explicit recognition acknowledges that one State officially accepts the sovereignty and existence of another state. This acknowledgment can occur through bilateral agreements, diplomatic exchanges, or membership in international organizations. Through the establishment of explicit recognition, it is possible to create a legal framework that outlines the rights and responsibilities of each state under international law, thus enabling diplomatic relations between them.

On the other side, implied recognition is based on the idea that when states interact with an entity that has the specificities of a state, that amounts to recognizing it as such. Even though it is not explicitly stated, implied recognition is still legally important because it contributes to the juridical status and international reputation of the recognized entity.

Moving on to the specific case of Palestine, as of the 29th of November 2012 it is a non-member observer state in the UNGA with resolution 67/19, which has paved the way for an ulterior spark of the debate around statehood. Certainly, steps forward have been made, but at the same time, questions around the implications in terms of implied recognition of statehood arise. Many lawyers and scholars have advanced the idea that indeed the accession of Palestine to certain treaties and organizations might itself point to an implied recognition of it as a state⁵⁶. In this regard, while explicit recognition remains limited in its scope, implied recognition has become more significant, because despite it not being legally binding as the explicit instead is,

⁵⁶ See Jean Salmon, ‘RBDI - Revue Belge de Droit International’, 13 (*rbdi.bruylant.be* 2013) <https://rbdi.bruylant.be/index3916.html?module_id=00000000006&rec_id=00000080192#:~:text=La%20Palestine%20doit%20aujourd%27hui> accessed 13 March 2024; Mutaz M Qafisheh, *Palestine Membership in the United Nations : Legal and Practical Implications* (Cambridge Scholars Publishing 2013).

it holds a weight that is both political and symbolic, meaning that it can contribute to reshaping perceptions of statehood and legitimacy.

The notion of implied recognition has historical roots in the case of Palestine, namely the 1993 Oslo Accords and consequent negotiations that resulted in the international actors cooperating with Palestinian authorities in many fields such as humanitarian assistance and support of Palestinian representation. This willingness on the part of international actors to cooperate, while not constituting formal recognition, reflects an implicit acknowledgment and support of Palestine's aspiration to be considered as a state, and of the legitimacy of its institutions.

Even though implied recognition holds political significance, its legal aspect and its interpretation are still up for debate. Critics argue that implied recognition lacks legal clarity and formal obligations, that are instead inherent in the explicit recognition, thereby casting doubts on its efficacy in furthering Palestinian aspirations for statehood. Furthermore, the complexities arising from the unresolved status of Jerusalem, the establishment of Israeli settlements in the West Bank, and the ongoing territorial disputes increase the already major difficulties that characterize the achievement of extensive implied recognition of the Palestinian statehood.

1.4. Conclusions

This first chapter was divided into two sections that respectively introduced the historical and legal aspects of the Palestinian claims to statehood. As for the historical part, the analysis started from the British Mandate after World War I and arrived at the present day.

Concerning the legal aspects, the Montevideo Criteria are explained thoroughly and then applied to the specific case of Palestine. After that, the two main theories of recognition, namely the constitutive and the declaratory theory, are defined and again applied to Palestine. Another aspect that is analysed is the process of recognition of Palestine within the international community, in terms of assessing whether a collective type of recognition could amount to a formal recognition of the entity as a state. To conclude, the concepts of explicit and implicit recognition are explained, and particular attention is given to the latter as a feasible alternative to explicit recognition for the Palestinian case.

The next chapter will delve into Palestine’s accession to the International Criminal Court⁵⁷, the matter of jurisdiction according to the Rome Statute, and the 5th of February 2021 Decision on the “Situation in Palestine” by the ICC. This analysis is required as the decision of the ICC Pre-Trial Chamber itself has at its core the affirmation that it has jurisdiction over the Palestinian territories, by affirming that Palestine qualifies as the State “on the territory of which the conduct in question occurred” for the purpose of the Rome Statute.

⁵⁷ Hereinafter ICC

2. THE JURISDICTION OF THE ICC IN PALESTINE

2.1. Introduction

This chapter represents the main body of the thesis. Its first and second sections aim to analyse the ICC in general, how the jurisdiction of the Court works according to the Rome Statute, and the phases of the ICC's assessment of a certain "situation", namely, the preliminary examination, and the investigation. In the case of the Situation in Palestine, a step has been added between the preliminary examination and the investigation, that is, the Prosecutor posed a question, in accordance with Article 19(3), in order to further clarify the territorial jurisdiction of the ICC in the matter. In the third section, there is an overview of the path that led Palestine to accede to the Rome Statute and its consequences. Finally, in the fourth section, the analysis of the 5th of February 2021 Decision of the Pre-Trial Chamber I is carried out, in response to the ICC Prosecutor Fatou Bensouda's request, which states the acknowledgment by the ICC of having jurisdiction on the territory of Palestine corresponding to Gaza, and the West Bank, including East Jerusalem. Furthermore, the dissenting opinion of Judge Peter Kovács concerning the Decision is presented. The Decision by the Pre-Trial Chamber marked the beginning of the investigation, which started officially on the 3rd of March 2021. Before delving into the matter, it is important to stress that this chapter's analysis of the Decision is crucial, as it constitutes the basis for the critical analysis that will be carried out in the last chapter to assess its consequences.

2.2. General overview of the structure and objectives of the ICC

The International Criminal Court (ICC) was created on the 17th of July 1998 with the adoption of the Rome Statute by 120 states at the headquarters of the Food and Agriculture Organization of the United Nations in Rome. In the next four years, the Statute managed to get the sixty ratifications needed for its entry into force, which took place on the 1st of July 2002.⁵⁸ Negotiations for the creation of the Court were already underway when, after the end of the Cold War, the world was witnessing the commission of atrocious crimes in the territory of former Yugoslavia and in Rwanda.⁵⁹ In that case, since the ICC system was still not in place, it was deemed necessary to establish two *ad hoc* tribunals, which had a profound influence on

⁵⁸ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2017).

⁵⁹ International Criminal Court, 'Understanding the International Criminal Court' (2020) <<https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>>.

the decision to convene the aforementioned conference at the FAO premises to establish the Court. Thus, the ICC was created to help end impunity for the perpetrators of the most serious crimes of concern to the international community, namely genocide, crimes against humanity, war crimes, and crimes of aggression, when committed after the 1st of July 2002.⁶⁰ It is also important to mention that the Court has jurisdiction over these crimes only if they were committed on the territory of a State party to the Statute or by one of its nationals. To do so, it was conceived as an independent international organization and therefore is not part of the United Nations system. Moreover, the Court was intended to complement the national criminal justice system, and not replace it.⁶¹ The ICC is composed of four primary organs: the Presidency⁶², the Judicial Divisions⁶³, the Office of The Prosecutor (OTP)⁶⁴, and the Registry⁶⁵. Also, the Assembly of States Parties functions as the Court's management, oversight, and legislative body, and is not an organ of the Court, as its role is to establish the budget, elect judges and prosecutors, and amend law and procedure. Finally, – also this one conceived as separated from the court – the Trust Fund for Victims was created to provide assistance and support to the victims, while also focusing on implementing the reparations ordered by the Court.⁶⁶

2.3. Jurisdiction of the ICC

2.3.1. Fundamental jurisdictional requirements in the Rome Statute

The term jurisdiction is mentioned in multiple articles of the Rome Statute to identify the scope of the Court's authority.⁶⁷ More specifically, Article 11 covers the jurisdiction *ratione temporis* by stating: “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”, and “If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the

⁶⁰ International Criminal Court, ‘Rome Statute of the International Criminal Court’ (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 10 March 2024

⁶¹ ‘The ICC at a Glance’ <<https://www.icc-cpi.int/sites/default/files/Publications/ICCAAtAGlanceENG.pdf>> accessed 10 March 2024

⁶² Its President, First, and Second Vice Presidents are all elected by an absolute majority of the judges of the Court for a 3-year renewable term and serve full time.

⁶³ The judiciary divisions are three, namely the Appeals Division, The Trial Division, and the Pre-Trial division.

⁶⁴ The OTP is responsible for receiving referrals and information on crimes within the jurisdiction of the Court, which it then has to examine, investigate upon, and conduct prosecution on before the Court.

⁶⁵ It provides judicial and administrative support to all the organs of the Court, while also assisting and organizing external defense, witness’ and victims’ protection, and facilitating their participation

⁶⁶ International Criminal Court Project, ‘Structure of the ICC’ (*The ABA’s ICC Project* 2 December 2019) <<https://www.aba-icc.org/about-the-icc/structure-of-the-icc/>>.

⁶⁷ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2007).

entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.” This article explains that until the creation of the ICC, all previous international criminal tribunals had exercised jurisdiction retroactively. Whereas this Court now has jurisdiction over crimes committed since its entry into force, that is, since the 1st of July 2002.⁶⁸

After this, Article 12 is entitled “preconditions to the exercise of jurisdiction” but it actually sets out the *ratione loci* and the *ratione personae*. The article represents a way to incentivize states to ratify and access the Rome Statute, because only by doing that they can be sure to protect their territory and ensure that the Court has jurisdiction over crimes committed in it.⁶⁹ The article is divided into three paragraphs, that respectively ensure the principle of automatic acceptance of jurisdiction over the crimes listed in Article 5⁷⁰, the territorial and active personality of jurisdiction⁷¹, and the possibility for non-party states to declare that they accept the jurisdiction of the Court “with respect to the crime in question” but without ratifying the Statute.⁷² Therefore, Article 12(3) allows for an exception to the general rule concerning the temporal application through the use of an *ad hoc* declaration⁷³, and in this case, the crimes for which the state is giving jurisdiction to the ICC seem to be of a retroactive nature⁷⁴.

Finally, Article 17 requires the Court to defer to national prosecutions unless the “State which has jurisdiction” over the offence in question is unwilling or unable to investigate or prosecute, and Article 19 requires the Court to “satisfy itself that it has jurisdiction in any case brought before it”. To sum up, whether after or during the commission of alleged atrocity crimes, the ICC can only exercise jurisdiction over such crimes in one of three ways, namely when a state party refers the crimes to the Court (State Party Referral)⁷⁵, when the UN security council refers the crimes to the Court (UN Security Council Referral)⁷⁶, or when the ICC Prosecutor initiates a preliminary examination into the crimes (*Proprio Motu* Investigation)⁷⁷.

⁶⁸ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010).

