Palestine’s Accession to the Rome Statute:

An analysis of the legal issues of investigating the Palestinian Situation

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1 Introduction

1.1 Topic and Research Question

The acceptance of Palestine as a State Party to the International Criminal Court (ICC) on 2 January 2015 marks a significant event in not only Middle Eastern relations, but for the entire international community, especially in the field of international criminal law. On this date, Palestine deposited its instrument of accession to the Rome Statute. Membership was accepted shortly afterward, and Palestine formally became a State Party of the Court on 1 April 2015, henceforth becoming the 123rd State Party of the ICC. This thesis will primarily analyze the legal issues the ICC will have to overcome to proceed with the Palestinian situation.

To what extent does the ICC have the jurisdiction to prosecute atrocity crimes committed in the Israeli-Palestine conflict as requested by the Palestinian government in their application to become a State Party? What are the material and procedural challenges the Court will face in doing so? It is safe to say that the Court may now face its most challenging investigation to date. Never before has a State whose status as a State is, least to say, controversial; and whose territorial boundaries remain undefined, acceded to the Statute. By investigating the Palestinian situation, and along the long road toward prosecutions, a series of legal issues will need to be addressed by the Court. This thesis will examine these issues.

The Rome Statute only gives the ICC jurisdiction over crimes committed on the territory of a State Party, or by its nationals. What does this mean for the existence or non-existence of a State of Palestine? Moreover, what does it mean for Palestine’s recognition as a State that the ICC granted it membership so quickly? Membership raises the issue of not only Palestinian statehood but also where precisely its territorial boundaries lie. Is the Court required to draw up State borders in the Middle East, which has been the core issue of the conflict in the Middle East for over half a century?

The ICC can essentially only investigate crimes that have been committed after a State becomes Party to the Statute. However, along with a membership application, Palestine issued an Article 12(3) declaration granting the ICC jurisdiction to investigate crimes committed on Palestinian territory, including East Jerusalem, as of 13 June 2014. This date marks the begin-
ning of the 50-day War with Israel in Gaza. The Court has also been asked to investigate the issue of Israeli settlements in what is considered to be occupied Palestinian territory on the West Bank including East Jerusalem. The crimes within the jurisdiction of the Court are atrocity crimes. Atrocity crimes refer to the core crimes under international law, and are listed in Article 5 of the Rome Statute. Crimes against humanity, genocide and war crimes are amongst these.

Both Israeli and Palestinian leaders can potentially be prosecuted for atrocity crimes. Despite protests from both Israel and the US, the ICC initiated a preliminary examination on 16 January 2015. During this investigation, the Court will make an initial assessment of the situation. The Prosecutors of the ICC will have to decide whether the criteria for the subject matter, temporal jurisdiction and personal or territorial jurisdiction have been met. It is at this stage the issue of undefined territorial boundaries will be analysed. The ICC can essentially only prosecute crimes committed on the territory of a State Party.

The move toward justice could potentially backfire and raise tensions with Israel and the US, and move the two parties further away from a peaceful solution, and to some extent it already has. Israel has clearly stated they are unwilling to extradite any Israeli citizens. Does this mean that only Palestinian leaders risk prosecution? The ICC has thus far opened investigations into 23 cases in ten different situations. The States Parties themselves referred most of these investigations which involved crimes committed within internal conflicts. The success of the ICC moving forwards will be contingent on its ability to solve the challenges that will naturally arise in a situation where the prosecutor is attempting to bring the crimes of a non-State Party before the Court.

Up until this point, atrocities and human rights breaches committed in the Palestine-Israel conflict have fallen outside the jurisdiction of international criminal courts. Palestinian membership in the ICC signals an important development in international criminal justice, as the Court will seek to prosecute those responsible in the fight against impunity, and to prevent the most serious crimes under international law. However, an investigation gives rise to substantial challenges for the ICC. In addition to the material and procedural conflicts raised by the Palestinian issue, the ICC stands to lose its legitimacy and weight as a binding instrument of international criminal law. The question of the Court's legitimacy is, on the other hand, a much larger topic that requires more space than available here, however, it is worth consideration.
1.2 Definitions

For the purpose of this thesis, procedural challenges refer to the difficulties that can arise from the set of rules that govern the machinery of the Court, and the methods by which both the State and the individual enforce their rights in the court. Procedural law prescribes the means of enforcing rights or providing redress of wrongs; and comprises rules about jurisdiction, pleading and practice, evidence, appeal and other matters of procedure. Material or substantive law refers to the statutory or written law that governs rights and obligations of those who are subject to it. The Rome Statute contains both the procedural and substantive law that governs the ICC. By legal issues this thesis refers to both material and procedural law.

This thesis will not argue the legality of the Palestinian accession to the Rome Statute in great depths. However, the issue is certainly controversial, and the argument for such an accession will be questioned in the first section of the thesis. However, the fact that the ICC has accepted Palestine as a State Party to the Rome Statute presupposes that the ICC recognises Palestine as a State based on UN General Assembly status. For the purpose of this thesis, “Palestine” of Occupied Palestinian Territories refers to the State of Palestine as acknowledged by the majority of the General Assembly.

Also, this thesis refers to member States, non-member States, non-States Parties and State Parties to the Rome Statute and to the ICC. The sets of terminology are used interchangeably and are accepted references to the relationship between the State and the ICC. The ICC uses non-States Parties when referring to countries that have not signed and ratified the Rome Statute.

Palestine’s Article 12(3) declaration refers to the Palestinian territory as occupied. A qualification, which is based on the determination of the International Court of Justice (ICJ) that this territory has been, and still is, occupied by Israel since 1967. The conclusion of the ICJ was based on the Security Council resolutions 242, 298 and 478, which all emphasize the occupied nature of this territory.
1.3 The International Criminal Court

The Rome Statute established the International Criminal Court on 1 July 1998. It is a permanent institution established at The Hague in the Netherlands.\(^1\) The Court has the power to exercise jurisdiction over persons for the most serious crimes of international concern, such as war crimes, genocide and crimes against humanity.\(^2\) The ICC is complementary to national criminal jurisdictions and the provisions outlined in the Rome Statute govern the jurisdiction and functions of the Court.\(^3\)

The creation of the ICC is a major development in international criminal law. The notion of an international court prosecuting individuals, and not States, saw its origin following World War II.\(^4\) Supporters of international criminal law assert that certain human rights breaches are so grave they cannot go unpunished. In light of the horrors committed during World War II, \textit{ad hoc} military tribunals were established at Nuremberg and Tokyo to prosecute those individuals most responsible.\(^5\) However, the need for a more permanent criminal court was highlighted by the brutalities that were committed in the former Yugoslavia and Rwanda in the 1990s.\(^6\) Consequently, at the Rome Conference in 1998, 120 States voted for the adoption of the Rome Statute.\(^7\) The Statute entered into force on 1 July 2002 and as of April 2016, 123 States are Party to the Statute.\(^8\)

The Court is an independent institution and is not part of the UN. However, the ICC maintains a cooperative relationship with the UN. The Court is composed of four organs. These are the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. For this thesis, the most important organs to have an understanding of are the Office of the Prosecutor (OTP) and the Pre-Trial Chamber.

The OTP is in charge of referrals and any supporting information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. Its is the OTP who decides to initiate a preliminary examination should a situation warrant it. The OTP is led by the Prosecutor who has been elected by the States Parties for a term of nine years. The current Prosecutor of the ICC is Fatou Bensouda.

The Judicial Divisions consist of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers that are responsible for conducting the proceedings of the Court at different stages. The judicial functions in the Pre-Trial Division are carried out by Pre-Trial Chambers. The Pre-Trial Chamber plays an important role in the first phase of judicial proceedings until the confirmation of charges upon which the Prosecutor intends to seek trial against the person charged. The significance of this with respect to the Palestinian Situation will be demonstrated throughout this thesis. However, it is quite complex and it, therefore, seems beneficial to have a brief overview of the institution beforehand.

Up until this point, the ICC has investigated 23 cases in ten different situations. Four States Parties to the Rome Statute have referred situations occurring on their territories to the Court. These are Uganda, the Democratic Republic of the Congo, the Central African Republic I and II, and Mali. The UN Security Council has referred two situations involving non-States Parties: the situation in Darfur, Sudan, and the situation in Libya. After a comprehensive analysis of all the available information, the Prosecutor decided to open and is currently conducting investigations in all of the above-mentioned situations.

In March 2010, Pre-Trial Chamber granted the Prosecution authorisation to open an investigation *proprio motu* in the situation of Kenya, and in October 2011 authorized the Prosecutor to open investigations *proprio motu* into the situation in Côte d’Ivoire. *Proprio motu* will be explained in due time. On 27 January 2016, the Pre-Trial Chamber authorised the Prosecutor to proceed with an investigation for the crimes within the ICC jurisdiction, allegedly committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008. The ICC is also currently conducting preliminary investigations into seven situations: Afghanistan, Colombia, Nigeria, Guinea, Iraq, Ukraine and Palestine.
1.4 Methodology and Limitations

1.4.1 Methodology

The method recognised by international criminal law will be applied throughout this thesis. The main sources of international criminal law are treaties. The Rome Statute was adopted 1 July 1998 and entered into force 1 July 2002. It is the main document of which this thesis is based on. The Statute is a treaty and will, therefore, be interpreted according to the principles in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

Article 21 of the Rome Statute lists the laws that the Court shall apply, and the principles of interpretation are also codified in the Vienna Convention. Furthermore, Article 38 of the Statute of the ICJ, which is perhaps the most authoritative statement of the sources of public international law, lists additional sources that the ICC may apply. These include:

“international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognised by civilized nations; (and) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

UN resolutions, opinions and declarations as well as other documents issued by the ICC will be examined, as well as other public documents from international courts, such as the ICJ Advisory Opinion on the Wall, which is central for the territorial jurisdiction section of the thesis. Other treaties will also be used in order to support arguments made; such as the Montevideo Convention and Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land.

This thesis will also utilize general analytical methods. Documentary analysis involves obtaining data from existing documents such as newspaper articles, blogs, non-governmental
organizations and government policy records for analysis. Such documents may reveal a great deal about the politics, institutions and parties involved in an investigation of the Palestinian situation.

There is a limited amount of authoritative sources on this particular topic, except for the Rome Statute itself. This is because the subject matter is still very much a current affair. Legal theory and opinions by relevant scholars will, therefore, be consulted extensively. In addition, the topic is heated and extremely politicized. Interpreting treaties in a situation where both facts and politics are disputed is controversial.

This brings us right to a very important element of this thesis, which is the relationship between international law and politics.

“There is little hope for the promotion of the rule of law internationally if the most powerful international body makes it subservient to the rule of political expediency.”
– Former ICTY Chief Prosecutor Louise Arbour

An investigation of the Palestine Situation will bring the OTP and the ICC into an area where international law and politics intersect. One of the most controversial issues in pursuing justice in international conflicts is the question of to what extent political impact will have on the decision whether to prosecute or not in a particular case. It is a common belief that legal and political considerations should be completely separated when international criminal law is being applied. After all, fairness is one of the main criteria of justice, which can only be ensured if the same rules are applied to similar cases irrespective of other considerations. However, that may be a naive conception of international law, and in international relations it can be difficult to guarantee that politics will not play an influential, if not decisive role. Nonetheless, this thesis will focus on the applicable international law, and more specifically on the Statute. It will not attempt to analyse how the current political climate will effect ICC decisions, but rather highlight the presence of political incentives. The politics involved in the Palestinian Situation cannot be completely left out – as that would paint an unrealistic picture of the task at hand. Politics are very much relevant in the international arena.
In an anarchic world system, and unlike on the national level, there is no overarching State power, or other institution, that guarantees the prosecution of international crimes. Whether investigations are initiated and whether they lead to arrests depends to a large part on a couple of powerful States within the international community, such as the ICC’s donor States. In line with realist theory, these States tend to have their own priorities and interests, and international courts and tribunals are often just a factor in their overall equation, or merely the means to an end. The policies of these States have an impact on the prosecutions, and international prosecutors have to decide on how to align themselves with these powers. This is a tricky task because these powerful States might try to use the ICC and other courts and tribunals as instruments to further their own national interests. While the prosecutors depend on the support of these States, close cooperation might lead to perceptions of a biased and political court, which will in turn have negative repercussions for the investigations. This is the case as the credibility of an international investigation in an ongoing conflict depends on being seen as neutral. If it is seen as a one-sided endeavour, it quickly becomes a contested issue among the parties and thus part of the conflict. It is clear that the ICC and its prosecutors have a very difficult task ahead of them.

In order to distinguish between the two, the following method is applied. First, the relevant law and treaties are interpreted, and how they are applied is analysed. Then, the factors that influence the law, which in this situation is mainly politics, are identified. And finally, how specifically they relate to and influence the application of the laws is evaluated. Would the outcome be the same or different if the political factor was absent.

Another significant dimension of this thesis is the relationship between the Statute’s wording and its object and purpose. For the Palestinian Situation, these appear to not always overlap. The Vienna Conventions provides that:

“A treaty shall 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 the light of its object and purpose.”

If we apply the ordinary meaning to the terms of the treaty and in their context, the OTP will struggle with respect to the interpretation of for example “State” and “territory” in the Rome
Statute for the Palestinian Situation. The reasons for this will become evident throughout the thesis. In light of this, however, there is a chance that because of the ambiguity of a “State of Palestine,” and regarding its imprecise territorial boundaries, that the ICC will not be able to prosecute if they rely solely on the terminology.

However, the objective and purpose of the Statute is to put an end to impunity for the perpetrators of most serious crimes of concern to the international community and to contribute to the prevention of such crimes. Should the ICC chose to interpret the Statute in line with this purpose, and to not get too preoccupied with the specific meanings of the text, then prosecutions seem more likely to find place.

Where these do not correspond, the question is whether the treaty should be interpreted in line with a purposive approach or according to its text. The Statute and other documents of international law provide little guidance as to which method that should be applied, nor is there a general consensus as to which will dominate on the matter. This thesis will not attempt to undertake this task – that is a job for the judges of the ICC. It will instead seek to identify where the object and purpose of the Statute do not correspond with the meaning of the text.

1.4.2 Limitations

The limitations of this thesis are many. It is challenging not to engage in a political debate, or a recollection of history, or a discussion on the legitimacy of the Court when dealing with the Israel-Palestine conflict. These are altogether separate thesis topics, which will not be expanded upon any further. Thus, with the allocated space, the focus will to a large extent be theoretical: an analysis of the legal issues raised by the Palestine question.

Furthermore, with the powder keg that is the Middle East and the added political element that goes with the territory, it can be challenging to remain completely neutral, and to distinguish neutral sources from an array of politically motivated ones. It seems the entire world has an opinion on this particular conflict.
Moreover, in an always-changing political climate, it can prove difficult to keep up to date on such a current situation. The preliminary examination of the ICC is ongoing at this point in writing, and continuously unfolding.

The accession of a disputed State, of which the territorial scope has yet to be defined, to the Rome Statute is a first for the ICC. There exists no case law or precedent in similar situations. This is not entirely surprising, as the ICC has only opened investigations into 23 cases and ten situations thus far, and there have only been four cases of a 12(3) declaration. Nevertheless, it means that the amount of authoritative sources available is limited.

1.5 Structure

The first chapter of this thesis will present a summary and historical background of the State of Palestine and Palestine’s path to the ICC. Changing world opinion towards Palestine, and the hurdles left to overcome to be a fully recognised State will be examined here.

The next section of chapter one assesses Palestine’s status as a State. Statehood, as will be shown, is a precondition for accession to the Rome Statute. What is the definition of a State? Under which conditions can Palestine call itself a State? What is the status of Palestine in the UN? But most importantly, what are the ICCs reasons for accepting Palestine’s instrument of accession to the Rome Statute? This is important because the decision of the OTP may be challenged during the investigation. All relevant issues related to the question of statehood will be drafted here, and the importance thereof.