⁶⁹ *ibidem*

⁷⁰ Art. 12(1)

⁷¹ Art. 12(2)

⁷² Art. 12(3)

⁷³ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2007).

⁷⁴ *ibidem*

⁷⁵ For an example case, see *Comoros Referral 2013* <https://how-the-icc-works.aba-icc.org/uploads/Referral-from-Comoros.pdf>

⁷⁶ For an example case, see 2005 UNSC Resolution 1593 – Sudan Referral <https://how-the-icc-works.aba-icc.org/cases/2005-unsc-resolution-1593/>

⁷⁷ For an example case, see 2015 Preliminary Examination – Iraq <https://how-the-icc-works.aba-icc.org/cases/2015-iraq-preliminary-examination/>

2.3.2. The preliminary examination and its phases

Once the referral is made, a case always begins with what is called a “preliminary examination”. Each preliminary examination has four phases of analysis: initial, jurisdictional, admissibility, and interest of justice assessments, and in the case of all four criteria being satisfied, the ICC Prosecutor may move to a formal investigation.

In the initial assessment, the ICC Prosecutor must determine whether the alleged crimes satisfy the fundamental jurisdictional requirements of the Rome Statute⁷⁸, as explained in the previous section. Even when the four criteria are satisfied, the Rome Statute limits the types of cases “admissible” to the ICC. This means that the Prosecutor needs to assess whether another court is properly investigating and prosecuting the alleged crimes⁷⁹ and whether the alleged crimes are the gravest of crimes⁸⁰. Finally, even if the jurisdictional and admissibility requirements are met, the Prosecutor has the discretion to determine whether moving a case forward at the ICC serves the “interests of justice”. If the Prosecutor decides not to move forward, a Pre-Trial Chamber can review the decision. In the present case, the preliminary examination of the Situation in Palestine lasted almost 5 years, after which the Prosecutor found it necessary to take another step before going into the investigation process, namely, to resolve the issue of the territorial scope of the Court’s jurisdiction in the Situation in Palestine. This preliminary step consisted in seeking a ruling on the question, so as to obtain clarity at the outset so that any subsequent inquiry would have a solid and judicially tested foundation.⁸¹

2.3.3. Investigation

The preliminary examination may be turned by the ICC Office of the Prosecutor (OTP) into a form of investigation called a “situation” if the four phases of the preliminary examination are satisfied. In the investigation, the OTP gathers as much data as possible in order to understand who is responsible and what are the specificities of the alleged crime. In this respect, the OTP is legally required to take all the necessary measures to achieve this objective and the Prosecutor is obliged to disclose all the evidence to the Defense. Once the evidence establishes reasonable grounds to believe a person is responsible for an atrocity crime, the Prosecutor may

⁷⁸ Temporal, territorial, subject matter, and personal jurisdiction

⁷⁹ Principle of complementarity i.e the ICC complements other courts that have jurisdiction over the alleged crimes. This principle makes the ICC a “court of last resort”.

⁸⁰ Principle of gravity i.e the alleged crimes must be the gravest of atrocity crimes. The ICC Prosecutor determines gravity by looking at the scale, nature, manner, and impact of the alleged crimes.

⁸¹ ‘Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine’ (*International Criminal Court* 3 March 2021) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>>.

request the Pre-Trial Chamber to issue a summons⁸² or arrest warrant⁸³. After an individual's initial appearance, the Pre-Trial Chamber (PTC) must hold a hearing within a reasonable amount of time to confirm or dismiss the charges presented by the Prosecutor. In case of confirmation of the charges, the Trial Chamber (TC) is required to conduct a fair and expeditious trial that protects the rights of all the people involved. In the trial, the OTP presents its evidence, then it is the turn of the Defense, and victims are allowed to testify. Once the trial is complete, the Trial Chamber will begin to deliberate in private and reach a guilty or not guilty verdict. The Trial Chamber delivers its verdict with written justifications. If convicted, the Trial Chamber will determine the appropriate sentence by considering a range of factors, such as the gravity of the crimes and the convicted person's role in the crimes. Along with the sentence, it may also order reparations for victims for the harm suffered.⁸⁴

2.4. The road to Palestinian membership within the ICC

Now focusing on the specific case of Palestine, it first approached the ICC in 2009, following Israel's military incursion in Gaza and the subsequent allegations of war crimes violations made by NGOs. These allegations reached the Office of the Prosecutor of the ICC⁸⁵, with a suggestion that he investigate and prosecute the individuals who might be responsible.⁸⁶ The Rome Statute specifies the cases in which the Court has jurisdiction⁸⁷, the first of which is that the ICC can prosecute people if the UN Security Council refers the situation to it, but in this case, despite Bolivia asking the UNSC for a referral, it decided not to act. The second case allows the ICC to prosecute nationals of a State Party to the Statute, but Israel was not part of it, and still is not, thus Israeli officials could not be tried. The third case allows the Court to have jurisdiction over individuals that commit one of the crimes listed in Article 5 in the territory of a State that is part of the Statute, but Palestine had not ratified it yet, so the Court had no jurisdiction whatsoever. However, the Court can have jurisdiction in a last circumstance, namely according to Article 12(3), a state that is not part of the Statute may confer jurisdiction

⁸² A summons can be issued if the Pre-Trial Chamber is satisfied that the person will appear in the courtroom and can contain conditions sufficient to ensure the person's appearance.

⁸³ An arrest warrant can be issued if the Pre-Trial Chamber believes that the arrest of the person is necessary to ensure that the person appears at trial or that the person does not obstruct the investigation or to prevent the person from committing the crimes suspected of having committed.

⁸⁴ ABA Center for Human Rights, 'How the ICC Works' (*ABA-ICC Project*) <<https://how-the-icc-works.aba-icc.org/#start-of-jurisdiction>> accessed 19 March 2024.

⁸⁵ At the time, the Prosecutor was Luis Moreno-Ocampo

⁸⁶ John Quigley, *The Statehood of Palestine* (Cambridge University Press 2010).

⁸⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (International Criminal Court), Article 11,12,13,14

for acts in its territory by issuing a declaration specifying that it accepts the jurisdiction of the ICC, which is what Palestine decided to do on the 21st of January 2009⁸⁸. At the time, the ICC prosecutors concluded that due to Palestine's uncertain status regarding statehood under international law, the declaration could not be accepted, as they were not empowered to define the term "State" for the purpose of Article 12(3) but kept their right of reconsidering if light was cast on those doubts by the UN Secretary-General and the UNGA. This happened with Resolution 67/19 in 2012, which granted Palestine the status of "non-member observer state", and therefore resulted in a renewal of the Palestinian declaration of acceptance of the ICC's jurisdiction over alleged crimes committed in the occupied Palestinian territory since 13 June 2014, and in Palestine's official accession to the Rome Statute on the 1st of April 2015.⁸⁹ After the official accession and the re-submission of the declaration by the PA, the preliminary examination of the situation in Palestine was reopened.

Palestinian membership in the ICC has its criticalities, apart from the political and legal ones, as Israel and its Western allies have and continue to oppose the prosecution of Israeli crimes. Proof of such a situation is evident in the efforts put by those actors in preventing the PA from joining the ICC between the period of Resolution 67/19 in 2012 and the actual accession in January 2015. Examples of such actions are reports dating back to 2013 showing that the US and Israel have threatened to withdraw economic aid to the PA if it persisted in its request to accede to the Statute.⁹⁰ The pressure intensified even more once the PA actually acceded to the Statute in January 2015, with Israel withholding the monthly tax revenues it collected on behalf of the PA⁹¹ - which were almost 2/3 of the PA's revenue - to only release some of them after some international pressure⁹², and the US Congress passing a law in December 2014 according

⁸⁸ Palestinian Declaration recognizing the jurisdiction of the International Criminal Court (21 January 2009) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> accessed 16 April 2024

⁸⁹ Triestino Mariniello and Micaela Frulli, 'What Is the Legal Relationship between the International Criminal Court and Non-State Entities? Beyond the Case of Palestine' (*QIL* 21 September 2015) <<http://www.qil-qdi.org/what-is-the-legal-relationship-between-the-international-criminal-court-and-non-state-entities-beyond-the-case-of-palestine/>> accessed 10 March 2024.

⁹⁰ Salma Karimi-Ayyoub, 'Palestinian Membership of the International Criminal Court | al Jazeera Centre for Studies' (*studies.aljazeera.net* 9 July 2015) <<https://studies.aljazeera.net/en/reports/2015/07/20157972711804703.html>> accessed 17 April 2024.

⁹¹ Toi Staff, 'Israel Freezes Palestinian Funds in Response to ICC Bid' [2015] *The Times of Israel* <<https://www.timesofisrael.com/israel-freezes-palestinian-funds-after-icc-bid/>> accessed 17 April 2024.

⁹² Tovah Lazaroff and Khaled Abu Toameh, 'Israel Releases Frozen PA Tax Funds for March and April' (*The Jerusalem Post* | *JPost.com* 18 April 2015) <<https://www.jpost.com/Arab-Israeli-Conflict/Frozen-tax-fund-agreement-reached-Israel-to-transfer-over-NIS-1-billion-to-PA-398480>> accessed 17 April 2024.

to which annual aid to the PA would stop if it decided to initiate or support any judicially authorized ICC investigation of Israel⁹³.

Despite the situation just described, the PA persisted in its objective to accede to the Rome Statute, and the subsequent Palestinian membership in the ICC represented a development in the pursuit of justice, which translated into the initiation of the preliminary examination by the ICC Prosecutor Fatou Bensouda in 2014 that would last five years, until 2019, when she deemed necessary to bring the question of the Court's territorial jurisdiction before the Pre-Trial Chamber, which expressed its ruling two years later.

The next section of the chapter will be devoted to analysing specifically the Pre-Trial Chamber decision of the 5th of February 2021 on the "Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine". This decision, which confirmed the possibility of the Court to exercise its criminal jurisdiction and its territorial scope, led to the opening of the investigation into the Situation in the State of Palestine on 3 March 2021.

2.5. Pre-Trial Chamber I "Situation in Palestine"

On December 20, 2019, ICC Prosecutor Fatou Bensouda, conscious of the complex and unique issues arising in the situation she had examined for the past five years, declared that she would request a ruling from the judges of the Pre-Trial Chamber I, to clarify the territorial scope of the Court's jurisdiction in the Situation in Palestine. In the request, dated 22 January 2020, the Office set out its legal position but also urged the Chamber to consider the opinions and arguments of all the stakeholders, before making a decision.⁹⁴ The Chamber did so, and on the 5th of February 2021, it recognized its territorial jurisdiction over the Palestinian territories occupied by Israel since 1967, namely the Gaza Strip and the West Bank, including East Jerusalem. The Chamber held that despite the controversy over the legal status of Palestine, it is in effect a State party to the ICC, having ratified the Rome Statute in 2015. This decision paved the way for the Prosecutor to officially open investigations, which happened on the 3rd of March 2021, into the situation in Palestine, which, in other words, has been recognized as a State Party for the purposes of the ICC's jurisdiction. Thanks to this, the Court will now finally be able to open investigations into alleged war crimes and crimes against humanity committed on Palestinian territory, as also requested by Palestine itself through the "referral" submitted

⁹³ Donna M Christensen, Consolidated and Further Continuing Appropriations Act 2014 [H.R.83].

⁹⁴ 'Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine' (*International Criminal Court* 3 March 2021) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>>.

under Articles 13(a) and 14 of the Statute.⁹⁵ The decision in question had been overdue for more than a year, that is, since the ICC Prosecutor's Office announced the conclusion of its preliminary examination of the situation in Palestine on the 20th of December 2019. The Prosecutor's Office had already determined at that time that all the criteria under the Rome Statute for opening an investigation had been met. However, before proceeding with the investigation, the Prosecutor asked the judges of the Pre-Trial Chamber to confirm the scope of the Court's territorial jurisdiction in the situation at hand by submitting a request under Article 19(3) of the Statute.

In the next section, a thorough analysis of the decision will be carried out by delving into the question with which it was faced, the solution reached, and the argumentative path that it followed to get there, which will allow for the critical analysis that will be conducted in the third chapter of the thesis, with the contribution of the scholarly doctrine on the matter.

2.5.1. The Prosecutor's Request

The Prosecutor's⁹⁶ Request was based on the view that "the Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza"⁹⁷. Nonetheless, conscious of the peculiar situation of Palestine's statehood under international law, the Prosecutor found it necessary to ask for confirmation from the Pre-Trial Chamber I pursuant to Article 19(3), so as to "facilitate and ensure a cost-effective and expeditious conduct of the [...] investigations"⁹⁸. According to Article 19(3), "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under Article 13, as well as victims, may also submit observation to the Court".⁹⁹

As already mentioned, the Prosecutor justified her Request for confirmation to the Chamber with the necessity to ensure certainty on an issue that would have been likely to arise at a later

⁹⁵ Chantal Meloni, 'La CPI Conferma La Sua Giurisdizione Territoriale Sulla Palestina' (www.sistemapenale.it 9 February 2021) <<https://www.sistemapenale.it/it/scheda/corte-penale-internazionale-giurisdizione-palestina>> accessed 21 March 2024.

⁹⁶ The Prosecutor at the time was Fatou Bensouda. She served from 2012 to 2021 when she was succeeded by the current Prosecutor, Karim Ahmad Khan

⁹⁷ Péter Kovács and others, 'Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine Source: Office of the Prosecutor' (2020) <<https://www.legal-tools.org/doc/clur6w/pdf>> accessed 21 April 2024, para. 3

⁹⁸ *Ibidem*, paras 5-6, 20

⁹⁹ International Criminal Court, 'Rome Statute of the International Criminal Court' (International Criminal Court 1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>>.

stage of the proceedings¹⁰⁰ and judicial economy and efficiency¹⁰¹. In addition to this, the Prosecutor found it important to stress that “in order to exercise its jurisdiction in the territory of Palestine under Article 12(2), the Court need not conduct a separate assessment of Palestine’s status (nor of its statehood) from that which was conducted when Palestine joined the Court”¹⁰². Thus, according to the Prosecutor, Palestine’s accession to the Statute has the following two outcomes. Firstly, as per Article 12(1), “under the ordinary operation of the Rome Statute, a State that becomes a Party to the Statute pursuant to Article 125(3) thereby accepts the jurisdiction of the Court according to Article 12(1)”¹⁰³. Secondly, “Article 12(2) specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a party to the Statute under Article 12(1) or having lodged a declaration under Article 12(3)”¹⁰⁴. Consequently, “a state under Article 12(2) and Article 125(3) should also be considered a state under Article 12(2).¹⁰⁵” According to the Prosecutor, this line of reasoning should likewise apply to Palestine.¹⁰⁶

2.5.2. The reasoning behind the Decision: preliminary issues, legal basis, and merits

Before proceeding with the ruling, the Chamber began by analysing the three preliminary issues to consider and resolve in order to answer the Prosecutor’s Request. The first issue to determine concerns whether the Prosecutor’s Request is of a political nature, or of a legal one, which is based on an argument brought before the Chamber by some participants, including certain *amici curiae*¹⁰⁷, State Parties¹⁰⁸, and representatives of Victims¹⁰⁹. Some¹¹⁰ of them asserted that the Request is of a political nature, thus, it could potentially affect the Court’s legitimacy. In contrast, others¹¹¹ claimed that the territorial scope of the Court’s jurisdiction is

¹⁰⁰ Péter Kovács and others, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020) <<https://www.legal-tools.org/doc/clur6w/pdf>> accessed 21 April 2024, para. 36

¹⁰¹ *Ibidem*, para. 38

¹⁰² *Ibidem*, para. 7

¹⁰³ *ibidem*

¹⁰⁴ *ibidem*

¹⁰⁵ *ibidem*

¹⁰⁶ *ibidem*

¹⁰⁷ The Israel Forever Foundation, The Lawfare Project, The Institute for NGO Research, Palestinian Media Watch, The Jerusalem Center for Public Affairs *see* [ICC-01/18-108](#), paras 62-64; [ICC-01/18-81](#), paras 8, 21

¹⁰⁸ The Federative Republic of Brazil *see* [ICC-01/18-106](#), paras 10, 33; and the Republic of Uganda *see* [ICC-01/18-119](#), para. 5

¹⁰⁹ Legal Representative of Persecution Victims, Katherine Gallagher *See* [ICC-01/18-110](#), para. 30

¹¹⁰ Ambassador Dennis Ross *See* [ICC-01/18-94](#), paras 16, 39, 41; The Federative Republic of Brazil [ICC-01/18-106](#), paras 30-33; the Republic of Uganda [ICC-01/18-119](#), para. 6.

¹¹¹ Associate Professor Dr. Robert Heinsch, Assistant Professor Dr. Giulia Pinzauti *See* [ICC-01/18-107](#), para. 3; Professor Richard Falk *see* [ICC-01/18-77](#), para. 41; Professor John Quigley *see* [ICC-01/18-66](#), para. 59; Raji

a legal question and therefore determining it falls under the Court's competence. To this issue, the Court responded by saying that "arguments to the effect that the aim or the consequence of the Prosecutor's request would be the creation of a "new State" reflects a misunderstanding of the actual subject matter of the Request"¹¹², as the Court inevitably has to determine certain facts, which can be sometimes based on political decisions, in order to understand the legal contours of the situation, and "the legal consequences that may need to be addressed for the purpose of the jurisdictional activity"¹¹³. In this specific case, therefore, the Prosecutor has addressed a legal issue to the Chamber, whose possible political consequences cannot prevent the Chamber from exercising its mandate, so this first issue was resolved by the Chamber by deciding to only assess what is within the scope of its mandate.

The second issue to be resolved is the absence of Israel in the proceedings. Some participants have pointed out the "Monetary Gold principle", which is a legal rule that came into being during the case of the "Monetary Gold removed from Rome in 1943"¹¹⁴ brought before the International Court of Justice (ICJ) in 1954 and holds that the Court cannot rule on cases in which the conduct of a State not party to the proceedings forms the "very subject matter" of the dispute¹¹⁵. The Monetary Gold Rule was born in the context of disputes between States before the ICJ, which is very different from the situation at hand. This principle was brought up in the proceedings of the ICC to support the claim that the subject matter of the Request involved also Israel and its territorial sovereignty, so it could not be examined without the presence of Israel in the proceedings.¹¹⁶ In this regard, the Court answered the issue by noting that the ICC cannot rule on disputes between States, as it is instead the case of the ICJ that in that situation needed the consent of all the states involved, but can only exercise jurisdiction

Sourani, Counsel; Chantal Meloni, Counsel; Triestino Mariniello, Assistant Counsel *see* [ICC-01/18-112](#), paras 66-67.

¹¹² Judge Kovacs and others, 'Situation in the State of Palestine' (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> accessed 21 April 2024, para. 54

¹¹³ Judge Kovacs and others, 'Situation in the State of Palestine' (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> accessed 21 April 2024, para. 56

¹¹⁴ International Court of Justice, 'Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland)' (*www.icj-cij.org* 15 June 1954) <<https://www.icj-cij.org/case/19>> accessed 18 April 2024.

¹¹⁵ Tom Sparks, 'Reassessing State Consent to Jurisdiction' (2022) 91 *Nordic Journal of International Law* 216 <https://brill.com/view/journals/nord/91/2/article-p216_002.xml?ebody=pdf-117260> accessed 20 April 2024.

¹¹⁶ The Republic of Uganda *See* [ICC-01/18-119](#), paras 8-9; The Israel Forever Foundation *see* [ICC-01/18-108-Corr](#), para. 65; Amicus Curiae Observations of Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker *see* [ICC-01/18-93](#), para. 30

over natural persons. Adding to this, the Court highlighted that Israel was invited to submit observations¹¹⁷, but refused the opportunity.

Finally, the third issue that arises revolves around criminal jurisdiction and the territory of States. In fact, national criminal courts sometimes have to determine the extent of the territory of States in order to identify the extent of their territorial jurisdiction, without constituting a determination on the actual scope of that State's territory¹¹⁸. To this regard, the issue is easily solved as it had been explicitly affirmed by the Chamber in the "Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" of 6 September 2018, that "the territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty"¹¹⁹. Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine's territory¹²⁰.