The rest of the thesis is structured in the same way that the legal issues will present themselves for the OTP and essentially the judges of the ICC. Consequently, the phases of a preliminary examination will be picked apart and analysed in the first few chapters. Chapter three will address the issue of the preliminary examinations, what this is and why it matters.

Chapter four constitutes the greater part of the thesis. The question of jurisdiction will be raised here. This is where the real challenge for the ICC lie, and which will also have to be dealt with in a preliminary examination. What are the different types of jurisdiction the Court may be granted, and how is this jurisdiction initiated? Are the jurisdictional criteria met? Here the issue of retroactivity and an Article 12(3) declaration will be discussed. Furthermore, as
the Statute states in Article 12(2)(a) the Court only has jurisdiction over the State on the territory of which the conduct in question occurred. The national borders of Palestine are yet to be defined. How will this affect the jurisdiction of the Court?

Admissibility and issues of complementarity are addressed in chapter five. Article 17 of the Statute sets forth two criteria for admissibility: complementarity and gravity. Complementarity relates to whether genuine investigations and prosecutions have been or are being conducted, and the willingness to do so, in the State concerned in respect of the case. Has the Israeli judiciary investigated the situation independently? If so, what will this mean for the Court? And finally, are the crimes severe enough to meet the gravity criteria of the Court?

Chapter six elaborates on the Pre-Trial Chamber and the opening of an investigation. If all of the above criteria are satisfied, the ICC may open an investigation. However, in order to do so, the Prosecutor needs to apply for authorisation to open an investigation from the pre-trial chamber of the ICC. This is because an Article 12(3) declaration does not trigger an investigation alone. Or, Palestine could submit a formal State Party referral under Article 14 of the Statute. This approach might be more beneficial for Palestine as they will not have to apply for authorization from the Pre-Trial chamber. Only time will tell how the issue of jurisdiction comes before the judges. This section also examines the other criteria that will have to be met, and other obstacles to overcome, in order to open an investigation.

The last section looks at some final difficulties the Court will face. Given that a full-scale investigation is launched into the Palestinian situation, the Court will still have to deal with an uncooperative Israel and the challenges that arise in trying to prosecute non-State Party nationals. It is evident that substantial difficulties may arise at any point in the investigation. This thesis is an attempt to address these challenges, as they will present themselves to the Court and the Prosecutors.
2 The Issue of Palestinian Statehood

Palestine’s path to accession and the issue of statehood is relevant because the issue itself may become a significant procedural challenge for the OTP to overcome should proceedings ever find place. A new prosecutor and the judges of the ICC must still determine whether Palestine meets the criteria for ‘statehood’ within the context of the ICC Statute, and they are not bound by the prior prosecutor’s view on this matter. Statehood is undefined in the Statute, and a new prosecutor is free to make an independent determination based on the Montevideo Convention or any other relevant criteria, or to other bodies with potential authority over the issue, such as the Assembly of States Parties, or the Security Council. Furthermore, the question of statehood may be resurrected should any of the ICC States Parties seek to challenge it. There is compelling evidence both for and against Palestine’s claim to statehood, and should the ICC’s decision be contested the opposition may have a convincing case. This section will first present a brief account of the history of the Palestinian cause for statehood. Some background will help explain the Palestinian government’s route to the General Assembly, and the general understanding of the significance of the move. Next, this section will address Palestine’s history with the ICC and the path to accession to the Rome Statute. Then the issues relating to Palestinian statehood will be addressed; and finally, the mechanisms through which the issue of Palestinian statehood can be challenged will be explored.

2.1 Palestine as a State?

Palestine is a partially recognised State in the Middle East. The Palestinian Liberation Organization (PLO) declared Palestinian independence on 15 November 1988.\(^9\) A range of countries promptly acknowledged the declaration, and by February 1989 the PLO was recognised by 94 States. As part of an attempt to resolve the ongoing Israeli–Palestinian conflict, the Oslo Accords signed between Israel and PLO in September 1993 established the Palestinian National Authority (PNA) as a self-governing interim administration in the Palestinian territories.\(^10\) Israel does not recognise Palestine as a State and maintains de facto military control of all the territories.\(^11\)

The PNA began a diplomatic campaign to gain recognition for a State of Palestine on the borders prior to the Six-Day War, with East Jerusalem as its capital. The efforts, which began in late 2009, gained widespread attention in September 2011 when President Mahmoud Abbas submitted an application to the UN to accept Palestine as a full member State. This would constitute collective recognition of the State of Palestine, which would allow its government to pursue legal claims against other States in international courts.

In order for a State to gain membership in the General Assembly, its application must have the support of two-thirds of member States with a prior recommendation for admission from the Security Council. This requires the absence of a veto from any the Security Council's five permanent members. At the prospect of a veto from the US, Palestinian leaders signalled they would opt instead for a more limited upgrade to "Non-Member Observer State" status, which requires only a simple majority in the General Assembly but provided the Palestinians with the recognition they needed to join the ICC and other international treaties. The PNA is currently opting for UN recognition as a State and full UN membership.

2.2 History with the ICC

Palestine is no stranger to the ICC. On 22 January 2009, the Palestinian Minister of Justice, on behalf of the Palestinian National Authority (PNA), lodged a declaration recognizing the jurisdiction of the ICC “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.” It took the prosecutor three years reach a decision, and on 3 April 2012, the ICC Office of the Prosecutor (OTP) concluded that the preconditions to the exercise of jurisdiction were not met, arguing that Palestine had only been granted Observer Mission status, and not Non-Member Observer State status by the General Assembly.

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12 I.c.
13 I.c.
16 Palestine (2009).
17 Ambos (2014).
The analysis employed by the prosecutors in order to determine what a State is under Article 12, is rather unexpected.\(^\text{18}\) The prosecutors argued that it is the Secretary General of the UN who is, by force of being the depositary of the Rome Statute, competent to determine what entities qualify as State under Article 12 of the statute. Furthermore, in cases where the statehood of an entity is unclear, the Secretary General should “defer to the guidance of the General Assembly.”\(^\text{19}\) Having concluded as such, the OTP then proceeded to examine what Palestine’s status in the UN General Assembly was at the time. It found that because Palestine had failed to attain a Non-Member Observer State status, the Court could not accept an Article 12(3) declaration.\(^\text{20}\)

This analysis bases statehood on status in the General Assembly, rather than on the accepted legal criteria for statehood found in customary international law and international conventions.\(^\text{21}\) The UN and the ICC are obliged to cooperate and coordinate with each other through the Negotiated Relationship Agreement\(^\text{22}\) and respect each other’s mandate and status as permanent independent institutions. The relationship agreement is an extension of the Statute’s Article 2 and General Assembly Resolution 58/79 of 9 December 2003. Keeping this in mind, the ICC’s decision to base Palestinian membership on status in the UN seems justifiable and reasonable. It also suggests that the OTP would not look to already well-established criteria of statehood, such as the Montevideo Convention, but rather accept as binding the political determinations of the General Assembly. The Montevideo Criteria will be discussed in further detail below.

The Prosecutor has stated that “allegations of crimes committed in Palestine” can be considered “in the future” if the “competent organs of the UN … resolve the legal issue relevant to an assessment of Article 12.”\(^\text{23}\) This explicitly left the door open for a future ICC application, should Palestine obtain the necessary General Assembly status. This did not take long, and on 29 November 2012 the UN General Assembly by 138 votes to nine, with 41 abstentions de-

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\(^\text{18}\) Høgestøl (2015).
\(^\text{19}\) ICC Office of the Prosecutor (2012).
\(^\text{20}\) Ambos (2014).
\(^\text{21}\) I.e.
\(^\text{22}\) Negotiated Relationship Agreement.
\(^\text{23}\) ICC Office of the Prosecutor (2012).
cided ‘to accord to Palestine Non-Member Observer State status.’\textsuperscript{24} Palestine could consequently submit its instrument of accession to the Court at any point in time following this resolution. This was further emphasized when the chief prosecutor of the ICC wrote a newspaper Article in 2014 affirming that “Palestine could now join the Rome Statute.”\textsuperscript{25} Given this public statement of support, it is not entirely unanticipated that the Court accepted Palestine’s membership application within one week when Palestine finally applied in January 2015.\textsuperscript{26}

### 2.3 Changing World Opinion

The world’s general opinion toward Palestine has undeniably changed over the last few decades. As of 14 September 2015, 136 of the 193 Member States of the United Nations and two Non-Member States have recognised the State of Palestine.\textsuperscript{27} However, it has long been US policy to veto any UN Security Council initiative to recognise Palestine as a State, which would upgrade Palestine’s status from a Non-Member Observer State to a fully-fledged member.\textsuperscript{28} In May 2015 the Vatican officially recognised the State of Palestine immediately sparking Israeli accusations that the move could damage peace prospects.\textsuperscript{29} The treaty, which concerns the activities of the Catholic Church in Palestinian territory, clearly demonstrates that the Holy See has switched its diplomatic recognition from the PLO to the State of Palestine.\textsuperscript{30}

Following Vatican recognition of a Palestinian State, there has been an enormous amount of international momentum for precisely such a UN Security Council resolution. Currently, it appears the only thing standing in the way of global recognition of a State of Palestine is US President Barack Obama.\textsuperscript{31} For years, the threat of a Security Council veto has been stopping a resolution from moving forward. However, now that Benjamin Netanyahu has been re-elected as Israeli Prime Minister and has put together a cabinet that, in so far, does not seem inclined to negotiate with Palestine, the Obama-administration is pledging to re-evaluate their

\textsuperscript{24} GA Resolution 67/19.  
\textsuperscript{25} Bensouda (2014).  
\textsuperscript{26} Høgestøl (2015).  
\textsuperscript{27} Snyder (2015).  
\textsuperscript{28} I.c.  
\textsuperscript{29} Winfield (2015).  
\textsuperscript{30} I.c.  
\textsuperscript{31} I.c.
approach and says that it will not prejudge what it will do if a vote comes up at the UN. The US and Israel oppose recognition, arguing that it would undermine efforts to negotiate an Israeli-Palestinian deal on the terms of Palestinian statehood, also known as the two-State solution. This change in opinion, however, highlights how wide the split between the Obama administration and Israeli government has become, especially following the Iran nuclear deal.

Most countries in Western Europe have held off on recognition following US initiative, but some have suggested that their position could change if the peace efforts remain deadlocked.

2.4 What Makes a State?

The Palestinian question of statehood is not so much a problem for the Court at this point - acceptance of membership to the ICC presupposes that the ICC does, in fact, recognise Palestine as a State. However, the issue of statehood could be resurrected. Only States can be State Parties to the Rome Statute of the Court. The UN does not recognise Palestine as a full member State, the Montevideo criteria, an extension of customary international law, does not recognise Palestine as a fully autonomous State, and Palestine continues to lack the recognition of a significant number of other States in the international community. So, what exactly makes a State? What are the necessary ingredients to obtain State-status? Granted that the ICC accepted Palestine’s instrument of ratification as quickly as it did, and the mere fact that this decision could be challenged, the ICC’s reasoning for this deserves further examination.

2.4.1 The Rome Statute and Statehood Criteria

The Rome Statute is the treaty that establishes the ICC. And it is precisely that - a treaty. A treaty can, in general, be defined as a written agreement between two or more States governed by international law. Article 125(3) of the Statute governs the mechanisms of which a State can become a State Party to the ICC. It clearly dictates that “(t)his Statute shall be open to

32 Breshnahan and Dovere (2015).
33 Ackerman (2015).
34 Rome Statute Art. 125(3).
accession by all States.”\textsuperscript{36} Based on this it is safe to say that statehood is a condition for accession to the Statute. Palestine’s status as a fully recognised State is still pending.

The question of whether Palestine can be defined as a State, or not, has been addressed without clearly defining its content. So, what constitutes a State? The Montevideo Convention on the Rights and Duties of States signed on 26 December 1933 sets out the definition, rights and duties of statehood. Most well known is Article 1, which dictates the four criteria for statehood:

\textit{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 states.}\textsuperscript{37}

The Montevideo Convention, and prevailing views at the time of its creation saw States as a kind of \textit{sui generis} legal entity operating and existing under its own authority and power. Article 3 provides:

\textit{“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, an consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”}

Article 6 then goes on to state:

\textit{“The recognition of a state merely signifies that the state which recognises it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.”}

The criteria of the Montevideo Convention are for the most part well-established and undisputed law. However, perhaps they should be questioned? The criteria lack objectivity. What exactly constitutes a “government” under Article 1(c)? Do all recognised States need to have a defined territory, as the Article 1(b) requires? In fact, there is an abundance of examples of

\textsuperscript{36} Rome Statute Art. 125(3).
\textsuperscript{37} Montevideo Convention Article 1.
States that do not have all its State boundaries clearly defined. The next sections will take a closer look at the Statehood criteria. It will show that the Montevideo criteria are lacking in consistency and objectivity and introduce other theories on statehood. The purpose of this is to demonstrate the theoretical arguments for and against the existence of a State of Palestine, and point to the necessary ingredients for a State. Subsequently, the ICC’s decision to base membership on status in the UN will appear all the more reasonable.

2.4.2 The Montevideo Criteria

There is an ongoing debate taking place in the international legal community over whether or not satisfying the Montevideo criteria alone is enough to constitute a State or if recognition by other means is also necessary. The two most important doctrinal theories on State recognition are known as the constitutive and declaratory theories of statehood.\(^38\)

The constitutive theory sets out that the recognition of an entity as a State by other States is the most crucial component for a State. Only upon the recognition by other States does the new State exist, at least in a legal sense. This theory would explain why Somaliland and other similarly situated entities are not considered to be States. Somaliland is a self-declared State but internationally recognised as self-governing region of Somalia. The government of Somaliland regards itself as the successor State to the former British Somaliland protectorate and has since 1991 been governed by democratically elected governments that seek international recognition as the Government of the Republic of Somaliland. This non-State entity has essentially been independent since 1991, and it has a permanent population, a defined territory and an autonomous government that has engaged in relations with other States. Despite satisfying the Montevideo criteria, Somaliland's self-proclaimed independence remains unrecognised by any country or international organisation and is therefore not considered a State.\(^39\)

On the other hand, this theory fails to explain why certain entities that have received numerous recognitions as such are not, in fact, States. It also raises the question of how “many” recognitions are necessary in order for an entity to become a State. Is a majority enough? One clear example of this problem is the State of Palestine, which has received wide-scale recog-

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38 Davids (2012).
39 BBC News (2016).
nition in the UN General Assembly. The constitutive theory, like the declaratory theory, therefore, would seem to provide little useful information standing alone on whether an entity is or is not a State.\textsuperscript{40}

The declaratory theory looks to the alleged State’s assertion of its sovereignty within the territory it exclusively controls to determine whether or not it is a State. It is the opposite of the constitutive theory in that it holds that recognition is almost irrelevant because other States have little authority in determining whether an entity constitutes a State.\textsuperscript{41} In other words, the declaratory theory emphasises that the moment in which an entity satisfies all the conditions set out in the Montevideo Convention, that entity is a State. This theory is close in line with the Montevideo Convention itself and the pronouncements of Articles 3 and 6. However, it fails to adequately describe the creation of “States” in international practice.\textsuperscript{42} There are entities in the world that \textit{de facto} satisfy the criteria of the Montevideo Convention but do not benefit from being “States” as such, and do not receive or benefit form the rights that come with upholding such status. One such entity is Somaliland as described above.

The lack of evidence supporting the declaratory theory could lead to the impression that the constitutive theory best explains State formation. However, like the declaratory theory, it also fails to explain the actual formation of States. One can argue back and forth about the importance of recognition in fulfilling the Montevideo criteria. Yet, the question still remains: what is it that makes a State? Articles 3 and 6 of the Montevideo Convention assert that the recognition of an entity as a State is not what makes it a State. However, even the Montevideo Convention accommodates recognition as a component that the new State has to be able to enter into international relations. It appears that “Statehood” is the product of a balance between the Montevideo criteria and recognition. The more you have of one, criteria or recognition, the less you need of the other. However, in all cases, you need a little of both to be a State. This leaves the question of who decides what you need of which criteria and how much? The UN seems to be the most qualified to undertake such an evaluation.