2.5.2.1. The legal basis

In the section devoted to the legal basis of the Decision, the Prosecutor noted that, in regard to the present Request for a ruling on a question of jurisdiction, she is "satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to Article 53(1) of the Statute"¹²¹. In this regard, she specified that "there is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip, potential cases arising from the situation which would be admissible have been identified, and there are no substantial reasons to believe that an investigation would not serve the interests of justice."¹²² The legal consequence of this claim is that the Prosecutor is, in principle, obliged to open an investigation, as stipulated in Article 53(1). In these circumstances, consequently, the Chamber found that it would be appropriate for it to determine

¹¹⁷ Péter Kovács and others, 'Public Order Setting the Procedure and the Schedule for the Submission of Observations' (2020) <<https://www.legal-tools.org/doc/yfd939/pdf>> accessed 21 April 2024, para. 16; Péter Kovács and others, 'Situation in the State of Palestine' (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> accessed 22 March 2024, para. 59

¹¹⁸ William Schabas, 'Public Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence Source: Professor William Schabas' (2020) <<https://www.legal-tools.org/doc/u9y4lh/pdf>> accessed 21 April 2024, para. 27

¹¹⁹ Judge Kovács and others, 'Request under Regulation 46(3) of the Regulations of the Court' (6 September 2018) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF> accessed 21 April 2024.

¹²⁰ Judge Kovacs and others, 'Situation in the State of Palestine' (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> accessed 22 March 2024.

¹²¹ Péter Kovács and others, 'Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine Source: Office of the Prosecutor' (2020) <<https://www.legal-tools.org/doc/clur6w/pdf>> accessed 21 April 2024, para. 2

¹²² *ibidem*

whether Article 19(3) of the Statute is applicable, as requested by the Prosecutor, so as to rule on this question of jurisdiction before the case begins. This conclusion was reached by the Chamber in accordance with the Vienna Convention on the Law of Treaties (VCLT) whose Article 31(1) states that “A Treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”¹²³.

2.5.2.2. The merits of the decision in regard to the statehood question and the territorial jurisdiction

After determining that Article 19(3) is applicable in the proceedings, the Chamber then turned to analyse the merits of the Prosecutor’s Request. Firstly, it had to assess whether Palestine could be considered “the State on the territory of which the conduct in question occurred” within the meaning of Article 12(2)(a) of the Statute, secondly it had to delineate the territorial jurisdiction of the Court in the Situation. This is the section of the decision that comprises the main findings of the Chamber in regard to the claim of jurisdiction and the Palestinian statehood question.

As for the first issue, the one specific to statehood, the judges relied upon Article 31(1) of the VCLT to interpret Article 12(2)(a) taking into consideration Articles 125(3) and 126(2) of the Statute that delineate the modalities of accession to the Rome Statute. In this context, the judges highlighted that Palestine’s accession has followed all the required steps, therefore making it a State Party and demonstrating its statehood for the purposes of the ICC. Moreover, another proof of Palestine’s statehood for the purposes of the ICC lies in the inter-office memoranda that the Office of Legal Affairs issued, stating that the UNGA had determined that Palestine would be able to become party to any treaties open to “any State” or “all States” as a result of it obtaining the non-member observer status in accordance with Resolution 67/19¹²⁴. None of the states¹²⁵ claiming that Palestine is not a State for the purposes of Article 12(2)(a) challenged the admission process of Palestine to the Rome Statute, therefore rendering null the claim of Palestine now not having the right to transfer its criminal jurisdiction to the Court. In fact, in the words of the Chamber, “once the conditions for accession pursuant to Article 125 of the

¹²³ United Nations, ‘Vienna Convention on the Law of Treaties’ (1969) 63 The American Journal of International Law <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 20 April 2024.

¹²⁴ UNGA, ‘Resolution 67/19 Status of Palestine in the United Nations’ (29 November 2012) <<https://documents.un.org/doc/undoc/gen/n12/479/74/pdf/n1247974.pdf?token=mzfc6FeWCyYeoltoUL&fe=true>>.

¹²⁵ Czech Republic, Austria, Australia, Hungary, Germany, Brazil and Uganda

Statute have been fulfilled, the effect of Articles 12(1), 125(3) and 126(2) of the Statute, taken together, is that the Statute automatically enters into force for a new State Party. By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party.”¹²⁶ In an attempt to remain neutral, the Chamber stressed that it is not its place to define whether Palestine is a State under international law, but only that it is for the purposes of the Statute, which is a different thing, thus distancing itself from making any claims that would not be under the jurisdiction of the ICC. So, to summarize the position of the Chamber in regard to the first issue, given that Palestine was legally admitted as a State Party to the Rome Statute in 2015, it would be contradictory to not grant it the ICC jurisdiction.

The second issue regards, as stated before, the territorial jurisdiction of the ICC. More specifically, the issue at hand arises out of the question of whether or not the ICC can have jurisdiction over Israeli-occupied territories with the delegation from Palestine. The answer in this case is given once again by UNGA Resolution 67/19, which “reaffirmed the right of Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*”¹²⁷, that is used as a basis by the Chamber to argue that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, that is to say, Gaza and the West Bank, including East Jerusalem.¹²⁸ As the right to self-determination is owed “*erga omnes*” and is considered a “fundamental right” with “a broad scope of application”¹²⁹, the Chamber finally argues that the territorial parameters of the Prosecutor’s investigation implicate the right to self-determination, even more so considering that certain measures adopted by Israel in the West Bank “severely impede the exercise by the Palestinian people of its right to self-determination¹³⁰”. In this respect, more recently, the UNSC called on States not to recognize acts in breach of international law in the Occupied Palestinian Territory by “condemning all measures aimed at

¹²⁶ Judge Kovacs and others, ‘Situation in the State of Palestine’ (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF>, para. 102 accessed 20 April 2024.

¹²⁷ UNGA Resolution, ‘Status of Palestine in the United Nations’ (2012), para 1

¹²⁸ Michelle Staggs Kelsall, ‘Between False Messiah and Symbolic Politics: The International Criminal Court and the “Situation in the State of Palestine”’ (2023) 23 *Palestinian Yearbook of International Law* 156 <<http://eprints.soas.ac.uk/37499>> accessed 20 April 2024.

¹²⁹ Judge Kovacs and others, ‘Situation in the State of Palestine’ (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF>, para. 120

¹³⁰ ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (www.icj-cij.org2003) <<https://www.icj-cij.org/case/131>>.

altering the demographic composition, character, and status of the Palestinian Territory occupied since 1967, including East Jerusalem.”¹³¹

To conclude, the Chamber found that the Prosecutor could indeed initiate an investigation into the Situation in Palestine. Nonetheless, it is important to mention, also in light of the critical analysis that will be conducted in the third chapter, that the Chamber stressed that “[the] findings are without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court’s jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Chamber is *neither adjudicating a border dispute under international law nor prejudging the question of any future borders*”¹³² therefore stating very clearly that its decision has limitations.

2.5.3. Kovács’s dissenting opinion

The Chamber found that Palestine is a State Party to the Statute by majority, Judge Kovács dissenting, and also found that Palestine qualifies as “the State on the territory of which the conduct in question occurred” for the purposes of Article 12(2)(a) of the Statute, and finally, again by majority, Judge Kovács dissenting, that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. In its dissent, the judge disassembles the reasoning of the Decision in order to explain the reasons why, in his view, it has “no legal basis in the Rome Statute and even less so, in public international law”.¹³³ A common thread in the reasoning behind his disapproval of the Decision is surely the problematic approach of the Chamber, given that the Majority focuses more on finding ways to prove its point than actually conducting a thorough analysis of the sources at hand.

The judge stresses that the reasoning of the Chamber “cannot mask legal reality”¹³⁴ as it fails to provide an in-depth assessment that would allow for an analysis going beyond the resolutions of the UNGA upon which the Prosecutor has built its request¹³⁵. This further analysis, according to the judge, would take the form of finding a “definitive answer with regard to the

¹³¹ United Nations Security Council, ‘Resolution 2334’ (2016) <<https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>> accessed 20 April 2024.

¹³² Judge Kovacs and others, ‘Situation in the State of Palestine’ (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF>, para. 113

¹³³ ‘Judge Péter Kovács, Partly Dissenting Opinion’ (*Situation in Palestine* 5 February 2021) <https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF> para. 3

¹³⁴ *Ibidem*, para. 13

¹³⁵ *Ibidem*, para. 93

legality of the Prosecutor exercising jurisdiction in order to conduct her investigations, so as to avoid it from being the subject of future proceedings.”¹³⁶ Moreover, Kovács proceeds to explain why Palestine at this moment cannot be considered a State, based on the Montevideo Criteria and more in general to the ordinary meaning to be given to the term “state”. In this respect, he also points out that he disagrees with the “Majority’s view that an assessment of the elements of statehood would equate to challenging the validity of the accession” and instead believes that “the two issues can be separated and treated independently”.¹³⁷ Finally, still concerning the question of statehood, and with particular attention to the – often mentioned in the Decision – UNGA Resolution 67/19, he affirms that “participation in an interstate international organization is not in itself irrefutable proof of statehood or of an alleged perception of full-fledged statehood by the Member States having voted in favor of the admission.”¹³⁸

A critique that has been brought up against his – nonetheless objective – reasoning is that Judge Kovács has based his claims on a very Eurocentric reading of international law therefore leaving out various scholars from the Global South who had indeed engaged in analyses related to the matter at hand¹³⁹, which is something that can also be said about the Prosecutor’s Request, as she failed to cite Palestinian scholarship on the legal issues raised in the referral, such as the historical background to the situation in Palestine¹⁴⁰.

2.6. Conclusions

This chapter had the aim of delving into the specificities of Palestine’s accession to the ICC by providing a historical overview of the process, an analysis of the concept of jurisdiction according to the Rome Statute, of the processes of preliminary examination and investigation, and finally, a thorough explanation of the decision of the Pre-Trial Chamber I, dated February 5, 2021.

¹³⁶ Michelle Staggs Kelsall, ‘Between False Messiah and Symbolic Politics: The International Criminal Court and the “Situation in the State of Palestine”’ (2023) 23 *Palestinian Yearbook of International Law* 156 <<http://eprints.soas.ac.uk/37499>> accessed 20 April 2024.

¹³⁷ *Ibidem*, para. 53

¹³⁸ *Ibidem*, para. 218

¹³⁹ Michelle Staggs Kelsall, ‘Between False Messiah and Symbolic Politics: The International Criminal Court and the “Situation in the State of Palestine”’ (2023) 23 *Palestinian Yearbook of International Law* 156 <<http://eprints.soas.ac.uk/37499>> accessed 20 April 2024.

¹⁴⁰ Victor Kattan, ‘Palestinian Scholarship and the International Criminal Court’s Blind Spot’ (*TWAILR - Third World Approaches to International Law Review* 20 February 2020) <<https://twailr.com/palestinian-scholarship-and-the-international-criminal-courts-blind-spot/>> accessed 20 April 2024.

The Decision was analysed in such a way that would highlight its main characteristics, namely, the Prosecutor's request, the reasoning of the Chamber that brought it to issuing the decision itself, the actual outcome of the deliberation, and the dissenting opinion of one of the judges. This was deemed necessary in order to have a solid ground for the critical analysis that will be conducted in the next and last chapter, which is designed to shed light on the implications that the investigation might have on Palestinian statehood, by relying upon works from a variety of scholars.

3. CRITICAL ANALYSIS OF THE DECISION ISSUED BY THE PRE-TRIAL CHAMBER OF THE ICC

3.1. Introduction

This third and last chapter will focus on a critical analysis of the Decision of the Pre-Trial Chamber described in the previous chapter. To conduct the analysis, the doctrine of various scholars will be provided, and the aim will be to look at the Decision and its implications for the question of Palestinian statehood from multiple angles. Therefore, the first section will be devoted to the analysis of the legal implications of the Decision, first in terms of the consequences of Israel not being present in the proceedings, then for what concerns its impact on the traditional approach to the recognition of statehood, and finally through an in-depth analysis of the colonial premise behind the conferral of jurisdiction to the ICC. After that, the second section will analyse the question of Palestinian statehood before the ICC in light of a possible overcoming of the Montevideo Criteria in favour of an ad-hoc approach through the law of belligerent occupation and the right to self-determination. Finally, the last section will be devoted to an analysis of the current status of the investigation that was initiated on the 3rd of March 2021, – after the ICC confirmed its jurisdiction as per the 5th of February 2021 Decision – and of possible future developments for the recognition of Palestine as a State.

3.2. Legal consequences of the 5th of February 2021 decision

The decision by the Pre-Trial Chamber confirmed that Palestine is to be considered “the State on the territory of which the conduct in question occurred” within the meaning of Article 12(2)(a) of the Statute and that the ICC has jurisdiction over the territories of Gaza, and the West Bank, including East Jerusalem. This response to the Prosecutor’s request allowed for the opening of the investigation on the 3rd of March 2021, which is still ongoing. The Decision has had various consequences from a legal standpoint, some of which will now be analysed.

3.2.1. Implications of Israel’s non-participation to the Rome Statute and its absence in the proceedings

On the same day that the ICC Prosecutor Fatou Bensouda issued her Request before the Pre-Trial Chamber to have confirmation of the exact “territory within which the investigation may be conducted”¹⁴¹, the Office of the Legal Advisor of the Israeli Ministry of Foreign Affairs

¹⁴¹ ‘Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction’ (*International*

published a report entitled “The International Criminal Court’s Lack of Jurisdiction over the So-called “Situation in Palestine”: Synopsis”¹⁴². A more detailed memorandum was issued by the Office of the Israeli Attorney General¹⁴³. Both documents claimed that the Court possessed no jurisdiction based on the belief that Palestine was not a State and it did not have defined boundaries, and for this reason, no investigation could be carried out¹⁴⁴. Despite the Israeli response, the Pre-Trial Chamber analysed the Prosecutor’s request, and in order to issue a ruling it asked all the interested parties i.e. States, *Amici Curiae*, and Victims to submit observations. Among those with the possibility to issue observations, there was also the Israeli government, which was invited in the “order setting the procedure and the schedule for the submission of observations”¹⁴⁵ of the 28th of January 2020, but refused to provide observations, based on the ICC not having, in its view, jurisdiction on the matter. In this regard, in the Decision of the 5th February 2021, the Chamber noted that certain *Amici Curiae* on the Israeli side had mentioned the Monetary Gold principle as grounds for the impossibility of the Court to proceed with the investigation, as Israel, one of the main actors, was not present in the proceedings, but the Chamber noted that the principle was created in the context of interstate disputes, so it could not be applicable in a Court that only investigates and prosecutes individuals¹⁴⁶. As for the investigation that was opened on the 3rd of March 2021, the question that arose was whether or not it could have legal consequences for Israeli nationals, considering that Israel is not a State party to the Statute. The main concept to keep in mind to answer the question is that the Court is exercising jurisdiction based on the referral from Palestine – a State Party to the Statute – which allowed the Court, under Article 12, to investigate alleged crimes committed on the territory that, after confirmation with the 5th of February 2021 Decision, it has jurisdiction on, regardless of the nationality of the perpetrator. Therefore, the Court has

Criminal Court 20 December 2019) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>> accessed 24 April 2024.

¹⁴² ‘The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”: Synopsis’ (*www.gov.il* 20 December 2019) <<https://www.gov.il/BlobFolder/reports/20-12-2019/en/Ministry-Foreign-Affairs-Synopsis.pdf>> accessed 24 April 2024.

¹⁴³ ‘Memorandum by the Office of Attorney General on the International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”’ (*www.gov.il* 20 December 2019) <<https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf>> accessed 24 April 2024.

¹⁴⁴ Mutaz M Qafisheh, ‘What Is Palestine? The de Jure Demarcation of Boundaries for the Icc’s Ratione Loci Jurisdiction and Beyond’ (2020) 20 *International Criminal Law Review* 908 <https://brill.com/view/journals/icla/20/5/article-p908_908.xml> accessed 24 April 2024.

¹⁴⁵ ‘Order Setting the Procedure and the Schedule for the Submission of Observations’ (*icc-cpi.int* 28 January 2020) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00217.PDF> accessed 24 April 2024.

¹⁴⁶ ‘Questions and Answers Questions and Answers on the Decision on the International Criminal Court’s Territorial Jurisdiction in the Situation in Palestine WHAT WAS DECIDED by the JUDGES REGARDING the SITUATION in PALESTINE?’ (2021) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf>> accessed 24 April 2024.

jurisdiction over the actions of Israeli officials in Gaza and the West Bank, including East Jerusalem¹⁴⁷.

As for cooperating with the Court during the investigation, one may point out that given that Israel is not a State party to the Statute, it has no obligation to cooperate with the Court and in this regard, the Israeli Prime Minister has stated that Israel rejects the ICC's Decision to investigate the Situation in Palestine and, instead, will oppose it, which is a decision that could imply the prevention of the ICC investigation team from entering the oPt¹⁴⁸. Nonetheless, it should be noted that Israel could be asked to cooperate with the Court, as per Article 87(5) of the Rome Statute, and be required to do so with a Resolution from the UNSC, under Chapter VII of the UN Charter. Finally, as part of the Geneva Conventions from 1949, Israel is obligated¹⁴⁹ to suppress all violations of IHL by its agents and to search for, prosecute, or hand over to other courts, perpetrators of "grave breaches" of the Geneva Conventions.¹⁵⁰

3.2.2. Could accepting the Palestinian position be a destabilizing precedent for the recognition of statehood?

Out of caution, in the Decision the judges of the Pre-Trial Chamber stated that "in order to avoid any misunderstanding, [...] these findings are without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court's jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Chamber is neither adjudicating a border dispute under international law nor prejudging the question of any future borders."¹⁵¹ This statement very clearly shows that the ICC is not competent in determining questions of statehood that could have an effect on the international community, which means that declaring to have jurisdiction on Gaza and the West Bank including east Jerusalem is not seen as determining the borders of Israel and Palestine but is a

¹⁴⁷ Nasser Thabet and Bashar Salut, 'Implications of the ICC Investigation in Palestine in Light of Israel's Refusal to Cooperate: Scenarios and Solutions' (*Law for Palestine* 27 August 2021) <<https://law4palestine.org/the-implications-of-the-international-criminal-courts-investigation-in-palestine-in-light-of-israels-refusal-to-cooperate-scenarios-and-legal-solutions/>> accessed 26 April 2024.

¹⁴⁸ occupied Palestinian territory

¹⁴⁹ International Committee of the Red Cross, 'International Humanitarian Law Databases' (*Icrc.org*) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-146>> accessed 26 April 2024.

¹⁵⁰ Diakonia International Humanitarian Law Centre Jerusalem, 'The ICC Investigation of the Situation in Palestine Questions and Answers' (2021) <<https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/05/diakonia-qa-icc-investigation-of-situationin-palestine.pdf>> accessed 26 April 2024.

¹⁵¹ Péter Kovács and others, 'Situation in the State of Palestine' (2021) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> para. 113 accessed 26 April 2024

consequence of the interpretation of UNGA Resolution 67/19¹⁵², made by the majority judges of the Chamber, which “reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967”.¹⁵³ Therefore, the question of the determination of the ICC jurisdiction is intended as not being linked to the determination of statehood, as it would be *ultra vires*, so being a State party to the Statute is not equal to being a State under international law, but simply in the context of the Statute, Palestine is seen as being on the same level as all the other State parties.

This aspect of the Decision has raised various concerns around the possibility that it might constitute a fracture in the concept of statehood. More specifically, asserting that Palestine is a State only in function of the Statute and refusing to make legal considerations on the matter of its statehood out of its political consequences gives the impression that Palestine could be a State for certain ends but not for others i.e functional statehood¹⁵⁴. In this case therefore it would mean that the Decision opens to the possibility of considering a political entity as a State only for the purpose of the accession to a multilateral treaty, and not on the grounds of it having sovereignty¹⁵⁵. The ambiguity of the Pre-Trial Chamber’s position creates an unfortunate precedent, given that, by its very nature, the ICC was born with the aim of persecuting international crimes, which in the majority of cases happen within highly politicized contexts such as armed conflicts, insurrections, national liberation movements etc. Moreover, the same Chamber recognized the political implications of the issues submitted to its jurisdiction and the probable political repercussions of its decision, ultimately admitting that this cannot prevent it from defining the territorial scope of the Court's jurisdiction over the situation in Palestine¹⁵⁶. Therefore, the question is “Why then not also admit that, in abstract terms, it is competent to rule on the qualification of Palestine as a sovereign entity in the sense of international law?”¹⁵⁷ If the Chamber had admitted that, it would have bypassed the functional statehood issue and,

¹⁵² Chantal Meloni, ‘La CPI Conferma La Sua Giurisdizione Territoriale Sulla Palestina’ (www.sistemapenale.it 9 February 2021) <<https://www.sistemapenale.it/it/scheda/corte-penale-internazionale-giurisdizione-palestina>> accessed 26 April 2024.