\textsuperscript{40} Davids (2012).
\textsuperscript{41} Worster (2010).
\textsuperscript{42} Davids (2012).
One example of this combined effect of recognition is the Vatican City State. This State was created in 1929 as a result of the Lateran Pacts between the Catholic Church and the Kingdom of Italy. The State is exceedingly small; only about 0,44 km² and as of July 2014 has a population estimated to 690, which is not considered permanent, as it is not self-sustainable. The recognition of the Vatican City State as a State, especially by Italy that surrounds it, allows it to operate as such even though it does not completely meet the Montevideo criteria. In other words, an entity with a government and a territory that can interact with other States does not need a permanent sustainable population, as long as it has some form of population, in order to be a State if it is recognised as such. Another example of a minor deficiency in the Montevideo criteria that has been alleviated by recognition is, for instance, India and Pakistan. It would be hard to argue that neither India nor Pakistan has a government or a population. However, the border between the two States in the Kashmir region is disputed and is a part of the much greater territorial conflict. Thereby not sufficiently satisfying the Montevideo Convention’s territory-post. The same could be said about the border between South Sudan and Sudan, Israel and Syria and numerous other similar cases. However, international recognition of the States involved has to an extent made up for this defect in the criteria for Statehood and all the States mentioned above have been allowed to join the UN and participate in other international affairs.

To sum it up, it is necessary that a State have a set of specific characteristics. It must have a government, population, a territory and the ability to interact with other States. A State as an entity that belongs to a wider community must also be accepted and recognised as such by that community. But to what extent? Recognition can to some degree make up for insufficiencies in the characteristics of a State as long as they are not too severe and preventing that entity from fulfilling its purpose. This could perhaps explain why Palestine, despite fulfilling several of the Montevideo Criteria (a permanent population and a government that possesses the capacity to enter into relations with other States) and is currently recognised by the majority of the General Assembly, is still not universally recognised as a State. The explanation for this might be that its deficiencies as a functioning State are too severe: States serve an administering role in the world. Their function is to govern a portion of the planet where people

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43 Davids (2012).
44 I.c.
live. If they cannot fulfil that purpose because they lack sufficient control (meaning the ability to exclude others from using coercion) over a territory or people on the territory, no matter what you call them, they are not States. One could argue that this is the case of Palestine: it has no effective control of which to speak over several areas considered to be a part of the State of Palestine, and therefore cannot, even with recognition, be a new State. Yet, the ICC has accepted it as such.

Practice in a few contemporary situations indicate the application of the constitutive theory rather than the declaratory theory is dominating; such as in the case for Palestine. Classical scholars have weighed in support of the constitutive theory arguing that it provides a more solid foundation for the determination of statehood status. Perhaps the Montevideo Criteria are out-dated and more appropriately explain the creation rather than the existence of a State? Perhaps it can be argued that there has been a shift in how States emerge post-Montevideo, and that the Montevideo Criteria are better suited to explain the emergence of States during the first half of the 20th Century. Nonetheless, every act of recognition must necessarily contemplate both aspects but generally one will be the predominant legitimizing force.

The Statehood criteria are certainly debatable, and to some extent unclear. As such, there are grounds for the ICC to readdress the issue of Palestinian statehood at any time. Palestine’s weakness as a State is that it has no clearly defined national borders, and consequently no territory over which to exercise executive control - and herein lays the core of the State issue.

2.4.3 United Nations Non-Member Observer State Status and the Court’s Decision

Palestine’s current status in the UN is that of a Non-Member Observer State. On 29 November 2012 with 138 votes, nine against and 41 abstentions, the General Assembly passed resolution 67/19 granting Palestine its current status. What this means is that representatives of Palestine can participate as observers in the sessions and the work of the General Assembly,

45 I.c.
46 Worster (2010).
47 I.c.
48 I.c.
and maintain a permanent observer mission at the UN headquarters in New York.\textsuperscript{50} However, Palestine cannot sponsor resolutions or vote on resolutions of substantive matters. The upgrade from an Observer Mission State to a Non-Member Observer State is merely symbolic in terms of actual influence in the UN. The rights and privileges of Palestine remain the same as those established by resolution 52/250, which granted Palestine Observer State status.\textsuperscript{51} Resolution 52/250 gave Palestine maximum rights without becoming a member of the UN.\textsuperscript{52} However, Non-Member Observer States are recognized as sovereign States, and are free to submit a petition to join as a full member at their discretion. This demonstrates that an overwhelming majority in the General Assembly recognise Palestine as a State; however, the question of full membership remains an issue for the Security Council. In 2011, Palestine applied for membership in the UN. Due to opposing positions within the Security Council the Palestinian application is still pending.

The legal issue raised in the ICC Prosecutor’s decision of April 2012 has thus been resolved. Palestine’s widespread recognition in the General Assembly produced the formal declaration of statehood, which to the ICC was considered the missing criteria for Palestine’s status as a State.\textsuperscript{53}

The view that Palestine is now a State is not only the prevailing view among scholars but has also been confirmed by treaty practice since the upgrade to Non-Member Observer State, by Palestine’s accession to several international treaties.\textsuperscript{54} Palestine, represented by its government, could then not only trigger ICC jurisdiction by issuing an Article 12(3) declaration of the ICC Statute but also directly accede to the ICC Statute.\textsuperscript{55}

Despite several weaknesses in what constitutes a State in the traditional, declaratory sense, the ICC, in line with the constitutive theory chose to accept Palestine as a State Party to the Rome Statute. The ICC did not have to accept Palestine’s instrument of accession to the Rome Statute.

\begin{footnotes}
\footnotetext[50]{I.c.}
\footnotetext[51]{I.c.}
\footnotetext[52]{I.c.}
\footnotetext[53]{Ambos (2014).}
\footnotetext[54]{I.c.}
\footnotetext[55]{I.c.}
\end{footnotes}
ute. However, given the close ties between the UN and the ICC, this consideration serves as a more than rational basis for membership, and the ICC is well within its rights as an international court. The acceptance of Palestine as a State Party could perhaps also be an indication that the ICC does not consider territorial clarification to be essential to address the Palestinian Situation. Furthermore, the ICC’s decision is most likely highly motivated by humanitarian considerations - in the sense that the need to prosecute the persons responsible for the most serious crimes of international concern could out-weigh the territorial issue. Again, all issues related to territory will be further explored in Chapter 4; however, it has been necessary to mention, perhaps pre-maturely, the questions associated with the territory of Palestine throughout the statehood-discussion.

2.5 **The Statute and Disputes: Article 119**

Disputes may arise not only between the Court and individual States, for example with regards to the admissibility of cases, but also between two or more States Parties. The acceptance of an only partially recognised State to a Statute to which only States can be members, and then initiating investigations into this State’s claims, indeed constitute adequate grounds for protests from other States Parties. The Statute provides a mechanism for resolving such disputes that begins with bilateral negotiations and then proceeds to the Assembly of States Parties. It may attempt to promote its own settlement, or it may refer the dispute elsewhere, including to the ICJ.56

Under Article 119 of the Statute, “any dispute concerning the judicial functions of the Court shall be settled by a decision of the Court.” Consequently, the judges of the ICC may be called upon to address the question as part of potential jurisdiction and admissibility proceedings should a trial ever take place.57 Furthermore, Article 119 (2) states that “any other dispute between two or more States Parties relating to the interpretation or application of the Statute, which cannot be settled through negotiations within three months of their commencement must however be referred to the Assembly of States Parties.” Hence, it is not the

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57 Hohler (2015).
UN Secretary General but the ICC Assembly of States Parties that could have the final say on the matter.\textsuperscript{58}

The Rules of Procedure of the Assembly of States Parties are silent on the procedure to follow should a dispute ever be referred. Or of it can be referred whatsoever. According to the Statute, the Assembly should attempt to settle the dispute itself, or make recommendations on further means of settlement. This could include referring the situation to the ICJ.\textsuperscript{59} Use of the word “recommendations” indicates that a referral to the ICJ is not obligatory. In any event, only a portion of the States Parties has accepted general jurisdiction under the Statute of the ICJ’s optional clause.\textsuperscript{60} States Parties that have not accepted the jurisdiction of the ICJ could in such a case make a special agreement, something that might be advocated by the Assembly of States Parties. However, the rest of Article 119(2) is binding, meaning that one of two parties to a dispute about interpretation and application of the Statute can refer the matter to the Assembly of States Parties after three months of good faith attempts to reach an agreement. The Assembly is then free to adopt a binding settlements procedure.\textsuperscript{61}

It is a possibility that the advisory opinion jurisdiction of the ICJ might be invoked to address issues concerning interpretation and application of the Statute. Article 119(2) does not mention this explicitly, however, given that it expressly addresses “dispute between two or more States Parties” it is reasonable to view Article 119(2) as a reference to the controversial jurisdiction of the ICJ.\textsuperscript{62} Moreover, an advisory opinion cannot be a dispute settlement mechanism because the ruling of the ICJ is only advisory; as such it has no binding force. It may prove helpful for the Assembly of States Parties when it is severely divided on an issue to seek guidance of the ICJ, even if it is not binding in a strict sense. Although the Assembly of States Parties cannot on its own invoke the advisory opinion jurisdiction of the ICJ, it membership is sufficiently influential within the General Assembly to ensure the success of a resolution in

\textsuperscript{58} I.c.
\textsuperscript{60} I.c.
\textsuperscript{61} Ibid. p. 1164.
\textsuperscript{62} I.c.
accordance with Article 96 of the UN Charter. What all this means is that if other States Parties to the ICC, for example, the UK and Canada, disagree with the application of the Statute with regards to the interpretation of Palestinian statehood, Article 119 may be enacted. If the dispute cannot be settled through negotiations or by the Assembly of States Parties themselves, the Assembly may seek advise from the ICJ. This demonstrates how the question of Palestinian statehood can become a major procedural hurdle for the OTP to overcome. The mere fact that the ICC accepted Palestine as a State Party to the Rome Statute is not final. The issue could go as far as being re-evaluated by the ICJ.

After such a controversial accession to the Rome Statute, it could be destructive to the reputation and credibility of the Court if the OTP retracted this stance only a year or so later on their own accord. After all, the majority of the UN General Assembly and 77 of the ICC’s own 122 States Parties have recognised Palestine as a State. However, it could happen should another of these State Parties protest. Nonetheless, the controversy over the issue of statehood has been demonstrated, and the problems it may present if the ICC should choose to proceed with an investigation into the Palestinian Situation. Nonetheless, this thesis assumes, henceforth arguendo that Palestine qualifies as an ICC State Party. Whether or not this will be challenged remains to be seen.

63 I.c.
64 The Middle East Monitor (2015).
3 Preliminary Examination

The significance of this chapter is to provide context for the following chapters. It is already at the preliminary examination stage that problems will arise. The stages of the preliminary examination are also quite straightforward; it therefore seems appropriate to tackle the task at hand by adopting the same approach. Ideally this section would be more closely linked to the actual preliminary examination of Palestine. Unfortunately very little information from the ICC is currently available.

A preliminary examination is an assessment by the Court on whether the Rome Statute criteria for opening an investigation are met. It is important to differentiate between cases and situations as the ICC only investigates entire situations and not individual, single cases. A situation refers to the somewhat broader set of events within which particular crimes occurred. This prevents countries from claim splitting, referring the alleged crimes of their enemies and not their own. The exact scope of a situation is not precisely defined in the Statute or the Court’s practice. This also goes hand in hand with the purpose of the Court, which is to prosecute those most responsible and not individual low-ranked so-called foot soldiers. If the Court only looked into single cases these soldiers would most likely become the subject of the Courts inquiry, however, by taking a step back and investigating entire situations, a more informed impression is formed and the outcome will more likely target those most responsible. With regard to the Palestinian situation, the Court has been asked to investigate the events of June 2014, which comprises of a collection of cases, incidents and suspects, which in total constitutes the aforementioned Palestinian situation.

A preliminary examination is a procedural step taken before a potential full investigation is launched. The following introduces the phases of a preliminary examination and highlights the legal challenges the Court will face when looking into the Palestinian Situation in a clear and orderly manner. At the end of the preliminary examination, the OTP must decide whether or not there is reasonable basis to launch an investigation, to dismiss the situation altogether, or that the OTP need to collect more information. Several situations referred to the ICC have

been dismissed for failing to meet this *reasonable basis*-principle following preliminary examinations. These are situations in Venezuela, Honduras, Republic of Korea and Comoros.

The assessment criteria for the preliminary examination are found in Article 53(1)(a)-(c) of the Rome Statute, and the investigation is divided into four stages. The first phase is an “initial assessment of all information on the alleged crimes” that have been committed, and an analysis of the seriousness of such crimes.  

In phase two, the OTP reviews all issues of jurisdiction in the applicable cases, phase three considers questions related to admissibility, and finally, phase four examines the interests of justice consideration in order to convey a final recommendation to the Prosecutor on whether there is a *reasonable basis* to initiate an investigation. The OTP of the ICC has issued a policy paper on preliminary examinations to elaborate on and assist in interpreting the Statute.

There are no timelines provided in the Rome Statute for decisions in a preliminary examination. Depending on the facts and circumstances of each situation, the OTP will decide whether to continue to collect information to establish a sufficient factual and legal basis to render a determination. If the OTP is satisfied that all the criteria set out in the Statute for this purpose are fulfilled, it has a legal obligation to open an investigation into the situation, or to decline an investigation if the circumstances warrant it. As of April 2016, the preliminary examination for the Palestinian situation is in phase two.

The legal framework for a preliminary investigation is listed in the Statutes Article 53. Article 53(1) states that in deciding whether to initiate an investigation, the Prosecutor should consider the following:

(a) *The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;* (b) *The case is or would be admissible under Article 17*; and (c) *Taking into account the*  

66 ICC Office of the Prosecutor (December 2014) para. 15.
67 I.c.
The requisite standard of proof of a *reasonable basis*, has been interpreted by the Pre-Trial Chamber of the Court to require “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed.” The Pre-Trial Chamber has indicated that all of the information does not necessarily have to “point towards only one conclusion.” This reflects the fact that the *reasonable basis* standard under Article 53(1)(a) “has a different object, a more limited scope, and serves a different purpose” than other, higher evidentiary standards provided for in the Statute. In particular, at the preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in Article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be comprehensive nor conclusive.” On that note and in agreement with Article 53(1)(a) of the Statute, the Prosecutor must determine whether there is a *reasonable basis* to believe that a crime within the jurisdiction of the Court has been, or is being, committed. Accordingly, there must be a *reasonable basis* to believe that the information fulfils all jurisdictional requirements, namely, temporal, subject matter, and either territorial or personal jurisdiction. If the OTP finds, for example, that the issue of territorial justification is not met, the Palestinian situation will never make it past phase II. This is why the preliminary examination is so important. Palestine’s pursuit for justice could come to a halt already during phase II.

Article 53(1)(b) considers issues of admissibility. In determining whether to open an investigation, Article 53(1)(b) requires the OTP to consider whether “the case is or would be admissible under Article 17.” Article 17 reads:

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70 Kenya Art. 15 Decision para. 35.
72 Ibid. para. 32.
73 Ibid. para. 27.
74 ICC Office of the Prosecutor (2013) para. 36.
“the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

At the preliminary examination stage there is not yet a case, as understood to comprise an identified set of incidents, suspects and conduct. Therefore, the consideration of admissibility will take into account “potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation.”