¹⁵³ UNGA, ‘Resolution 67/19 Status of Palestine in the United Nations’ (29 November 2012) <<https://documents.un.org/doc/undoc/gen/n12/479/74/pdf/n1247974.pdf?token=mzfc6FeWCyYeoltoUL&fe=true>> para. 1

¹⁵⁴ Territorial entities, not generally considered states, can nonetheless trigger functional treatment as a state depending on their status. Definition taken from William Thomas Worster, ‘Territorial Status Triggering a Functional Approach to Statehood’ (2020) 8 Penn State Journal of Law and International Affairs 118 <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1245&context=jlia>> accessed 25 May 2024.

¹⁵⁵ Emanuele Cimiotta, ‘È Uno Stato O No? La Determinazione Della Giurisdizione Territoriale Della Corte Penale Internazionale Sulla Situazione in Palestina’ (2021) 3 Rivista di diritto internazionale.

¹⁵⁶ Péter Kovács and others, ‘Situation in the State of Palestine’ (2021) para. 57 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF> accessed 26 May 2024.

¹⁵⁷ *ibidem*

given the importance that recognition has in ascertaining whether or not an entity can be considered a State, it would have contributed to the Palestinian quest of statehood at least to some degree¹⁵⁸. In fact, even if the response in 2021 would have been, with all probability, negative, still in the future the situation in regard to the occupation could have changed, thus making the Chamber's move a positive addition to the birth of the Palestinian State. Unfortunately, the Chamber did not follow that path, and chose to deem it outside of its scope. This being said, the 5th of February 2021 Decision can, nonetheless, change the contours of the discussion on Palestinian statehood under international law. In fact, although the Chamber cannot determine the statehood of Palestine or bind the international community in this respect, it can however influence discussions in that area, so as to push towards the attainment of a more formal recognition. This has already started with Prosecutor Fatou Bensouda taking a more forced stance¹⁵⁹, by trying to delegitimize the Montevideo Criteria, suggesting that the presence of Israeli settlements in Palestinian territory obviated Palestine's need to fulfil the strict criteria of having a defined territory¹⁶⁰.

3.2.3. The colonial premise behind the criteria for the conferral of jurisdiction to the ICC and the Pre-Trial Chamber's Decision as a development in Public International Law

Since its inception, the ICC has been criticized for being a colonial institution that perpetuates the "powerful versus the powerless" paradigm. More specifically, according to Mia Swart, visiting fellow at the Brookings Doha Center and research director at the Human Sciences Research Council (HRSC) in South Africa, the ICC is fundamentally colonial in two ways: in its design and in its funding¹⁶¹. In fact, its relationship to the Security Council allows the latter some influence, which can be counterproductive because of power relations and vetoes; and in terms of funding, the ICC is funded by a variety of states, contrary to ad hoc committees that are funded by the UN, among which the top funders are almost all western states, thus often

¹⁵⁸ The effectiveness criterion would still be an issue.

¹⁵⁹ Joe DelGrande, 'An Examination of Palestine's Statehood Status through the Lens of the ICC Pre-Trial Chamber's Decision and beyond – NYU JILP' (20 October 2021) <<https://www.nyuujlp.org/an-examination-of-palestines-statehood-status-through-the-lens-of-the-icc-pre-trial-chambers-decision-and-beyond/#FN37>> accessed 26 April 2024.

¹⁶⁰ Fatou Bensouda, 'Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine Source: Office of the Prosecutor' (2020) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF> paras 137-138 accessed 26 April 2024.

¹⁶¹ Khansa Maria, 'Is the International Criminal Court a Colonial Institution?' (*CIRS* 28 February 2018) <<https://cirs.qatar.georgetown.edu/event/international-criminal-court-colonial-institution/>> accessed 13 May 2024.

putting in a difficult position the Prosecutor¹⁶². Also, according to the scholar, “selectivity is the Achilles’ heel of international criminal justice; the aspect that gives it a dubious legitimacy”¹⁶³, as the ICC chooses a situation in a country, and its choosing a certain range of issues over others is a statement itself.¹⁶⁴ These features unfortunately render difficult for the ICC to stand up to its promises of accountability and deterrence.¹⁶⁵

Now, for the purposes of this thesis, the shift will be moved to the matter of the conferral of jurisdiction and its implications for the statehood criteria. This analysis is part of a broader one that is born out of the question of “whether the premise and promise of international criminal justice can for the Global South – given certain embedded colonial features – be anything more than illusory, or whether, drawing on TWAIL ¹⁶⁶ perspectives, a “decolonization” of international criminal justice might be conceivable”¹⁶⁷. In the specific context of the ICC, the main questions are, *inter alia*, how the Court takes jurisdiction over situations, and how the Prosecutor’s discretion is exercised¹⁶⁸. After the Decision of the 5th of February 2021, a new round of debate has emerged around its implications and the possible impact that it might have, given the slow pace of the ICC’s work in Palestine and its dubious legacy. On the one side the Decision represents a step towards accountability, on the other, the interests of Israel and other third parties such as the US envisage a likely long and hampered investigation. However, some scholars believe that through the manner in which the Pre-Trial Chamber articulated its Decision, it is somehow possible to overcome the colonial premise behind the concept of the conferral of jurisdiction. More specifically, scholars such as Aeyal Gross, Luis Eslava, and Sundhya Pahuja believe that the Decision allows to avoid a problem inherent in the Rome Statute, namely that “by determining that (apart from the Security Council) only States (either on a personal or a territorial basis) can confer jurisdiction to the ICC, the Rome Statute perpetuates a colonial premise under which only those accorded the status of statehood can be

¹⁶² Media Center of the OHCHR, ‘Israel/Gaza: Threats against the ICC Promote a Culture of Impunity, Say UN Experts’ (*ohchr.org* 10 May 2024) <<https://www.ohchr.org/en/press-releases/2024/05/israelgaza-threats-against-icc-promote-culture-impunity-say-un-experts>> accessed 13 May 2024.

¹⁶³ Khansa Maria, ‘Is the International Criminal Court a Colonial Institution?’ (*CIRS* 28 February 2018) <<https://cirs.qatar.georgetown.edu/event/international-criminal-court-colonial-institution/>> accessed 17 May 2024.

¹⁶⁴ *ibidem*

¹⁶⁵ OC Okafor and U Ngwaba, ‘The International Criminal Court as a “Transitional Justice” Mechanism in Africa: Some Critical Reflections’ (2014) 9 *International Journal of Transitional Justice* 90.

¹⁶⁶ *Third World Approaches to International Law*

¹⁶⁷ John Reynolds and Sujith Xavier, ‘“The Dark Corners of the World”: TWAIL and International Criminal Justice’ (2016) 14 *Social Science Research Network*

<<https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1101&context=lawpub>> accessed 13 May 2024.

¹⁶⁸ *ibidem*

actors who count in the international legal arena”¹⁶⁹. This colonial premise actively excludes the peoples who do not “have” a State, therefore rendering near impossible for them to achieve justice in the case of crimes committed in their occupied territory.¹⁷⁰

Therefore, in this context, it becomes easily visible how the Pre-Trial Chamber’s Decision represents a step forward in preventing that exclusion in a way that contributes to the development of international public law in favour of the Global South’s needs. Nonetheless, it should be noted that in the Decision it was made clear that Palestine was being considered a “State party for the purposes of the Rome Statute” and that the Chamber was in no way determining that Palestine was a State under international law, considering it outside its scope. On the contrary, the Prosecutor in her request went beyond it and claimed that self-determination coupled with the illegal occupation needs to be taken into consideration and contributes to determine Palestine’s statehood under international law.¹⁷¹

This ambivalence of views shows that the question of Palestinian statehood that is at stake is far from resolved, nonetheless, the Chamber’s Decision, despite its attempt to distance itself from such a debated issue, has contributed to the overcoming of the colonial premise mentioned above with the help of some technical arguments¹⁷². Despite it being a development in public international law, the Decision and the subsequent ongoing investigation do not exclude the possibility of the colonial premise persisting, given that the requirement of statehood is a distinctive feature in the Rome Statute and that Israel and its *amici curiae* have been challenging the ICC Decision on the grounds of the Court not having jurisdiction on Palestine due to its not being a State according to the Montevideo Criteria. This approach thus perpetuates the idea that people living under occupation cannot bring to justice their oppressors because that same occupation prevents their territory from being considered their State for the purposes of one of the few legal mechanisms that could address the crimes in question. Therefore, in this respect, the Decision allows to open a way through the structure of the ICC, so as to bypass or at least attempt to, the exclusion of peoples without a State.

¹⁶⁹ Aeyal Gross, ‘Decolonizing the ICC: The Situation in Palestine and Beyond’ (*Just Security* 8 March 2021) <<https://www.justsecurity.org/75204/decolonizing-the-icc-the-situation-in-palestine-and-beyond/>> accessed 13 May 2024.

¹⁷⁰ *ibidem*

¹⁷¹ Office of The Prosecutor, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020), para. 9 <<https://www.legal-tools.org/doc/clur6w/pdf>> accessed 13 May 2024.

¹⁷² UNGA Resolution 67/19, the deposit of the instruments of Palestinian accession to the Rome Statute with the UN Secretary General, the official accession to the ICC, the admission to the Assembly of State Parties

More generally, the Palestinian case before the ICC shows, *inter alia*, the importance of a normative approach instead of a factual one when it comes to statehood. This means an approach that in this context puts an emphasis on the right to independence and in order to do so distances itself from the strict Montevideo Criteria¹⁷³. So as to further analyse the need for an overcoming of the Montevideo Criteria in the particular case of Palestine, the next section will be devoted to the relevance of the law of belligerent occupation and of the right to self-determination in the assessment of Palestinian statehood before the ICC.

3.3. Going beyond the Montevideo Criteria regarding Palestine's statehood before the ICC

3.3.1. The relevance of the law of belligerent occupation as governed by International Humanitarian Law

According to scholars Robert Heinsch and Giulia Pinzauti, statehood should not require fixed criteria, but instead, in the case of Palestine, the effectiveness of government should be interpreted flexibly due to a factual circumstance that is the belligerent occupation of Israel.¹⁷⁴ The Pre-Trial Chamber has deemed the determination of the Palestinian statehood out of its scope, but if it had instead decided to intervene in the matter, it should have taken into account the impact of the Israeli belligerent occupation as it is defined under international humanitarian law. Occupation thus has a role in the assessment of statehood, but it was not analysed thoroughly from either the Prosecutor or the Chamber or even the scholarly debate. In this regard, Israel claimed that Palestine does not have an effective government and does not exercise governmental authority over the strip of Gaza, administered by Hamas, and exercises only a limited one over Area C in the West Bank.¹⁷⁵ Nevertheless, the Montevideo Criteria have been under scrutiny by scholars who claim that they do not represent "the exclusive and determinative hallmarks of statehood"¹⁷⁶, and that they are a reflection of the notion of statehood at the time they were conceived¹⁷⁷, which is very different from the current times¹⁷⁸.

¹⁷³ Aeyal Gross, 'Decolonizing the ICC: The Situation in Palestine and Beyond' (*Just Security* 8 March 2021) <<https://www.justsecurity.org/75204/decolonizing-the-icc-the-situation-in-palestine-and-beyond/>> accessed 17 May 2024.

¹⁷⁴ Robert Heinsch and Giulia Pinzauti, 'To Be (a State) or Not to Be?' (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 14 May 2024.

¹⁷⁵ State of Israel Office of the Attorney General, 'The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"' (*gov.il* 20 December 2019) <<https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf>> accessed 14 May 2024.

¹⁷⁶ Zachary Saltzman, 'Much Ado about Nothing: Non-Member State Status, Palestine and the International Criminal Court and the International Criminal Court' (2013) 3 *scholarship.law.stjohns.edu* 163 <<https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1019&context=jicl>> accessed 14 May 2024.

¹⁷⁷ Robert Heinsch and Giulia Pinzauti, 'To Be (a State) or Not to Be?' (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 14 May 2024.

¹⁷⁸ Since the drafting of the Montevideo Criteria in 1933, some principles of international law such as the self-determination of peoples have had an impact on the concept of statehood.

To this regard, various entities have indeed been recognized despite lacking effectiveness, particularly during the decolonization process, showing that there is a practice of flexible interpretation¹⁷⁹. Therefore, according to the scholars, “statehood has to be assessed on a case-by-case basis”, meaning that in the case of Palestine, since “occupation presupposes that the occupying power has acquired effective control over the occupied territory”¹⁸⁰, it should have an impact on the interpretation and application of the Montevideo Criterion of effective government with respect to the occupied entity¹⁸¹. When applying the aforementioned considerations to the situation of Palestine before the ICC, it has been confirmed by the ICJ itself that Israel exercises control over the Occupied Palestinian Territories¹⁸², and since the current status of occupation impedes the fulfilment of the criteria if applied strictly, Israel as the “occupier cannot complain that an occupied entity does not fulfil the criterion of effective government, as it is the occupier itself that sets the factual reason why the effectiveness of the government is hampered.”¹⁸³

International humanitarian law defines the rules that the occupying power has to respect, but Israel has exceeded the authority granted to it under the law of occupation, as it has adopted legislative, executive and other measures¹⁸⁴ *de-facto* exercising sovereignty over the occupied territory and consequently impeding the capacity of the occupied people to exercise its right to self-determination and its sovereign capacity. The ICC Prosecutor herself has pointed out the excesses in Israeli occupation¹⁸⁵, and for that reason has asked for an overcoming of the Montevideo Criteria, recognizing that Israel’s protracted military occupation and certain unlawful measures indeed contribute to the inability of Palestine to have an effective government.

¹⁷⁹ Democratic Republic of Congo, Bosnia-Herzegovina, Croatia, Namibia, Guinea-Bissau

¹⁸⁰ Art. 42 of the 1907 Hague Regulations

¹⁸¹ Robert Heinsch and Giulia Pinzauti, ‘To Be (a State) or Not to Be?’ (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 14 May 2024.

¹⁸² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, [78], [139]

¹⁸³ Robert Heinsch and Giulia Pinzauti, ‘To Be (a State) or Not to Be?’ (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 15 May 2024.

¹⁸⁴ Construction of the separation barrier and its associated regime, expansion of the settlements, obstruction of Palestine’s viability as a State and of the Palestinian right to self-determination. These measures have had as consequences the fragmentation of Palestinian territory, restriction to freedom of movement of Palestinian people, the extraterritorial application of Israeli domestic law to a number of settlers living in Area C, and thus on Palestinian territory, while Palestinians are subjected to military law, the inability to carry out governmental functions in the OTP

¹⁸⁵ Office of The Prosecutor, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020) para. 146, 138, 157-177 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF> accessed 15 May 2024.

With its accession to the ICC in 2015, Palestine also signed 17 treaties, all of which are open for ratification, acceptance, approval or accession by “States”, therefore the fact that the depositary accepted Palestine’s instruments of accession suggests that they considered Palestine to possess sufficient attributes of statehood to be able to accede those treaties¹⁸⁶. The entity’s accession to treaties per se does not make it a State¹⁸⁷, but the acceptance of the other states parties to the treaties of the depositary’s approval can be seen as indicating that they regarded the accession as effective¹⁸⁸. Finally, the scholars point out that “the Rome Statute does not require that the central government of a State party has effective control over the entirety of its territory for the Court to exercise jurisdiction over the State’s territory pursuant to Article 12(2)(a) of the ICC Statute”¹⁸⁹ and they give examples to support this claim¹⁹⁰, moreover, the Statute itself explicitly envisage belligerent occupation as a factual situation in which the Court can exercise its jurisdiction¹⁹¹, showing that occupation does not affect a State’s sovereignty over its territory or the Court’s jurisdiction over the crimes listed in the Statute¹⁹².

To conclude, Heinsch and Pinzauti have shown that a status of belligerent occupation prevents Palestine, as an occupied entity, from having an effective government as required by the Montevideo Convention. The lack of this criterion, in the case of belligerent occupation, needs to be counterbalanced against the principle of self-determination – especially when the occupying power, in this case Israel, breaches the rules of occupation law – and also against the already widespread recognition of Palestine. Therefore, all these aspects put Palestine in the position to trigger the jurisdiction of the ICC.

¹⁸⁶ Robert Heinsch and Giulia Pinzauti, ‘To Be (a State) or Not to Be?’ (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 15 May 2024.

¹⁸⁷ W Schabas, ‘Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, Situation in the State of Palestine (ICC-01/18), Pre-Trial Chamber I, 16 March 2020’

¹⁸⁸ R Heinsch and G Pinzauti, ‘Submission pursuant to Rule 103 (Robert Heinsch & Giulia Pinzauti), Situation in the State of Palestine (ICC-01/18), Pre-Trial Chamber I, 16 March 2020’ (Heinsch and Pinzauti Amicus Brief)

¹⁸⁹ Robert Heinsch and Giulia Pinzauti, ‘To Be (a State) or Not to Be?’ (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 15 May 2024.

¹⁹⁰ Situation in Georgia, Cyprus

¹⁹¹ Art. 8(2)(b)(viii), Art. 8bis(2)(a)

¹⁹² The State of Palestine’s Observations in relation to the request for a ruling on the Court’s territorial jurisdiction in Palestine*, *Situation in the State of Palestine* (ICC-01/18), Pre-Trial Chamber I, 16 March 2020. Para. 49

3.3.2. The relevance of the right to self-determination in the absence of effective control

As already anticipated, another factor that has been mentioned in regard to the Palestinian statehood before the ICC is the right to self-determination. More specifically, in her request, Prosecutor Fatou Bensouda mentioned that the absence of effective control can be compensated with, *inter alia*¹⁹³, the right to self-determination that has been internationally recognized to Palestinians, including the right “to an independent and sovereign State in the Occupied Palestinian Territories.”¹⁹⁴ Some scholars¹⁹⁵ claim that the OTP’s proposal to depart from the Montevideo Criterion of effectiveness through the use of the right to self-determination needs to have a solid legal basis among existing sources of law, which practically means that there must be a practice of acknowledgment of statehood when the effective control is lacking, and that the recognition of statehood needs to be despite the acknowledgment of the shortfall and on the basis of self-determination¹⁹⁶. The scholar Yaël Ronen finds that the right to self-determination cannot be taken into consideration, because the issue at hand in Palestine’s case is “not whether the shortfall in Palestinian control can be played down, but how the effective control by Israel (the occupant) affects Palestinian statehood”¹⁹⁷ and therefore it is Israel’s control that renders Palestine incapable of fully satisfying the Montevideo Criterion of effectiveness but the bar of the criteria cannot be lowered only through the right to self-determination.

As for the Pre-Trial Chamber, it has relied on the principle of self-determination in its Decision, but, contrary to the Prosecutor’s stance in her Request¹⁹⁸, only for the purpose of determining the territorial scope of Palestine. The other view, that of the Prosecutor¹⁹⁹ and of other

¹⁹³ The other two factors are the inability of Palestinian to fulfill the effective control criterion due to the Israeli unlawful occupation, and the broad recognition of statehood enjoyed by Palestine.

¹⁹⁴ Péter Kovács and others, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020) <<https://www.legal-tools.org/doc/clur6w/pdf>> accessed 21 April 2024.

¹⁹⁵ Yaël Ronen, ‘Palestine in the ICC’ (2020) 18 *Journal of International Criminal Justice* 947-966 <<https://academic.oup.com/jicj/article/18/4/947/6017407>> accessed 16 May 2024.

¹⁹⁶ *ibidem*

¹⁹⁷ *ibidem*

¹⁹⁸ Fatou Bensouda, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF> accessed 26 April 2024.

¹⁹⁹ Office of The Prosecutor, ‘Public with Public Annex a Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine Source: Office of the Prosecutor’ (2020) para. 146, 138, 157-177 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF> accessed 16 May 2024.

scholars²⁰⁰, is that given the occupation and its related excessive measures, the capacity of the occupied people to exercise its right to self-determination is restricted, and therefore, this can “mitigate the effects of a deficiency in effective control in particular circumstances.”²⁰¹ The reason for the focus that has been put by the OTP on the need to review the Montevideo Criteria for statehood for the Palestinian case is because recognizing Palestine as a State for the purposes of the Rome Statute aligns with the Statute’s goal of ensuring that crimes do not keep going unpunished.