Similarly, Pre-Trial Chambers have held, in the context of their decisions on the Prosecutor’s applications for authorisation to open an investigation into the Situation in the Republic of Kenya and the Situation in the Republic of Côte d’Ivoire,

“admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”

Pursuant to the requirements of Articles 53(1)(b) and 17(1)(a)-(c), the complementarity assessment is case-specific and relates to whether genuine investigations and prosecutions have been or are being conducted in the State concerned in respect of the cases identified by the

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75 Ibid.
76 Ibid.
OTP. As described above, at the preliminary examination stage, this is assessed based on potential cases that would likely arise from an investigation into the situation. An admissibility determination is not a judgement or reflection on the national justice system as a whole. If an otherwise functioning judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings.\textsuperscript{77}

The jurisdictional and admissibility criteria will be assessed in much greater detail in the following two chapters. However, a brief overview of the structure of the preliminary examination is beneficial in shedding some light on the challenges that are to come. After a more thorough analysis it will become evident why the preliminary examinations are still in phase II.

\textsuperscript{77} Ibid
4  Jurisdiction

4.1  The Thorny Issue of Jurisdiction

Jurisdiction refers to the Court’s right to exercise its power to investigate and possibly indict perpetrators of crimes that fall within the scope of the Statute. The ICC operates primarily on the principle of delegated jurisdiction, not universal jurisdiction.\textsuperscript{78} Its jurisdiction depends on the consent of its States Parties, and it can, therefore, only prosecute crimes that occur in the territory of complying States, or that were committed by their nationals, or referred to it by the Security Council. The most controversial aspect of the ICC’s jurisdiction has always been its ability to prosecute nationals of non-States Parties for conduct on the territory of a State Party.\textsuperscript{79} Such jurisdiction is, however, consistent with national sovereignty and traditional territorial principles because the State Party itself has jurisdiction over its own territory, nationals and any non-State Party nationals acting in this territory. A State is, therefore, well within its rights as an autonomous entity to delegate this jurisdiction to an international tribunal, or in any other way that the State sees fit.

Under Article 12 of the Statute, the ICC could only have jurisdiction over Israeli nationals for conduct that occurred “on the territory” of the State of Palestine. Article 12 will be interpreted thoroughly throughout this chapter, and repeated several times. However, because of its significance it seems beneficial to start by simply rendering its contents right away. Article 12 reads as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on

\textsuperscript{78} Akande (2003) p. 621-634.
\textsuperscript{79} Ibid.
board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

According to Article 12, exercising jurisdiction requires determining whether the territory on which crimes have been committed is Palestinian territory. The ICC Statute apparently presumes defined, accepted international boundaries. Most contemporary boundary disputes have thus far been irrelevant to situations that have been addressed by the ICC. Hence, when these territorial assumptions are not satisfied, the Statute provides no guidance for dealing with such grey areas, nor does any previous case law.\(^8^0\)

This chapter will start by taking a closer look at the jurisdictional criteria outlined in the preliminary examination. This will, in turn, unravel an abundance of legal issues related to jurisdiction, which the ICC will come to face even before a full-scale investigation can be initiated. First, and perhaps the most straightforward jurisdictional post in the preliminary examination is the issue of subject matter jurisdiction. This will, therefore, be analysed first. Second, the thesis will take a closer look at temporal jurisdiction. The temporal jurisdiction of the Court applies from the date of entry into force of the Statute, which for most States will be from 1 July 2002.\(^8^1\) Temporal jurisdiction in a particular situation depends on the date of entry into force of the Statute for the State Party. In the case of a later ratification or accession, the date specified in a Security Council referral, or the date indicated in a declaration lodged pursuant to Article 12(3) will be the determining factor.\(^8^2\)

Finally, issues related to territorial jurisdiction will be analysed. It will be shown that this is a hugely complex matter and most likely the greatest challenge the Palestinian situation poses.

\(^8^0\) Kontorovich (2013) p. 984.
\(^8^1\) ICC Office of the Prosecutor (2013) para. 37
\(^8^2\) ibid.
to the ICC. Pursuant to Article 12(2)(a) of the Rome Statute, the ICC only has jurisdiction over “the State on the territory of which the conduct in question occurred.” Article 12(2)(a) lists two criteria: statehood and a territory. The issue of Palestinian statehood has already been addressed – the ICC recognises Palestine as a State. However, Palestine has been accepted as a State Party to the ICC without having clarified its territorial boundaries. It is now appears to be key for the Court to define the territorial scope of Palestine. The Court will not have jurisdiction unless the territory upon which the crime was committed can be shown to be part of the Palestinian State. Hence, defining the territorial scope of the State of Palestine may be crucial for the OTP for the Palestinian Situation to proceed to phase three of the preliminary examination. An analysis of the problems related to territorial jurisdiction includes an examination of the Green Line and Armistice Agreements, Israeli settlements on the West Bank, the Monetary Gold principle, the Oslo Accords, Gaza, General Assembly resolutions and the ICJ Advisory Opinion of the Wall.

The question still remains, however; whether it is necessarily crucial for the territory of Palestine to be clearly defined in order for the ICC to investigate and potentially prosecute? Can the Court not prosecute those parts of the situation that clearly fall within a territory that is indisputably Palestinian and avoid acting as a boarder defining body altogether? On the other hand, does such territory exist? Granted Palestine’s upgraded status in the General Assembly there must be some consensus as to what is inherently Palestinian. Although not an easy task, this chapter will also attempt to make an assessment of such a claim.

4.2 Subject Matter

The subject-matter jurisdiction of the Court, as set out in Article 5 of the Statute, reads:

*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*

Genocide, crimes against humanity and war crimes are all elaborated on in detail in Articles six to eight of the Statute. The crime of aggression is yet to be defined in the treaty.
Israeli and Palestinian nationals are both suspected of having violated international humanitarian law during the 50-Day War, which occurred in Gaza during the summer of 2014. The UN Human Rights Council claim that both sides have committed atrocity crimes. The United Nations Human Rights Council on 23 July 2014, by resolution S-21/1, decided to put together an “independent, international commission of inquiry to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014.” The report was published a year later, and the commission reveals that it has found “serious violations of international humanitarian law” that “may amount to war crimes” by both Israeli and Palestinian militants. The commission also claims “impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture and ill-treatment in the West Bank.” As for Palestine, the Commission is seriously concerned regarding the “inherently indiscriminate nature of most of the projectiles directed towards Israel.” This is just the tip of the iceberg. The report points out some potentially grave breaches of international criminal law that may be in violation of the offenses laid out in Article 5 of the Statute.

Israeli migration to the West Bank and the subsequent settlements are widely regarded as violating Article 8(2)(b)(viii) of the ICC Statute, which prohibits “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.”

The OTP also has to consider “contextual circumstances, such as the nexus to an armed conflict or to a widespread or systematic attack directed against a civilian population; alleged

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83 A/HRC/29/52.
84 Human Rights Council S-21/1 (2014).
85 A/HRC/29/52 para. 1.
86 Ibid. para 74.
87 Ibid. para 76.
88 Ibid. para 79.
perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernable at this stage.\textsuperscript{89} These elements of the crimes can be found in the ICC’s Elements of Crimes, which was created in order to assist the Court in the interpretation and application of Articles 6, 7 and 8, consistent with the Statute. This thesis will not elaborate on these elements in any more detail. The so-called 50-Day War is surely considered an armed conflict, and the mental element required is present.\textsuperscript{90} The subject matter jurisdictional criteria in the Palestinian situation are met. It is therefore highly unlikely that the subject matter will be found to fall outside the jurisdiction of the Court.

\subsection*{4.3 Jurisdiction Ratione Temporis}

Article 11 of the Rome Statute outlines the temporal jurisdiction of the Court.

\begin{enumerate}
\item The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
\item 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 entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.
\end{enumerate}

According to Article 11(2) of the Statute, the Court may exercise its jurisdiction only “with respect to crimes committed after the entry into force of this Statute” for that State.\textsuperscript{91} In the context of this thesis, jurisdiction refers to the ICC’s right to exercise its power, which consists of investigating and prosecuting perpetrators of the crimes enlisted in Article 5 of the Statute. In the case of Palestine, this means that the Court can only investigate events that occurred following the entry into force of the treaty for Palestine, namely 1 April 2015.\textsuperscript{92}

\textsuperscript{89} ICC Office of the Prosecutor (2013) para. 39.
\textsuperscript{90} ICC (2002).
\textsuperscript{91} Rome Statute Article 11(2).
\textsuperscript{92} ICC Press Release (April 2015)
However, Article 11(2) also envisages the possibility that a State may, in addition to becoming a State Party, lodge an *ad hoc* declaration. This is exactly what Palestine did – for along with its instrument of accession to the Statute, Palestine also submitted an Article 12(3) declaration. When this happens, the Court is granted the power to investigate situations that occurred before to the entry into force of the treaty for that State. This allowed Palestine to request the retroactive investigation of acts committed before 1 April 2015. More specifically, from 13 June 2014 which is the day after the kidnapping and killing of three Israeli teenagers in the West Bank. For Israel, this means that the kidnapping and killing itself, which took place on 12 June, will remain outside the Court’s jurisdiction and thus cannot be investigated by the ICC. The retroactive *ad hoc* declaration does give the Court a mandate to investigate the so-called 50-day War, which followed, provided the Court reaches the conclusion that Gaza constitutes “occupied Palestinian territory,” which will be addressed in more detail below.

To summarize, retroactivity is ruled out in the case of accession to the Statute; however, it is made possible via an *ad hoc* declaration. This certainly explains why Palestine submitted both an *ad hoc* declaration under Article 12(3) and an instrument of accession to the Rome Statute in the span of only a few days. When faced with Palestine’s most recent declaration, the chief prosecutor of the Court decided to open a preliminary examination into the situation in Palestine, which is still ongoing. The Palestinian situation pertains to crimes committed from 13 July 2014 and is, therefore, well within the temporal jurisdiction of the ICC.

### 4.4 Territorial Jurisdiction

The third jurisdictional requirement of a preliminary examination is to show that the situation falls within either the personal or territorial jurisdiction of the Court. Territorial or personal jurisdiction of the Court applies if a crime referred to in Article 5 of the Statute is committed on the territory or by a national of a State Party; or a State not Party to the Statute, which

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93 Ambos (2014)
94 Palestine (2014)
95 Høgestøl (2015).
96 Rome Statute Article 12(2).
has lodged a 12 (3) declaration accepting the exercise of jurisdiction by the Court.\footnote{Høgestøl (2015).} The Palestinian Article 12(3) declaration, however, is explicitly territorial in nature, in that it invites the Court to investigate crimes “committed in the occupied Palestinian territory, including East Jerusalem.”\footnote{Palestine (2014).} The Palestinian situation will, therefore, be based on territorial jurisdiction.\footnote{Høgestøl (2015).} The matter of the Court’s personal jurisdiction will not be discussed any further in this thesis. Assuming then that both the temporal and subject matter jurisdiction requirements have been met, the question of territorial jurisdiction is still left unaccounted for, which represents a fundamental obstacle for the Court. In the following it will be demonstrated why this is such a difficult task.

4.4.1 Determining the Territory of Palestine

Palestine has asked the ICC to investigate crimes “committed in the occupied Palestinian territories, including East Jerusalem.”\footnote{Palestine (2014).} Occupied Palestinian Territory refers to Gaza and the West Bank. If the ICC were to take on the Palestinian situation, it would face formidable challenges. The borders of Palestine could potentially have to be settled by the judges. The jurisdiction of the Court over Israelis is strictly territorial; hence, if the Court were to indict Israeli nationals for war crimes, they would have to have been committed on the territory of Palestine. It is a bit of a different matter for Palestinians. Any attacks against Israel carried out by Palestinian nationals will, therefore, be fair game for the ICC because the Rome Statute has nationality jurisdiction over the relevant crimes. Moreover, by joining the ICC, Palestine has committed itself to cooperating with investigations and prosecutions, including turning suspects and evidence over to The Hague.

There is no way around territorial jurisdiction. The specific territory in question for each violation of the Rome Statute will have to be clarified. However, the entirety of what constitutes the State of Palestine might not need to be established, and the ICC could perhaps abandon this novel task altogether. The ICC could potentially go around this problem by only investigating breaches that have occurred on territory that is undoubtedly Palestinian. However, only

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\footnote{Høgestøl (2015).}
\footnote{Palestine (2014).}
\footnote{Høgestøl (2015).}
\footnote{Palestine (2014).}
if such territory exists. Israel would surely argue to the contrary. The lack of established borders for Palestine may surprise many, given the General Assembly’s recognition of a Palestinian State and the widespread condemnation of Israeli civilian presence in the West Bank. But neither the aforementioned General Assembly resolution nor the alleged illegality of settlements elaborates on the separate question of Palestine’s sovereign borders.

4.4.1.1 The Green Line

The General Assembly and the ICJ both agree to some extent that the Green Line, that is, the pre-1967 demarcation lines established by the Armistice Agreements in 1949 constitutes the territorial boundaries of Palestine. The end of the 1948 Arab-Israeli War in 1949 did not set fix borders, but established armistice lines where the fighting concluded between Israel and its Arab opposition. No final peace treaty was signed between the warring parties as each party ultimately sought entirely different borders. The 1949 Egyptian Armistice Agreement, similar to the Jordanian Agreement, clearly stated that:

“The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary,...The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move.”

In 1967, following the Six-Day War, Israel captured the West Bank from Jordan; the Gaza Strip and the Sinai Peninsula from Egypt; and the Golan Heights from Syria. Israel later annexed East Jerusalem in an act which has never recognised by the international community. Consequently, the borders changed. Suddenly, Israel occupied areas inhabited by hundreds of thousands of Palestinian Arabs, including refugees of the 1947-49 war who had fled territory that became the State of Israel. Following the Six-Day War Israel began building settlements in the West Bank and Gaza. The Green Line and pre-1967 borders refer to those lines drawn up in the 1949 Armistice Agreements.

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102 Newman (2014)
103 Holmes (2011)
These armistice lines cannot serve a border defining function. The Armistice Agreements were drafted with future peace talks in mind, and they all acknowledge that the boundaries might change. Furthermore, Security Council Resolution 62, also known as the Armistice Declaration, specifies that the Green Line should not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties;” it adds that the Green Line was drawn “without prejudice to future territorial settlements or boundary lines.” Interpreting this language, the ICJ explains in its Advisory Opinion on the Wall that “[t]he Demarcation Line was subject to such rectification as might be agreed upon by the parties.” The Oslo Accords reaffirm this view. However, the Accords require much greater analysis and will be discussed further later in this thesis.

The lack of defined borders does not necessarily mean that Palestinian territory is entirely undefined. For Palestine to be considered a State, it must have some form of a territory, or in other words, a piece of land that can be said to be Palestinian. Yet, the Green Line does not and never has functioned as a border.

4.4.1.2 No-Mans Lands and DMZs

The easiest way to demonstrate the unsuitability of the Green Line for boundary purposes is the existence of significant pockets of no man's land and demilitarized zones (DMZs). These zones lie in central and strategic areas, including the centrally located Latrun, through which the main Jerusalem-Tel Aviv highway runs, and several key areas in Jerusalem. There, the Armistice Line is not a line at all, but rather two parallel lines, 1-3 kilometres apart, with a ‘no man's land' between them. Such zones make sense for armistice lines, to keep two opposing armies disengaged. Indeed, many of the most controversial 'settlements' in the Jerusalem municipality lie in the narrow strip of no man's land, rather than on Jordanian-occupied territory. This includes many of those most loudly decried by the interna-

104 Luban (2015)
Palestine considers all of the no man's lands and DMZs to be part of its territory, and calls the Israeli presence in these areas illegal settlements, and they are generally described as such. As a legal matter, it would be exceedingly difficult to conclude that ‘no man's land,' which under an armistice agreement was left unpopulated, is to be included in ‘the territory of Palestine.’ On the other hand, if the ICC found that it had no jurisdiction over these areas, it would give a virtual green flag for continued Israeli construction in these sectors, which from a diplomatic perspective would have the same effect as establishing settlements on ‘Palestinian' territory. Thus, if the ICC takes Palestine's territory to be that territory formerly occupied by Jordan and Egypt, it would immunize Israeli settlements in sensitive areas. On the other hand, including those areas of no man’s land becomes equally problematic.

4.4.1.3 West Jerusalem and Mount Scopus

The 1949 Armistice Agreement included the area around the Hebrew University on Mount Scopus as an Israeli enclave within Jordanian-held territory. The Mount Scopus enclave contained what is now a largely Arab neighbourhood that contemporary peace plans tend to incorporate in a Palestinian Jerusalem. Despite not being under Jordanian control before 1967, Israel has chosen not to allow Israeli construction in this Arab neighbourhood, and any Israeli presence there would be criticized as settlements. However, as recently as 31 March 2016 the local Planning and Construction committee at Jerusalem Municipality endorsed 18 new settlements for Jewish families in the Mount Scopus area.

It could be difficult to contest that the Mount Scopus area is part of Palestinian territory. An ICC determination to the contrary could remove any inhibition Israel felt about allowing more Israeli settlements there. In short, addressing the settlements issue in a criminal court might encourage Israel to alter residential construction plans in the Jerusalem area to these areas.

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108 I.c.
109 Israel-Jordan Agreement on demilitarization of Mount Scopus Area (July 7, 1948), UN Doc. S/3015, 23 May 1953, Art. 1-2
110 Kontorovich (2013) p. 986
111 Palestinian Information (2016)
112 I.c
rather than the entirely Jewish neighbourhoods where they currently build.\textsuperscript{113} If the ICC found it has jurisdiction over settlements in no-man’s land and DMZs, it would effectively be awarding these territories to Palestine. If the Court concludes that it has no jurisdiction in these areas, it would essentially award them to Israel, or, at least, immunizing Israel from legal sanctions for settlement in these regions.\textsuperscript{114}

This is significant not only because of the territorial disputes they raise, but because they illustrate that the Armistice Line was never intended to be seen as a border, and cannot be assumed to be the border of a Palestinian State. All references to it serving as baseline for boundary discussions refer to a peaceful settlement of all issues, and not only the border issue independently.\textsuperscript{115}

\textit{4.4.1.4 Western Jerusalem}

Just as Palestine has no clear borders, Israel has no clear borders. Before 1967, few nations recognised Israel’s sovereignty over territory beyond that suggested for Jewish sovereignty in the 1947 General Assembly Partition proposal. That seems to have changed throughout the last few decades, with most nations recognizing Israel sovereignty within the 1949 Armistice Lines. However, there is a major exception to this. The General Assembly and the Security Council have all denounced or declared Israel’s control of Western Jerusalem invalid. No nation in the world officially recognises pre-1967 Western Jerusalem as Israeli territory.\textsuperscript{116} Thus, if the ICC adopts the Armistice Line position in a demarcation, it would be endorsing a position on Israel’s presence in Western Jerusalem that no government has been willing to take.\textsuperscript{117} If the ICC takes the position that Western Jerusalem is not Israeli because it was intended to be part of an extraterritorial corpus separatum for Jerusalem, then by the same token, Eastern Jerusalem could not be Palestinian sovereign territory. Consequently, settlements there would fall outside the ICC’s jurisdiction. This highlights the extraordinary complexity and collateral consequences of any border delineation effort.\textsuperscript{118}

\textsuperscript{113} I.c
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
\textsuperscript{117} Cf. Zivotofsky v. Clinton (2012)
\textsuperscript{118} Kontorovich (2013) p. 987
Objections might be raised that if undefined territory bars admissibility, it would exclude many matters from ICC jurisdiction. While many nations are involved in territorial disputes, most are minor, peripheral and non-militarized. There is no reason to assume that the existence of territorial disputes, generally speaking, would significantly limit the Court’s jurisdiction over crimes in the Statute. When both disputants are ICC States Parties, for example, the territorial dispute would not affect jurisdiction. In such situations the conduct would most likely be on the territory of a State Party. The issue could only arise for referrals of non-State Parties by States Parties. Even if none of the nations involved in a situation have accepted jurisdiction, Security Council referral remains an option. Indeed, because the Security Council route does not involve direct State consent, the relevant provision does not mention territory of a State, as Article 12(2)(a) does. Thus, Security Council referrals can encompass disputed or non-sovereign territory without similar complication. The Sudanese and South Sudanese conflict over several territories, such as Abyia, Jodha and Kaka, never amounted to a major jurisdictional hurdle when the Security Council referred the situation to the ICC in March 2005. This could further suggest that crimes committed on a territory with uncertain sovereignty are best left to Security Council referral in order to avoid problems related to jurisdiction. However, it is quite understandable that Palestine could not wait for such a referral given the status of the US as a permanent member of the Security Council, thereby having to take matters into their own hands.

4.4.1.5 The General Assembly and the International Court of Justice

Neither of the two most prominent, yet non-legally binding, international statements on Palestinian rights aim to determine borders. Despite their condemnation of Israeli settlements, neither the 2012 General Assembly resolution 67/19 acknowledging Palestinian statehood, nor the 2004 ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories express or implied any border determinations.

The 2012 General Assembly resolution does not answer the question of Palestine’s borders,

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120 Wiegand (2011) p 86-89
122 Advisory Opinion on the Wall.
nor does it address it. The resolution merely decides to accord Palestine with Non-Member Observer State status in the General Assembly; it resolves nothing about its borders. Even the non-operative provisions are unclear as to borders. However, the first paragraph refers to “Palestinian territory occupied since 1967.” This appears to be more of a claim about indigenous rights than a determination of national borders, as there was no Palestinian State or entity in 1967. On the other hand, paragraph four expresses hope for the eventual achievement of a adjoining Palestinian State living side by side with Israel “on the basis of the pre-1967 borders.” This phrase is formulated with the intention that it would not exclude any potential land swaps, which may be essential in reaching a two-State solution in the future. It suggests that the Israel-Jordanian armistice line is not the operative or ultimate border. Moreover, it suggests that the Palestinian State does not yet have these borders. The ‘on the basis’ language has traditionally referred to adjustments in the 1949 Armistice Lines to include most Israeli settlements within Israel’s borders.

Even in objective terms, where the control of territory is a defining aspect of statehood, the recognition that an entity is a State does not say anything about what its borders are. Even if the statehood-vote determined that Palestine had some core-defined territory, it does not tell us what that territory is. This creates a particular difficulty for a settlements-focused referral, because by definition these are in the most-contested territory, in the sense that multiple agreements and declarations have stated that final border delimitations will involve adjustments specifically to accommodate settlements.

Similarly, the 2004 ICJ Advisory Opinion on the Wall recognises the differences between the existence of an occupation and borders, which delimit the territories of two separate sovereigns. The Court avoided any resolution of “permanent status” issues such as borders. It also made clear that the 1949 Armistice Lines, while in its view triggering the applicability of Geneva Conventions and other principles, do not constitute an international boundary. Indeed, the Court specifically criticized the route of the wall because it could ‘prejudge the fu-

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123 GA Resolution 67/19.  
125 Ibid.  
126 Ibid.  
127 Advisory Opinion on the Wall.  
ture frontier between Israel and Palestine’. Thus in the view of Court, there was no recognised frontier between the two entities. If the Green Line were the recognised ‘frontier’, the Wall would not prejudge it, but rather simply infringe on it. Thus, if the General Assembly resolution and ICJ Advisory Opinion demonstrate anything, it is that the border between Israel and Palestine remains a significant dispute. As will be seen below, the challenged settlement activity lies entirely within this zone of greatest dispute.  

All these documents leave the exact path of the boundary line to be determined by politics, not by international judges. In practice, it might not be hard for the judges to settle the border dispute. But there are cases, especially in contested East Jerusalem neighbourhoods, where defining the border for jurisdictional purposes would place the ICC into one of the world’s most heated disputes. As it stands today, however, the Green Line, or armistice line, can only serve as a guide to where the borders could be.

4.4.1.6 European Union

Similarly, as recently as 18 January 2016, the European Union (EU) adopted a resolution criticizing Israeli settlement activity in the occupied Palestinian territory. The resolution emphasized that EU’s agreements with Israel apply only to the State of Israel within the pre-1967 border, adding that the “EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967.” The resolution was drawn up amid mounting frustration from a number of European governments on the deterioration of the Israel-Palestine peace process, and is intended to increase pressure on the Israeli government. The adoption of the document is the latest diplomatic setback for an increasingly isolated Israel after Netanyahu’s failure to de-rail the Iran nuclear deal, which was implemented 16 January 2016. The strongest paragraph of the resolution underline the illegality of Israeli settlements in the occupied Palestinian territories. It states:

129 Ibid.
130 Ibid.
131 Beaumont (2016)
132 Ibid.
133 Ibid.
“Recalling that settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-State solution impossible, the EU reiterates its strong opposition to Israel’s settlement policy and actions taken in this context, such as building the separation barrier beyond the 1967 line, demolitions and confiscation – including of EU-funded projects – evictions, forced transfers including of Bedouins, illegal outposts and restrictions of movement and access.”

It urges Israel to end all settlement activity and to dismantle all outposts erected since March 2001, in line with prior obligations. The resolution criticises settlement activity in East Jerusalem and emphasizes that the settlements seriously jeopardise the possibility of Jerusalem serving as the future capital of both States. However, only days after this resolution was passed, Israel ratified plans to build 150 new illegal settlements in the occupied West Bank.134

Similarly to the General Assembly resolution and the ICJ Advisory Opinion on the Wall, the EU resolution fails to further define the territorial boundaries of the occupied Palestinian territories. Declaring that the EU does not recognise Israeli territory beyond the 1967 line does not necessarily make the territory on the other side of the line Palestinian. However, it underlines, once again, the uncertainties related to the borders of Palestine.135

4.4.1.7 Avoiding the Issue Altogether

The question of whether defining the territory of the entire State of Palestine, thereby settling the territorial dispute, is really necessary, has been raised. Could the ICC avoid the issue altogether by only investigating crimes that fall within what one could call territory inherently Palestinian? Yes, I suppose so. The ICC does not have to define the territorial scope of the State of Palestine. However, evidence supporting this view is severely lacking in its presence. One might say that the mere recognition of Palestine as a State presumes it having some borders. However, this assumption assumes that the General Assembly’s recognition was based on the declarative and Montevideo Convention-definition of statehood, instead of the constitutive, normative theory.136 Yet, the majority of the international community recognises

134 The Daily Mail UK (2016).
135 Ibid.
136 Ibid.
“something” as Palestinian. To follow up on this theory – what would, or could, qualify as “inherently and undisputed” Palestinian? The West Bank and East Jerusalem would fall outside this definition. These areas are defiantly contested and recognised as so by the entire international community. For example, if Israel were asked if anything could be considered Palestinian territory it would most likely deny the existence of anything Palestinian. On the contrary, its Arab neighbours would contend there is a Palestine, and maybe that it exists within pre-1967 borders. The average Norwegian might point to Gaza as inherently Palestinian.

So, perhaps a small area can be found in Gaza that can be said to be undisputedly Palestinian territory in which the ICC would have unquestionable jurisdiction. To be clear this is just an example and cannot be backed up by empirical data. To illustrate this area is symbolized by the black circle on the map below, which I have inserted:

![Map of Palestinian Territories](Map No. 3584 UN)

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137 Map of Palestinian Territories.
In doing so, however, the jurisdiction of the ICC would become very narrow and one can only assume that many breaches of the Statute would fall outside such a jurisdictional scope. This undermines the entire objective of the ICC and does not present a reasonable and sustainable solution to the issue of jurisdiction. Furthermore, deciding on “Palestine” in this regard may turn out to be just as complicated as sitting down and drawing up boundaries for the State of Palestine.

4.4.2 Israeli Settlements

This section focuses mainly on Israeli settlements in the West Bank and East Jerusalem, and the specific jurisdictional issues regarding these. It has already been established that these breach Article 8(2)(b)(viii) of the Statute, yet the question of jurisdiction still remains.

Prior Palestinian efforts at securing ICC jurisdiction have focused on more classic war crimes involving the use of military force by Israel in Gaza. Cases involving the use of force have been repeatedly tried in international and national tribunals and have a well-established jurisprudence. Referring these crimes to the ICC would at first glance seem more attractive for Palestine to pursue. However, typical *jus in bello* issues are bilateral and leave open the possibility of criminal charges against Palestinian leaders as well for attacks on civilian populations, promoting terrorism, and so forth. Settlements, unlike use of force crimes, are an issue that is not bilateral. Palestine is not engaged in committing any “deport or transfer” crime, hence, in a settlements-focused case, Palestinians might be safeguarded from prosecutions. In addition, the ICC only has jurisdiction when the home State is *unwilling* to investigate the crime. It seems plausible that Israel would be less likely to investigate allegations of “indirect transfer” than other war crimes, especially since they protest the illegality of the settlements in the first place.

A settlement-focused referral could still draw alleged Palestinian crimes into the enquiry. This is because States only refer situations to the ICC, not single cases or even individual crimes. A situation could be understood to include the broader conflict between Israel and Palestine, and thus Palestinian rocket fire and bombings. Either way, the ICC has been asked to investi-
gate both the Israeli settlements, as well as the allegations of war crimes in Gaza. \(^{138}\) The main focus of an investigation remains to be seen.

Let us, however, get back to the issue of jurisdiction. According to Article 8(2)(b)(viii) of the Rome Statute, “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” is a war crime. To determine if the settlements breach Article 8(2)(b)(viii) of the Rome Statute, the ICC will first have to demonstrate that (i) the territory is under occupation (ii) that the occupied territory belongs to Palestine and (iii) that Palestine has jurisdiction of which to delegate to the ICC in this territory. The following sub-sections will examine these issues. The central issue is: if it can be said that these territories are in fact occupied, does it mean that they are Palestinian? This is important because it demonstrates, once again, the complexity of the issue of defining the territory of Palestine.

Another complication is that the transfer of civilian populations into an occupied territory is only a war crime if it occurs in what is recognized as an international armed conflict. \(^{139}\) In her legal opinion rejecting the referral of Israel for the Flotilla incident, Bensouda assumed without deciding that Israel’s conflict with Hamas is international. She based this assumption on “the prevalent view within the international community … that Israel remains an occupying power under international law,” \(^{140}\) but the issue is far from settled. However, for the sake of this paper, let us take the same stance.

4.4.2.1 Occupation and the Fourth Geneva Convention

The ICJ touched upon the issue of settlements in its Advisory Opinion on the Wall. In the opinion, the ICJ finds Israel to be an occupying power and concludes: “that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.” \(^{141}\)

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\(^{139}\) Luban (2015).

\(^{140}\) The ICC Office of the Prosecutor (2014).

\(^{141}\) Advisory Opinion on the Wall (2004) paras. 79, 52-54 and 120.
Stipulating that the Palestinian territory is "occupied" is based on the ICJ interpretation that this territory has been since 1967, and still is, occupied by Israel. The conclusion of the ICJ rests on Security Council resolutions 242, 298 and 478, which all emphasize the occupied nature of this territory.\textsuperscript{142} Even though the occupied Palestinian territory includes two distinct areas, namely the West Bank and the Gaza Strip, the UN refers to these areas as one territory.\textsuperscript{143} The International Committee of the Red Cross, UN bodies and the overwhelming majority of the international community support this view.\textsuperscript{144} Israel contests this interpretation.

However, the judges at the ICJ have not gone as far as stating that the occupied territories legally belong to a Palestinian State.\textsuperscript{145} The legality of the settlements thus brings us right back to the issue of territorial jurisdiction, for to determine whether the settlements themselves breach Article 8, the ICC will first have to show that the areas under occupation belong to Palestine.

Establishing that Israel is in fact and occupying power does not necessarily make the territory part of a Palestinian territory.\textsuperscript{146} The predominating interpretation of the Geneva Convention is that an “occupation” can arise even in an area that is not the territory of any State.\textsuperscript{147} The origin of the ‘settlements’ norm is Article 49(6) of the Fourth Geneva Convention.