Ensuring criminal accountability can justify a more flexible approach in general, but the scholarly debate on whether or not this is applicable to the Palestinian statehood case is still ongoing. Certainly, one thing that is for sure, is that relying on a Security Council referral as it had been sometimes proposed, has its own limitations, namely the political interests of the veto powers and the ensuing cooperation of the States with the Court – which cannot be taken for granted. Therefore, it becomes easier to understand the reason for the path taken by the Prosecutor in her Request to the Pre-Trial Chamber and the importance of its Decision in the context of the Palestinian road to statehood.

3.4. The status of proceedings and the implications for the Palestinian statehood

The Decision of the 5th of February 2021 confirmed that Palestine is a State for the purposes of the Rome Statute and that the Court has jurisdiction over Gaza and the West Bank, including East Jerusalem. The OTP in its Request attempted to propose an overcoming of the Montevideo Criteria in the name of the particular situation in Palestine, more specifically considered the unlawful Israeli occupation, the recognized right to self-determination and the widespread international recognition. Nonetheless, the Pre-Trial Chamber, in its Decision, limited itself to affirm that Palestine is a State for the purposes of the Rome Statute, which is not the same as claiming that Palestine is a State under international law.

It remains to be ascertained whether the Decision can contribute to affirming Palestine's statehood in general and objective terms or it can undermine the Palestinian claim to statehood by arguing that Palestine is only a State in relative terms. As previously mentioned, the Pre-Trial Chamber’s decision not to express itself regarding Palestinian statehood might have important implications for Palestine, namely in the attribution of a statehood in functional

²⁰⁰ Robert Heinsch and Giulia Pinzauti, ‘To Be (a State) or Not to Be?’ (2020) 18 *Journal of International Criminal Justice* 927 <<https://academic.oup.com/jicj/article-abstract/18/4/927/5964179>> accessed 15 May 2024.

²⁰¹ M.N Shaw, ‘Submission of Observations to the Pre-Trial Chamber pursuant to Rule 103, Situation in the State of Palestine (ICC-01/18)’, Pre-Trial Chamber I, 16 March 2020, para 47

terms, that could distance the entity from acquiring the status of State in absolute terms. Using a functional approach is a pragmatic solution to situations that otherwise would not have one, but, at the same time, the widespread practice of treating an entity as a State for certain purposes and not others, has created a regime of quasi-statehood that puts at risk the legitimacy of the whole legal system.²⁰² Hence, there needs to be a “more predictable framework for determining when the functional approach is acceptable”²⁰³ and, since quasi-states are already a reality, acknowledging their existence and defining their role in international law is of the uttermost importance in order to provide legal clarity. Apart from the complexities of this new approach, functional statehood does not necessarily need to be frowned upon, as it allows a distancing from the traditional criteria of statehood that are often unable to accommodate the needs of the everchanging legal landscape, a clear example of which is Palestine. In fact, as thoroughly explained in this chapter, the situation of Palestine is not an easy one, and in such a context, strictly adhering to the Montevideo Criteria might not have granted Palestine the possibility to seek justice before the ICC for the crimes committed in its territories.

On the 3rd of March 2021, the Prosecutor was officially able to start the investigation on the crimes perpetrated in the territories of Palestine over which the ICC has jurisdiction, and as of now, it is still ongoing. The new Prosecutor, Karim Khan, is now conducting the investigation, also in light of the recent events²⁰⁴ despite threats after he claimed that the Court was reflecting on issuing arrest warrants against the Israeli Prime Minister Benjamin Netanyahu and other officials.²⁰⁵ The question of the Palestinian statehood is still debated, but there have been developments mostly in terms of international recognition to its favour, and pressures from the

²⁰² William Worster, ‘Functional Statehood in Contemporary International Law’ (2020) 46 Brooklyn Journal of International Law Brooklyn Journal of International Law 12

<<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1964&context=bjil>> accessed 26 May 2024.

²⁰³ William Thomas Worster, ‘Territorial Status Triggering a Functional Approach to Statehood’ (2020) 8 Penn State Journal of Law and International Affairs 118

<<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1245&context=jlia>> accessed 26 May 2024.

²⁰⁴ The escalation started on the 7th of October 2023

²⁰⁵ Andrew Macaskill, ‘Israel Concerned over Possible ICC Arrest Warrants Related to Gaza War’

(Reuters.com 29 April 2024) <<https://www.reuters.com/world/middle-east/israel-concerned-over-possible-icc-arrest-warrants-related-gaza-war-2024-04-29/>> accessed 17 May 2024. There was a development in the matter:

the Prosecutor Karim Khan, on the 20th of May 2024, has officially applied for arrest warrants before the Pre-Trial Chamber for Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (Deif), Ismail Haniyeh and Benjamin Netanyahu, Yoav Gallant *see* ICC, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine’ (*icc-cpi.int* 20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 26 May 2024.

UNGA on the UNSC to give “favourable consideration” to full Palestinian membership to the UN²⁰⁶.

However, since Palestine has accessed to the Rome Statute despite it not being universally recognized as a State, it has enjoyed the same rights as the other State parties, which therefore has allowed for the triggering of the ICC jurisdiction in its territories and for the subsequent investigation, which hopefully will provide justice for the crimes that have been and are still being perpetrated in those territories.

3.5. Conclusions

This final chapter had the aim of providing a critical analysis of the 5th of February 2021 Decision with the help of the scholarly contributions on the matter. In order to do so, firstly the legal consequences of the Decision have been analysed, namely the absence of Israel in the proceedings, whether accepting the Palestinian position could be a destabilizing precedent for the recognition of statehood, and the colonial premise behind the conferral of jurisdiction from the States to the ICC. After that, the focus shifted on the possibility of overcoming the Montevideo Criteria of statehood as proposed by the OTP, and in that regard, the views of some selected scholars on the factors to mitigate the statehood requirements and its implications have been provided. Finally, a short overview on the current status of the ICC investigation has been added, given that recently the ICC jurisdiction in Palestine was again put under scrutiny.

²⁰⁶ UN news, ‘UN General Assembly Presses Security Council to Give “Favourable Consideration” to Full Palestinian Membership | UN News’ (*news.un.org* 10 May 2024)
<<https://news.un.org/en/story/2024/05/1149596>> accessed 17 May 2024.

CONCLUSION

The concept of statehood remains a crucial issue in international law, even more so considering that there is no universally accepted theory for it. The twentieth century was characterized by the emergence of a considerable number of States, from around fifty at the beginning of the century, to almost two hundred at the beginning of the twenty-first. This was a phenomenon that changed the political landscape and the character of international law²⁰⁷, paving the way for a new set of controversial situations that sparked debates all around the globe, among which one of the most famous revolves around the question of Palestinian statehood. The case of Palestine stands as a significant departure from traditional state formation processes, continually challenging existing legal frameworks and political paradigms. In this deeply diverse context, this thesis sought to elucidate, through a comprehensive analysis, the implications of the ICC's Pre-Trial Chamber Decision of the 5th of February 2021 for the statehood of Palestine.

This thesis began with a necessary overview of the historical background behind the Palestinian claim to statehood and a legal analysis of the different theories regarding statehood and recognition. The analysis showed that the Palestinian case does not fall under the traditional legal framework of statehood, given that it does not currently have an effective government and is not fully independent due to the Israeli occupation. Surely what stands in Palestine's favour is not only the international recognition, but also the idea that indeed the accession of Palestine to certain treaties and organizations might itself point to an implied recognition of it as a State.²⁰⁸ This thesis addressed this reasoning, by having at its core the analysis of the 5th of February 2021 Decision by the Pre-Trial Chamber of the ICC, which confirmed that Palestine is to be considered "the State on the territory of which the conduct in question occurred" within the meaning of Article 12(2)(a) of the Rome Statute – to which Palestine acceded in 2015 – and that the ICC has jurisdiction over the territories of Gaza, and the West Bank, including East Jerusalem.

As explained throughout the thesis, there had been an attempt by the Prosecutor to encourage the overcoming of the Montevideo Criteria for Palestine, but the Chamber declared it outside

²⁰⁷ James Crawford, *The Creation of States in International Law* (Clarendon Press ; New York 2006).

²⁰⁸ See Jean Salmon, 'RBDI - Revue Belge de Droit International', 13 (*rbdj.bruylant.be* 2013) <https://rbdj.bruylant.be/index3916.html?module_id=00000000006&rec_id=00000080192#:~:text=La%20Palestine%20doit%20aujourd%27hui>; Mutaz M Qafisheh, *Palestine Membership in the United Nations : Legal and Practical Implications* (Cambridge Scholars Publishing 2013).

of its scope to assess the statehood of Palestine, as the implications of such a move would be too political. Nonetheless, by taking this path, the Chamber adopted a functional approach to statehood, thus implying that Palestine might be a State for certain purposes but not for others. This view has been highly contested, as on one hand it might go to the detriment of the Palestinian quest for absolute statehood, while on the other, in the case of the ICC jurisdiction, it appears to be the only way for Palestine to seek justice.

The Decision, despite its visible limits, was seen by some scholars as a way to reshape the discourse on Palestinian statehood and therefore as a development in Public International Law, so this thesis attempted to provide an overview of their debate. All the contributions focused on the implications of the Decision on statehood, ranging from the factors that could help mitigating the Montevideo Criteria to the critique of the colonial underpinnings of the ICC, such as the conferral of jurisdiction from the States, to also the explanation of how confirming to have jurisdiction in the territory of an entity, whose statehood is consistently put under scrutiny, allows the ICC to carry out its purpose of persecuting international crimes in a place that otherwise would be far from the eyes of justice.

The ICC's jurisdictional recognition, while not definitively resolving the question of the Palestinian statehood, has allowed for the opening of an investigation in the Situation of Palestine on the 3rd of March of 2021, which has in these days reached a turning point with the current prosecutor, Karim Khan, asking the Pre-Trial Chamber for approval of the arrest warrants against Israel's Prime Minister Benjamin Netanyahu and the Minister of Defence Yoav Gallant, and the three Hamas leaders Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (Deif), and Ismail Haniyeh.²⁰⁹ The recent developments have shown that Palestine's international status is of a dynamic nature, therefore proving the necessity for a deeper understanding of its position in international law, and of the complex interplay between legal principles and political interests. The analysis that was carried out in this thesis to assess the implications of the Pre-Trial Chamber Decision for the Palestinian statehood thus emphasized the importance of a constant critical examination of international law to ensure it adapts to unique and contested cases such as the Palestinian one.

²⁰⁹ ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine' (*icc-cpi.int* 20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 27 May 2024.

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