The fourth Geneva Convention relative to the protection of civilian persons in time of war puts forth regulations governing civilians in occupied territory, amongst other relevant regulations. Article 49 of the Geneva Convention provides that the “occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

It is similar to Article 8(2)(b)(viii) of the Statute:

\begin{quote}
The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
\end{quote}

\textsuperscript{142} UiB (2015) p.5.
\textsuperscript{143} I.c
\textsuperscript{144} BBC (2009).
\textsuperscript{145} Høgestøl (2015).
\textsuperscript{146} Kontorvich (2015).
\textsuperscript{147} Ibid.
In the drafting of the Rome Statute, the Arab States successfully proposed modifying the Geneva language to “directly or indirectly deport or transfer.” The inclusion of this language was thought to target specifically Israel's settlements and was the chief reason it did not join the treaty.

For transfer to be a crime, the relevant territory must be occupied. Israel has long argued that the underlying Geneva Convention provisions regarding occupation are limited to the ‘occupation of the territory of a “High Contracting Party.”’ The West Bank was not Jordanian sovereign territory when Israel took it in 1967. Since the territory did not belong to a High Contracting Party when occupied, the argument goes, the rules regarding occupation do not apply.

Many, and perhaps most, international lawyers reject this argument, concluding that the Geneva Conventions' protections are intended to have a broader scope. However, such a conclusion does nothing to establish the territory of a Palestinian State. The central difficulty for ICC jurisdiction is that the mere fact of Israeli occupation does not mean the territory falls under Palestinian sovereignty.

In this respect, ICC jurisdiction is narrower than the corresponding Geneva Convention norm, as it only extends to sovereign State territory. In other words, even if Israel is an occupying power throughout the West Bank and East Jerusalem for substantive humanitarian law, this does not establish that settlement activity occurs "on the territory" of Palestine. Despite Israel's violation of the Geneva-based norm of transfer, it still must be "on the territory" of a State for the ICC to have jurisdiction. This is because the ICC is not a court of general or global jurisdiction; its jurisdiction does not extend to all violations of humanitarian law anywhere in the world. This is consistent with the respective roles of the Geneva Conventions and the ICC. The Conventions, which have near universal adherence, are interpreted broadly because of a desire not to have gaps in coverage. With the ICC, which has a limited and particular jurisdiction, gaps in jurisdictional coverage are purposeful and inherent.

The lack of clear territorial jurisdiction would be particularly troubling in cases against non-State Party nationals because the underlying crime is not one of universal jurisdiction. Any

\[148\] Ibid.
\[149\] Kontorvich (2015).
and all nations have jurisdiction of universal jurisdiction crimes; no territorial connection with the offence is needed, although custody of the defendant may be required. For such crimes, an alternative theory of the ICC's jurisdiction is that it exercises also delegated universal jurisdiction, not merely delegated territorial jurisdiction. To the extent crimes within the Court's jurisdiction are universally cognizable, concerns about non-State Party nationals are somewhat attenuated. Not all crimes within the ICC Statute are universal. Perhaps the most salient exceptions are aggression and non-grave breaches of the Geneva Conventions, of which 'transfer' is one. Not only does the Geneva regime not make transfer universally cognizable, but there is also no practice whatsoever of universal jurisdiction being applied to the offence, even though there have been several universal jurisdiction proceedings against Israel.

Moreover, the aforementioned General Assembly resolutions and the ICJ’s Advisory Opinion on the Wall make clear that the borders of Palestine remain undefined. The ICC does not have the authorization to determine the territorial boundaries of States, and certainly non-States Parties. Given that Israel is a non-State Party, deciding on the borders of Palestine, even for jurisdictional purposes, would violate the Monetary Gold\textsuperscript{150} principle, as it would also determine Israel’s borders. Moreover, the Oslo Accords give Israel exclusive criminal jurisdiction over Israelis in the West Bank. Palestine cannot delegate to the ICC territorial jurisdiction that it does not possess.

### 4.4.2.2 Monetary Gold Principle

Adjudication by international tribunals, including the ICC, depends fundamentally on State consent. As a result, the ICJ held in the influential Monetary Gold case that it could not determine the legal rights and duties of a State that was not Party to the case and that had not given its consent.\textsuperscript{151} Thus where the decision of a case necessarily requires the adjudication of the legal interests of a non-consenting State, the Court cannot exercise jurisdiction. This principle extends beyond the ICJ; other international tribunals have treated the principle as part of

\textsuperscript{150} The Monetary Gold principle refers to an ICJ judgement of 15 June 1954 over the removal of monetary gold from Rome by the Nazis during World War II. The Court ruled that to go into the merits of the case would be to decide a dispute between Italy and Albania - which the Court could not do without the consent of Albania. If the Court did so, it would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

\textsuperscript{151} Italy v. France, UK, and US para. 19.
the general international law applicable to international tribunals:

\[T]\econsent principle applies to the ICC as it does to other international tribunals. Were the ICC to make judicial determinations on the legal responsibilities of non-consenting States with respect to the use of force and aggression, this would violate the Monetary Gold principle.\]

Not all, or even most ICC situations involving nationals of a non-State Party would implicate the Monetary Gold rule. The ICC determines the legal responsibilities of individuals; States are not Parties at all. While State responsibility may result from an Official committing a crime, the ICC itself will typically not need to make prior judgments about State responsibility to convict a defendant. Sometimes the ICC's jurisdiction infringes on the State consent principle. Dapo Akande has suggested that prosecuting non-State Party nationals for aggression would be such a situation since for an individual to be guilty requires a prior determination that the State is an aggressor. This would also be the case where underlying international borders between a State Party and its non-State Party neighbour are undetermined. To exercise jurisdiction, the Court necessarily must decide on the borders of Palestine, which simultaneously determines the borders of Israel, a non-State Party. In order to reach the issue of individual liability, the Court must first draw the borders of a non-consenting State, as clear a violation of the Monetary Gold principle as one could imagine.

**4.4.2.3 Oslo Accords and Delegated Jurisdiction**

Territorial jurisdiction is further complicated by the Oslo Accords. The ICC exercises delegated jurisdiction, and as Antonio Cassese so eloquently explains it, "the Rome Statute authorizes the ICC to substitute itself for a consenting State, which would thus waive its right to exercise its criminal jurisdiction." A Palestinian referral would, therefore, simply be the delegation of Palestine's national jurisdiction to the Court. For such delegated jurisdiction to be possible, the State Party must have territorial sovereignty over the areas in question, as discussed above, and not have previously delegated or ceded such jurisdiction. In other words,

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153 Ibid.
154 Ibid.
a State cannot delegate jurisdiction that it does not possess. The General Assembly's recognition of the State of Palestine has not annulled the Oslo Accords, which both parties continue to treat as binding.\textsuperscript{156}

The Oslo Accords give Israel criminal jurisdiction over portions of the West Bank and East Jerusalem. Jewish settlements in the West Bank all lie in Area C, where Israel has full control.\textsuperscript{157} Pursuant to Oslo II, the West Bank was divided into three distinct areas: Area A under Palestinian control, Area B with shared Palestinian-Israeli control and Area C under full Israeli civil and security control. Pursuant to the Agreement Annex IV, Article I(2), however, Israel retained sole criminal jurisdiction over criminal offenses committed by Israeli nationals in all zones:

“\textit{The Palestinian authorities shall not arrest Israelis or place them in custody. However, when an Israeli commits a crime against a person or property in the Territory, the Palestinian Police, upon arrival at the scene of the offense shall if necessary, until the arrival of Israeli military forces, detain the suspect in place while ensuring his protection and the protection of those involved.}”\textsuperscript{158}

Palestine does, however, have criminal jurisdiction over Palestinians and non-Israelis in Areas A and B. This means that Israeli nationals committing criminal offences in any of the zones defined by the Oslo Accords cannot be indicted or prosecuted by Palestine. This remains a task for the Israeli judicial system. Palestine can, on the other hand, prosecute its own citizens or nationals of any other State for crimes committed in Areas A and B.

What this means is that Palestine has no jurisdiction over Israelis in the settlements situation to delegate to the ICC in the first place. Palestine cannot delegate jurisdiction over the settlements when all criminal jurisdiction in this area has already been assigned to Israel in the Accords.\textsuperscript{159} Moreover, the lack of \textit{de jure} Palestinian jurisdiction over the territory of the settle-

\textsuperscript{156} Kontorovich (2013) p. 992  
\textsuperscript{157} Kontorovich (2015).  
\textsuperscript{158} Interim Agreement Annex IV, Art. II(c). See also, Interim Agreement, art. XII.1 and Annex IV of the Interim Agreement, art. II.7.  
\textsuperscript{159} Kontorovich (2013) p. 995.
ments makes it harder to argue that this area currently forms part of the *territory* of the State of Palestine.\(^{160}\)

It will, therefore, be tough for the OTP to claim jurisdiction under Article 12 of the Statute for territory over which the government of "Palestine has at no time had control over, and which has remained under Israeli authority, including criminal jurisdiction - by Palestinian agreement in the Oslo Accords."\(^{161}\) The authority and jurisdiction of the ICC depend on what its States Parties grant or delegate to it through accession to the Statute. In case it is not crystal clear by now - Israel is not a State Party. Thus, the Court has no jurisdiction over its nationals or territory. This is a given. The Court will have to respect any treaty signed by Palestine regarding criminal jurisdiction with Israel unless Israel agrees that criminal jurisdiction in the West Bank should be delegated to the ICC. Considering Israel's unwillingness to cooperate with the ICC, this seems extremely unlikely. Israel possesses the criminal jurisdiction over the settlement areas, and how the judges will address this fact will be interesting to see. For in order for the ICC to have jurisdiction over this matter, the Oslo Accords would then have to be abolished. While this is a possibility, it too seems unlikely. Abolishing the Accords would also abolish the PNA and create insecurity and chaos in the West Bank. Today, Abbas maintains that he will not dissolve the Palestinian Authority or abolish the Oslo Accords.\(^{162}\)

On the other hand, the territorial jurisdiction that is bestowed on the ICC upon accession is not necessarily limited to areas where that State currently exercises control, as William Schabas argues in his Commentary on the Court.\(^{163}\) He gives the example of Cyprus, which acceded to the Statute after Turkish invasion and has lodged a complaint to the ICC regarding the illegality of Turkish settlements in the northern regions of the island. Notwithstanding Turkish presence, the ICC maintains jurisdiction over Northern Cyprus.\(^{164}\) Despite the extensive Turkish settlement enterprise in occupied Cyprus, where Turkish settlers now outnumber protected persons, neither Cyprus nor the Prosecutor or other groups have shown any formal interest in bringing the matter to the ICC.\(^{165}\) However, this only applies to territory that at one

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\(^{160}\) Ibid.
\(^{161}\) Ibid.
\(^{162}\) Al-Naami (2015).
\(^{164}\) Kontorovich (2013) p. 996.
\(^{165}\) I.c.
point was clearly within the sovereignty of the acceding State; there is no dispute about Northern Cyprus’s status before the invasion. In contrast, Area C of the West Bank was never under the sovereignty, to say nothing of the actual control, of Palestine. Schabas gives the Golan Heights, but not the West Bank, as another example of territory that would fall within ICC jurisdiction if the occupied State would join the treaty. This is because when Israel occupied the Golan, it was clearly Syrian sovereign territory: adjudicating Israel’s presence in the Golan would not require a border determination. The West Bank, on the other hand, was not sovereign Palestinian, or Jordanian for that matter, territory in 1967.

The Oslo Accords raise another issue: the inherently discretionary power of the Prosecutor not to proceed when an investigation, according to Article 53(1)(c) of the Statute "would not serve the interests of justice." Of course, to many, the settlements represent one of the greatest injustices in the world, but the language in the ICC Statute has a particular meaning. They allow the Prosecutor to avoid taking action to protect ongoing peace processes or their results.

The Oslo Accords established the fundamental assumptions and the momentum of the Israeli-Palestinian peace process, and created the framework for the gradual establishment of a Palestinian entity in the West Bank. Within the context of Oslo, a Palestinian government has been created which controls the vast majority of the Palestinian population, enjoys direct foreign relations with most countries in the world, and, of course, has recently been welcomed as a sovereign state by the General Assembly. All of these developments are a direct consequence of the Accords. On the other hand, the Oslo Accords established the principle of negotiated final borders and the interim maintenance of settlements. Israeli jurisdiction over settlements is as much a part of the peace process as Palestinian control of Ramallah and Jenin, even if it is not the expected final status.

The South Sudan/Sudan border dispute offers a good illustration of the effects of Oslo on the determinacy of Palestine's borders. In Sudan, a pre-independence arrangement adopted in

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166 There was a dispute over the border between Israel and Syria even before 1967, as Syria had in 1949 occupied a strip of territory on the eastern shore of the Sea of Galilee. But the civilian presence in the Golan lies in territory that was previously undisputedly Syrian.
167 Rome Statute Art. 53(1)(c).
2005 called for a modification of the prior relevant colonial boundary line by an agreed mechanism between Sudan and the southern region, in particular regarding a certain area. That process was never accomplished, but as a consequence of the 2005 agreement, the border between the two States remains undetermined. As a result of the 2005 agreement ‘there can be no automatic presumption of the reestablishment of the [colonial era] 1956 boundary’.\textsuperscript{169} Sovereignty over this area is unclear; as a consequence, the ICC would not have jurisdiction over crimes occurring in this area were only one of the Sudans to join the treaty. This is comparable to the Oslo Accords and subsequent agreements, which determined that the 1949 Armistice Lines would be modified, in particular concerning settlements. Thus, even if the 1949 Armistice Lines were a ‘boundary arrangement’ that created presumptive borders for a new State, which they were not, subsequent developments prevent there being presumptive borders, just as the Armistice Lines are said to prevent the presumptive reestablishment of Mandate boundaries.

4.4.3 Gaza

It is evident from the time frame given in the Article 12(3) declaration that Palestine wants the ICC to investigate the 50-day War that took place in Gaza during the summer of 2014 in addition to the settlements. In the declaration, Palestine extends the temporal jurisdiction of the ICC back to 13 June 2014, which is widely accepted as the start of the conflict. The 50-day War saw hostilities between Hamas, which controls the Gaza Strip, and Israel. For the ICC to prosecute Palestinian or Israeli nationals for the crimes mentioned above, the ICC has to identify Gaza as Palestinian territory.

Since the Six Day War in 1967 Gaza has been formally occupied by Israel. Despite Israel’s withdrawal from its positions in Gaza in 2005, there is still ongoing tension. Under international law, and as already established above, Israel continues to bear the responsibilities of an occupying power.\textsuperscript{170} According to the Oslo Accords signed in 1993, the PNA became the administrative body that governed Palestinian population centres while Israel maintained control of the airspace, territorial waters and border crossings.\textsuperscript{171} The land border with Egypt is con-

\textsuperscript{169} Vidmar (2012) p. 541.
\textsuperscript{170} McElroy (2014).
\textsuperscript{171} Ibid.
trolled by Egypt. Since 2007, following Hamas’ victory in the elections for the Palestinian parliament, Israel has imposed a blockade on Gaza. Israel maintains that it is necessary to impede Hamas from rearming and to restrict Palestinian rocket attacks.

Article 42 of the 1907 Hague Regulations states that: "Territory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".\(^{172}\) This has led to the development of the “effective control” norm to identify occupation. Israel maintains that the Gaza Strip is neither occupied nor part of a sovereign State.\(^ {173}\) Instead, it describes the Gaza Strip as “administered” or “disputed”.\(^ {174}\) Some argue that air and sea authority of itself does not amount to effective control,\(^ {175}\) and that Israel is merely exercising its rights concerning border control.\(^ {176}\) Moreover, they point to the fact that the Palestinians have exercised their right to self-determination,\(^ {177}\) and that Israel does not have a permanent military presence in Gaza, as evidence that Hamas has “effective control” over the Gaza Strip.\(^ {178}\) The Israeli Supreme Court has considered the issue a number of times.\(^ {179}\) The current position of the Israeli Supreme Court is that the Gaza Strip has not been occupied since 2005.\(^ {180}\)

Regardless of the views expressed above and Israeli case law, the more commonly held view is that despite Israel’s disengagement, the Gaza Strip remains occupied by Israel.\(^ {181}\) The “effective control” is evident from Israel’s control over Gazan airspace and waters, the Gazan border and crossings.\(^ {182}\) Moreover, in the ICJ Opinion on the Wall, the ICJ found that Israel is the occupying power in the Gaza Strip and the West Bank.\(^ {183}\) Various organs of the UN also maintain that Gaza is occupied Palestinian territory.\(^ {184}\) Hence, the same arguments as for the

\(^{172}\) Hague Convention.
\(^{176}\) Ibid. p.946.
\(^{178}\) Ibid. pp.226-227.
\(^{179}\) Ibid p.228.
\(^{180}\) Ibid. p.233
\(^{181}\) Spelman (2013)
\(^{182}\) Samson pp.933-934
\(^{183}\) Darcy and Reynolds (2010) p.234
\(^{184}\) Ibid. p.213
West Bank and East Jerusalem can be applied. Does the fact that Gaza is occupied mean that the occupied territory belongs to Palestine? No, not necessarily. One major difference is that in Gaza, the PNA has not delegated criminal jurisdiction over Israelis to Israel. The Monetary Gold principle can also be applies to the Gaza-situation.

It is important to remember that this is still only at the preliminary examination stage. The abovementioned arguments are still a part of the Article 53(1)(a)-(c) deliberation. To summarise, the Green Line and Armistice Agreements do not define the borders of a State of Palestine. Nor do the ICJ, EU or the UN provide any guidance as to where precisely these territorial boundaries lie. Although Israel is found to be an occupying power of Palestinian Territories, including East Jerusalem, it does not mean that the occupied territories belong to an assumed sovereign State of Palestine. The Oslo Accords delegate all criminal jurisdiction over Israelis in the settlements situation in the West Bank to Israel leaving the ICC without any authority to prosecute Israelis for crimes committed concerning the settlements. This leaves Gaza to be the only area of which Palestine could legally delegate criminal jurisdiction to the ICC, unless the Oslo Accords are put aside. Although occupied, Gaza can also not be said to be "on the territory" of the State of Palestine. If, by some great miracle the OTP manages to get past the vast hurdle that is the problem of territorial jurisdiction and finds a solution to the border dispute, the next phase of the preliminary investigation is the question of admissibility.
5 Issues of Admissibility

5.1 Complementarity

Issues related to admissibility could present other legal challenges for the ICC. If it can be shown that Israel is investigating and prosecuting its own nationals for the crimes in question, the situation is inadmissible before the Court. The ICC is based on the principle of complementarity. National jurisdictions have the primary responsibility to end impunity for the crimes listed under the Rome Statute, and the ICC only serves as a last judicial resort. Only when a national justice system has proven to be unwilling or unable genuinely to carry out the investigation or prosecution will the ICC be a viable option.185 A case is not admissible before the Court if it has been or is being investigated or prosecuted by a State, which has jurisdiction over it. Israel is known to prosecute its own nationals for crimes committed in war. Nevertheless, the ICC would have to assess Israel's justice system and its capability to deal genuinely with war crimes allegations, but also assess how prepared they are to do so.186 While the actual determination would be made on the basis of a particular case and the individual concerned, it cannot be overlooked that Israel, in general, has a well functioning legal system headed by a respected Supreme Court.187

Article 17(1) of the Statute sets out the criteria to assess the admissibility of a situation. Admissibility refers to the Courts ability to act. Even where the Court has jurisdiction, and all other criteria have been sufficiently met, it will not necessarily act. The principle of complementarity provides that certain cases will be inadmissible. In general, a case will be inadmissible, meaning the Court will dismiss the case if it has been or is being investigated or prosecutions have been made by a State with jurisdiction, or if the gravity criteria have not been sufficiently met. In determining whether to open an investigation, Article 53(1)(b) requires the OTP to consider whether "the case is or would be admissible under Article 17."”

Admissibility requires an assessment of complementarity, as laid out in Article 17(1)(a)-(c), and gravity, found in Article 17(1)(d) of the Statute. The OTP will have to assess complemen-

185 ICC Office of the Prosecutor (2013)
187 I.c.
tarity and gravity concerning "the most serious crimes alleged to have been committed and those most responsible for those crimes." In a preliminary investigation there is not yet a fully investigated case, in the sense of having identified a “set of incidents, suspects and conduct.” Therefore, when assessing admissibility at the preliminary examination stage, the OTP will have to take into account cases based on the information available, and issues that would most likely arise from an investigation into the situation. As part of its preliminary examination of the Situation in the Republic of Kenya and the Situation in the Republic of Côte d'Ivoire, the OTP focused its investigation on those bearing the greatest responsibility for the most serious crimes.

5.1.1 National Jurisdiction

In line with the criteria of Articles 53(1)(b) and 17(1)(a)-(c), the complementarity assessment is case-specific and pertains to whether legitimate investigations and prosecutions have been or are being conducted in the State concerned. Article 17(1)(a)-(c) reads:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

If the OTP can sufficiently prove that the Israeli judicial system is unwilling to conduct investigations and prosecute its own nationals for atrocity crimes, the ICC can step in. If, on the other hand, Israel carries out its own investigations in good faith, it would be protected from

189 Ibid para. 43.
190 I.c.
191 Ibid para. 45.
most liability, potentially, even if nobody is ever indicted.192 The determining factor is the absence of relevant proceedings. It is not the OTP’s job to evaluate a national justice system as a whole.193 The absence of national proceedings is sufficient to make the case admissible. Furthermore, this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time.194 The ICC’s Policy Paper on Preliminary Examination expands on this in further detail.

If Israel conducts its own investigation, the OTP will face an overwhelming challenge having to prove bad faith, to carry on its investigation.195 Israel has a sophisticated justice system, and its government recently adopted the Turkel Commission’s recommendation to strengthen the independence and impartiality of military investigations of credible war crimes charges.196 To show bad faith or “unwillingness” as stated in the Statute, the Prosecutor would have to show that:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.197

Proving the abovementioned criteria in Article 17(2) of the Statute could prove to be especially difficult if Israel refuses to cooperate. Israel has several times expressed its unwillingness

192 Luban (2015).
194 I.c.
196 Turkel Commission (2010).
197 Rome Statute Article 17(2).
to cooperate, despite the ICC’s demand.\textsuperscript{198} Conducting an investigation will be especially difficult if the Israeli government refuses to share information from its own investigations, which it will almost certainly do.\textsuperscript{199} The Prosecutor of the ICC, Fatou Bensouda, has stated "if Israel does not cooperate with us in our investigation into the recent war on the Gaza Strip, the investigation will be carried out based on the materials that were made available." Such "materials" are those provided by the Palestinians.\textsuperscript{200}

However, that does not make for an impartial and independent investigation in line with the principles of the Statute. Going forward as such might only damage the reputation of the ICC.\textsuperscript{201} Of course, all the same considerations would apply to Palestine. It could invoke complementarity if it were willing and able to investigate and prosecute crimes by Palestinians. This could lead to immense political friction if the PNA investigates the Hamas leadership for rocket attacks against Israel. Under those circumstances, if Hamas stonewalls the investigation, the ICC might find that Palestine is unable to fulfil its responsibilities, in much the same way that it found Libya unable to prosecute Gaddafi.\textsuperscript{202}

Attacks by Palestinian nationals against Israel are now open for investigation and prosecution by the ICC because the Statute has been delegated both territorial and personal jurisdiction over the relevant crimes by Palestine.\textsuperscript{203} And by joining the ICC, Palestine has committed itself to cooperating with investigations and prosecutions, including handing over perpetrators and evidence to The Hague. Palestine's membership in the ICC can in some ways enhance Israeli security, by giving the Palestinian leadership incentives to restrain attacks on Israel.\textsuperscript{204}

However, Israel has one major problem in particular. Under the Rome Statute, “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the

\textsuperscript{198} The Middle East Monitor (2015).
\textsuperscript{199} Luban (2015).
\textsuperscript{200} The Middle East Monitor (2015).
\textsuperscript{201} I.e.
\textsuperscript{202} Luban (2015).
\textsuperscript{203} Ibid.
\textsuperscript{204} Ibid.
territory it occupies” constitutes a war crime, and that exposes Israel to prosecution for settlement activity in Palestine. It is highly unlikely that Israel will investigate or prosecute its own leadership for settlement activity. Thus, complementarity offers no protection in regards to the settlements that Palestine has asked the ICC to investigate, unless the settlements are located in the West Bank or East Jerusalem. Pursuant to the Oslo Accords, Israel has retained sole criminal jurisdiction in all zones laid out by the Accords. Palestine, therefore, has no jurisdiction in these areas of which to delegate to the ICC. On the other hand, if Israel can be found to be engaging in “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” and subsequent settlement activity in areas that are considered occupied Palestinian territory but that are not encompassed by the Oslo Accords, then the ICC would have jurisdiction.

In theory, the Israeli government has the power to ensure that the ICC never considers a case against any of its citizens, simply by making sure that its legal system conforms to the terms stated by Netanyahu. Whatever the outcome, it will certainly be interesting to see how the OTP will address the issue of complementarity.

5.1.2 Evidence Demonstrating the Unwillingness of the Israeli Justice System

In response to the announcement that the prosecutor of the ICC was opening a preliminary investigation of the situation in Palestine, the Jerusalem Post reported in January 2015 that Israeli Prime Minister Benjamin Netanyahu had stated that Israel "upholds the highest standards of international law," and its actions are "subject to the constant and careful review of Israel's world-renowned and utterly independent legal system."

If this were the situation – any case against Israeli nationals would be inadmissible before the Court because the national justice system of Israel is both able and willing to prosecute its own national for atrocity crimes. However, there is substantial evidence to the contrary.

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205 Rome Statute Article 8.
207 Keinon and Toameh (2015)
Descriptions offered by authoritative governmental and non-governmental sources indicate that the Israeli civil and criminal legal systems deviate from the radiant description given by Netanyahu. The Prosecutor and the Pre-Trial Chamber may find such authoritative evidence to be sufficiently persuasive as to decide not to defer cases to Israeli government investigation and prosecution. The following section examines the most compelling evidence advocating for the unwillingness of the Israeli justice system to impeach its own nationals for crimes relevant to the ICC, namely atrocity crimes.

5.1.2.1 UK and US Reports

A report issued by the UK Foreign and Commonwealth Office on 21 January 2015 states:

"We continue to be concerned about the dual court system employed in Israel and the OPT's [occupied Palestinian territories]. All Palestinians, except those residing in East Jerusalem, are subject to trial in Israeli military courts, regardless of the charges against them, while Israeli settlers are tried in Israeli civil courts."208

The US Department of State's "Country Report on Human Rights Practices for 2014, Israel and The Occupied Territories" confirms the UK report of separate and unequal legal systems:

"Non-Israeli residents of the Israeli-occupied Golan Heights were subject to the same laws as Israeli citizens. Noncitizens of Palestinian origin detained on security grounds fell under military jurisdiction even if detained in Israel."209

Furthermore,

"... Authorities held most Palestinian minors (under age 18) arrested in the West Bank and Gaza in prisons in Israel but prosecuted them under the Israeli military law applicable to the occupied territories, which denies many of the rights they would be granted under Israeli law..."

209 U.S Department of State (2014).
Also, the US State Department country report for Israel gives details of the system of "administrative detention" without trial that has been exclusively reserved for Palestinians. "[T]he 1979 Emergency Powers Law allows the defence ministry to detain persons administratively without charge for up to six months, renewable indefinitely."

The report also presents allegations of torture and abuse in the Israeli legal system exclusively directed at Palestinians. The report states that "human rights organizations alleged that interrogation methods permitted by [Israeli] law and used by [Israeli] security personnel included beatings and forcing an individual to hold a stress position for long periods." The report also states that "non-governmental organizations (NGOs) continued to criticize other alleged detention practices they termed abusive, including isolation, sleep deprivation, and psychological abuse such as threats to interrogate family members or demolish family homes." The report describes the alleged torture of Palestinian Arafat Jaradat, who died in custody at Megiddo prison in Israel.

5.1.2.2 UN Fact-Finding Mission

The UK and the US State Department reports were consistent with the Report of the UN Fact-Finding Mission on the Gaza Conflict, issued on 25 September 2009. The UN Fact-Finding Mission highlights its concern regarding the Israeli legal system.

"The Mission emphasizes that effective investigation and, if appropriate, prosecution resulting from acts by its agents or by third parties involving deprivation of life, serious injuries and torture or inhuman or degrading treatment or punishment, and other possible violations of international humanitarian law and human rights law, is an obligation of the State of Israel. The mission is concerned that the facts before it point to a failure by Israel to do so with regard to acts committed against Palestinians."\(^{210}\)

Furthermore,

"... The Mission is gravely concerned at the increased use of force, including the use of lethal force, in response to demonstrations, and at the generalized violence of secu-

rity forces against Palestinians living under occupation in the West Bank. Of particular concern is the apparent and systematic lack of accountability for acts of violence committed by Israeli security forces against Palestinian civilians.”

The UN Fact-Finding Mission also noted that:

“... If settlers are convicted, the sentences are reported to be very light. This practice should be contrasted with the harsh treatment and punishment meted out to Palestinians who harm Israelis. This has been described as a discriminatory policy. Similarly, action against members of security forces who commit acts of violence, including killings, serious injuries and other abuses, against Palestinians is very rare. Information available to the Mission points to a systematic lack of accountability of members of the security forces for such acts.”211

The Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.212

Also inconsistent with Netanyahu's claim regarding the Israeli legal system, the 22 June 2015 report of the Independent Commission of Inquiry established by the UN Human Rights Council states:

“The commission is concerned that impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrongdoers accountable, not only as a means to

211 Ibid. Para. 1825.
212 Ibid. Para. 1832.
secure justice for victims but also to ensure the necessary guarantees for non-repetition.\textsuperscript{213}

Again, concern that the Israeli justice system is exempting Israeli nationals from punishment and unwilling to prosecute, is voiced by the international community.

5.1.2.3 Turkel Commission

The Israeli government itself found serious inadequacies in the Israeli legal system. Prime Minister Netanyahu appointed an official Israeli government public commission headed by former Israeli High Court Justice Jacob Turkel to investigate the Flotilla incident that took place in 2010. It is also worth noting that this incident was referred by Comoros to the ICC, but a formal investigation was never opened. The commission was also charged with investigating how Israel examines and investigates claims that it violated the laws of armed conflict under international law.

Although the Turkel Commission report lined up with the Israeli government's views regarding the Flotilla and the blockade of Gaza, and although it cleared Israeli soldiers of any wrongdoing, it issued 18 recommendations in the report it submitted to Prime Minister Netanyahu in February 2013.

The first of these recommendations noted that Israeli criminal law does not include crimes recognised in international criminal law, including the war crimes established under the Rome Statute of the ICC. The Turkel Commission's first recommendation was that legislation needed to be adopted by Israel making these war crimes illegal under domestic Israeli criminal law.

Although Prime Minister Netanyahu appointed a second commission under Dr. Joseph Ciechanover to oversee implementation of the Turkel Commission recommendations, no action has yet been taken regarding including Rome Statute crimes into Israeli law, as described in an October 2015 analysis of the status of the 18 recommendations conducted by Israeli human

\textsuperscript{213} A/HRC/29/52.
rights organization Yesh Din.\textsuperscript{214} Israel did not add war crimes to its domestic law when the Turkel Commission made the recommendation in 2013. Therefore, alleged war crimes under the Rome Statute since June 13, 2014, cannot be investigated and prosecuted by the Israeli legal system. Although Israel has not incorporated war crimes and the specifics of the Statute to its national legislation, it must be noted that the crimes set forth by the Statute are in general considered customary international law, and that Israel in any event has to abide by these rules as such.

Israel's own official Turkel Commission urged action to close the gap between domestic criminal law and war crimes under the Rome Statute to shield Israeli nationals from prosecution in an international tribunal. Israeli political leaders failed to do so. Israeli political and military leaders must be aware that the ICC prosecutor is, therefore, unlikely to find that the Israeli legal system is willing and able to investigate and prosecute its citizens for alleged war crimes under the Rome Statute.\textsuperscript{215}

The evidence from the US and UK governments, two independent UN Human Rights Council reviews and several non-governmental organizations suggests that the Israeli legal system fails to meet the standard of impartiality, independence and willingness required by the Rome Statute for investigating and prosecuting Israeli political and military leaders for offences committed on the territory of Palestine. If it can be shown that the Israeli legal system accepts a general separate and unequal system to exist, and that it has institutionalized impunity, Israel disqualifies itself from meeting standards required by the Rome Statute of impartiality, independence, and willingness and ability to investigate and prosecute Israeli political and military leaders.\textsuperscript{216}

The ICC Prosecutor will have the opportunity to provide an independent and impartial assessment of the Israeli justice system in her evaluation of whether to defer the investigation and prosecution to Israeli. If the prosecutor determines that the Israeli justice system is as described by Netanyahu, the case is inadmissible and ICC will be able to defer cases for Israeli investigation and prosecution. The prosecutor and the Pre-Trial Chamber can also refuse to

\textsuperscript{214} Ciechanover Commission (2015).
\textsuperscript{215} Leas (2015)
\textsuperscript{216} Ibid.
defer if they determine that justice for Palestinians is genuinely unavailable under the Israeli legal system.\textsuperscript{217} If the ICC refuses to defer cases to the Israeli legal system, those individuals responsible for the impunity alleged by the authoritative governmental and non-governmental sources will be subject to investigation and prosecution by the ICC.\textsuperscript{218}

5.2 Gravity

The gravity aspect of the admissibility assessment does not offer quite as many problems as that of complementarity. Gravity refers to the seriousness of the alleged crimes. Although any crime falling within the jurisdiction of the Court is serious, Article 17(1)(d) requires the Court to “assess whether a case is of sufficient gravity to justify further action by the Court.”\textsuperscript{219} Pursuant with the Court’s purpose, the legal bar for the interpretation of gravity is not set overly restricted.\textsuperscript{220} It would be a shame for cases of major breaches of international criminal law to go unpunished because not enough people were killed, or they did not die a gruesome enough death. The OTP’s assessment of gravity includes both “quantitative and qualitative considerations”.\textsuperscript{221} As specified in regulation 29(2) of the Regulations of the OTP, the factors that guide the Prosecutors assessment include the “scale, nature, manner of commission of the crimes, and their impact.” The scale of the crimes may be assessed in light of, inter alia, “the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).”\textsuperscript{222} How the nature of the crimes, the manner of commission and the impact of the crimes may be assessed is similarly expanded on on the Policy Paper mentioned above.

It is worth noting that "the principle of impartiality as described above does not mean an 'equivalence of blame' between different persons and groups within a situation, or that the Office must necessarily prosecute all sides, in order to balance off perceptions of bias; in-
Instead, it requires the Office to focus its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner.\textsuperscript{223} Those most responsible are recognized to be those who carry the greatest responsibility for the crime in question. The ICC is interested in targeting for example generals, high-ranking officials, and State leaders who give orders and create policies rather than low ranking, "foot soldiers" merely carrying out orders.

It is quite certain that the Palestinian case will meet the gravity criteria. This assumption is based on the rather convincing UN Human Rights Council Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict. The assessment will, of course, be up to the OTP in the end, and finally the judges of the ICC.

\footnotesize{\textsuperscript{223} Ibid para. 66.}
6 The Opening of an Investigation

An accession and the submission of an Article 12(3) declaration by Palestine does not initiate an investigation or prosecution by the Court automatically. An Article 12(3) declaration is not a State Party referral; instead it is a declaration giving the Court jurisdiction over a specific territory, within a specific time frame. For the preliminary examination to result in an actual investigation, one of the so-called trigger mechanisms in the Rome Statute would have to be utilized. These can be found in Article 13 of the Statute. Should the Prosecutor come to the conclusion that there is a reasonable basis to believe that atrocity crimes have been committed in the Palestinian situation, and the situation is found to be admissible before the Court, one of these trigger mechanism have to be initiated in order for the OTP to be authorized to open a full-scale investigation into the situation. Hence, there are still a few challenges that the OTP will have to overcome. Some originate from the Statute itself, and others are of a political nature. This chapter will consider and analyse some of these final hurdles.

6.1 Article 13: Exercise of Jurisdiction and Article 15: Proprio Motu Powers

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

If the OTP finds that the reasonable basis criteria of the Rome Statute to open a formal investigation into the Palestinian situation have been met, the OTP may exercise its jurisdiction and

proceed with an investigation if the situation was referred (i) by a State Party, such as Comoros, who referred the Gaza Flotilla incident to the ICC, or, as of 1 April 2015, by Palestine itself; (ii) a referral by the UN Security Council, which seems highly unlikely due to the USs stance on the situation; or (iii) an opening of the investigation by the Prosecutor \textit{proprio motu} subject to the authorization of the ICC Pre-Trial Chamber.\footnote{Luban (2015).} \textit{Proprio motu} power refers to the Prosecutors own authority. States cannot \textit{initiate} an investigation. Only the OTP and its Prosecutor can. States can only agree to, invoke, or refer matters to the ICC. Hence, \textit{initiate} cannot be interpreted as meaningless. The most rational meaning of "initiate" is to "put in motion" or "trigger" events that lead to an ICC investigation. By lodging an Article 12(3) declaration in January 2015, Palestine has already \textit{initiated} or invoked the ICC’s jurisdiction in the sense that it has accepted the jurisdiction of the ICC within the territory of Palestine. However, the Article 12(3) declaration submitted by Palestine cannot be interpreted as an Article 14 State Party referral required by Article 13(a).

Unlike State Party or UN Security Council referral, the \textit{proprio motu}-mechanism requires judicial authorization for an investigation to begin.\footnote{Rome Statute Article 15(3).} The rules regulation the Prosecutors \textit{proprio motu} powers can be found in the Statute’s Article 15. The prosecutor will have to submit a request for authorisation to initiate the investigation from the Pre-Trial Chamber of the ICC along with any supporting materials and evidence collected.\footnote{Ibid.} The Pre-Trial Chamber will then have to consider if there is a \textit{reasonable basis} to proceed with the investigation and that the case appears to fall within the jurisdiction of the Court. As the situation stands today, this is what needs to be done in order to move on from the preliminary examination \textit{should} the OTP, first of all, find that there is a \textit{reasonable basis} to proceed. Palestine has yet to submit an Article 14 State Party referral.

If the Pre-Trial Chamber, after examining the OTP’s request and supporting evidence, considers that there is a \textit{reasonable basis} to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, “without prejudice to subsequent determinations by the Court with regard to the juris-
diction and admissibility of a case. The refusal of the Pre-Trial Chamber to authorize and investigation shall not prevent the submission of a new request by the Prosecutor based on new facts or evidence regarding the same situation.”

Only two situations have up until this point been opened using *proprio motu* powers: Kenya and Ivory Coast. In the authorization of both investigations, the Pre-Trial Chamber had to evaluate the jurisdictional requirements of the Court; and in the Kenya situation, the Pre-Trial Chamber even went so far as to establish specifically the territorial scope of the investigation. However, there was never any doubt that this territory was Kenyan as will be the case for the Palestinian Situation. In light of this we could expect the judges to rule on the question of territorial jurisdiction at this stage in the proceedings. The Prosecutor could, despite all this, essentially decide not to investigate any further, or to prosecute. On the contrary, however, Fatou Bensouda seems eager to proceed, despite political pressure to do quite the opposite. However, given Palestine’s statements in the past and determination to proceed with an ICC investigation, a *proprio motu*-referral seems unlikely. All signs indicate that Palestine will make an Article 14 State Party referral in the not so distant future, rendering a *proprio motu* judicial authorization requirement unnecessary to initiate an investigation.

### 6.2 Article 14: Referral of a Situation by a State Party

On 1 April 2015 another option presented itself for Palestine. On this date, the Rome Statute entered into force, which meant that Palestine as a State Party could effectively refer its own situation to the ICC. The rules for this are found in Article 14 of the Statute:

> 1.) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the

228 Rome Statute Article 15 (4)
230 Ibid.
231 Ibid.
232 Bensouda (2014).
233 Høgestøl (2015)
234 Rome Statute Article 14.
Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2.) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

This might be a much better alternative for Palestine, as the prosecutors will no longer have to apply for authorization to launch an investigation. With so many unclear elements, it seems unlikely that the Pre-Trial Chamber would grant the prosecutors this authority; hence, it might be a safer option for Palestine to refer the situation under Article 14.

Furthermore, Article 19(1) of the Statute also allows the Pre-Trial Chamber to pre-emptively consider and rule on questions of jurisdiction during an investigation:

“The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.”

Article 19(1) allows the judges of the Pre-Trial Chamber to address the problems related to jurisdiction at an early stage in the proceedings. If an investigation is launched, it seems like a rational approach forward to address these issues early on.  

Even if Palestine were to refer its situation to the Court, the Prosecutor could still decide not to investigate any further or to not prosecute at all following the preliminary examination. If the referring State wishes to challenge such any decision made by the Prosecutor, it would then be up to judges of the Court to decide. And even if Palestine makes an Article 14 State Party referral in the future, the OTP will likely take many more years to evaluate the situation before even attempting to open an investigation. It has already taken over a year.

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236 Rome Statute Article 53.
6.3 Article 16: Deferral of Investigation or Prosecution

The Rome Statute contains a provision, Article 16, which allows the UN Security Council to pass a resolution under Chapter VII powers to defer an ICC investigation or prosecution for a renewable period of 12 months. Article 16 states in full:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Chapter VII of the UN Charter empowers the Security Council to take measures to "maintain or restore international peace and security" if it has determined "the existence of any threat to the peace, breach of peace or act of aggression." Article 16 was never intended for use in other than exceptional circumstances.

The Security Council has yet to defer an ICC investigation or prosecution in the Court's almost fourteen-year history. However, this might become a reality when it comes to the Israel-Palestine conflict. In the current international climate, stability in the Middle East is crucial for international peace and security. By allowing the Palestinian situation to proceed past the preliminary examination stage, the ICC could further provoke Israel. This could in turn and hinder any progress in an already fragile and stagnant peace process. Israel has already voiced its outrage over Palestine’s accession to the Statute and has publicly announced it will not cooperate with the Court.237

According to Article 27 of the UN Charter, a decision to defer an ICC investigation or prosecution under Article 16 requires a positive vote of nine of the 15 members of the Security Council. The permanent members of the Security Council have veto powers and a negative vote by a permanent member would prevent a resolution of a request for a deferral from being adopted. A vote to defer would most likely come from the US, which has always opposed

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Palestine's decision to join the ICC. However, US opposition to the ICC addressing the Palestinian situation will be discussed in more detail below.238

At the end of a 12-month deferral period, the suspension concludes. To trigger another suspension, the Security Council has to reconsider whether or not to once again invoke Article 16 of the Rome Statute. “The affirmative vote of nine members, including the concurring votes or abstentions of permanent members of the Council on the basis of a continued threat to peace and security, is again required.”239 There is no limit on the number of times a Security Council deferral may be renewed, and it is of concern that once a deferral has been invoked, the Council will be more likely to continue renewing the suspension, possibly delaying the prospect of justice indefinitely.240

A deferral of an ICC investigation risks legitimizing political interference with the work of a judicial institution and could set a dangerous precedent for the accused in other situations. Any exception to this must be exceedingly well justified.

### 6.4 Article 18: Preliminary Rulings Regarding Admissibility

Article 18 requires the OTP to inform the relevant parties involved in a situation, Palestine and, as a non-State Party, Israel, that either a *proprio motu* or a State Party referred investigation has been initiated:

1.) *When a situation has been referred to the Court pursuant to Article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to Articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.*

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238 UN Charter Article 27.
240 Ibid.
2.) Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

In this situation, Israel or another relevant State, would have a one-month period to request the ICC led investigation to stop because a State-led investigation is occurring or has occurred. If this request is made, the Prosecutor “shall defer to the State’s investigation … unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the [Prosecutor’s] investigation.” If the Prosecutor does, in fact, receive such authorization, the investigation would then become “judicially authorized.” In other words, even an investigation that was initiated following a State Party’s referral, might require judicial authorization if a relevant State objects to the investigation. Whether or not Israel would protest at this stage remains to be seen. However, it might depend on the focus of the OTP’s investigation.\(^\text{241}\)

If the OTP has indicated that it will be focusing on alleged crimes committed during the most recent Gaza conflict. If this is the case, Israel is likely to request for the ICC to defer these cases to Israeli national proceedings. This is because Israeli authorities claim that they have already taken steps to investigate crimes committed during this conflict. On the contrary, if the ICC indicates that any part of its investigation relates to settlements, it would be harder for Israel to argue that it is investigating these settlements. The reason for this is that Israel has always argued against the illegality of such settlements. Why would the Israeli justice system investigate something they perceive to not be illegal. Nevertheless, Israel could still request a deferral here based on a genuine intent and willingness to investigate these crimes. Nevertheless, for the Prosecutor to override Israel’s deferral request in either circumstance and pursue her own investigation, she would need “judicial authorization.”\(^\text{242}\)

\(^{241}\) Rome Statute Article 18.

\(^{242}\) Hale (2015).
The only reason for Israel not to seek an ICC deferral under to Article 18 is if it concludes that any engagement with the ICC legitimizes an institution that it has recently sought to discredit. Israel may conclude, however, that a detached strategy will not have much delegitimizing effect given that 122 States — including many of its allies — are currently States Parties of the ICC. 243

Either way, it would be surprising if this situation even arose. Admissibility would be considered at the preliminary stage, and if found inadmissible the Prosecutor would not proceed to open an investigation. Should Israel decide to initiate an independent investigation into the alleged crimes at a stage where an investigation already has been opened, the entire situation might be inadmissible due to complementarity. However, only if Israel's investigation can be shown to be of good faith will it warrant the ICC's deference.

6.5 Lack of Cooperation from Israel

Israel has yet to cooperate with the ICC. Israeli President Netanyahu has commented on the decision of the ICC prosecutor to launch a preliminary investigation, calling it “absurd for the ICC to ignore international law and agreements, under which the Palestinians don’t have a State and can only get one through direct negotiations with Israel.” 244

Israel has up until this point prevented Hague officials from visiting the scene of the alleged crimes in Gaza and the West Bank, and has withheld from collaborating with the UNHRC. Israel has made it clear that they will not be handing over evidence, or nationals for that matter, to the Court.

Israel has also rejected the findings of the report from the UNHRC appointed commission, going so far as to issue its own report on the 50-day War. The Israeli report concludes that Israel did not commit war crimes during the conflict. 245 Israel, which refused to co-operate with the investigation in the first place, claims that the report fails to recognize the "profound difference" between "Israel's moral behaviour" and the "terror organizations" it confronted. 246 Netanyahu has further criticized the report, claiming that the UNHRC “is neither interested in

243 Ibid.
244 Bob (2015).
facts nor human rights; and that “the report is biased. The commission that wrote it is under a committee that does everything but protect human rights.”

Fatou Bensouda has confirmed that the focus of the preliminary examination will be crimes allegedly committed during the 50-day War. In doing so, the ICC may face a discouraging uphill battle with Israel throughout the investigation, and a lack of Israeli cooperation could significantly frustrate any progress. Nevertheless, it appears that Bensouda is set on moving forwards with an investigation and has made it clear that if Israel continues to hinder efforts made by the ICC, the investigation will be carried out based on the materials that are available. Those would be mostly Palestinian. However, if Israel has not committed any war crimes, and as Netanyahu claims is the “most moral army in the world,” then Israel would have nothing to fear from an investigation by the ICC.

6.6 The Problem of Prosecuting Non-State Party Nationals

Israel is not a State Party to the ICC and is, therefore, not obliged to cooperate with the Court, nor to hand over its nationals for prosecution. Israel has made it abundantly clear that it plans on doing absolutely nothing in order to please the Court. The territorial jurisdiction of the ICC, however, gives the Court jurisdiction over all individuals who have participated in the execution of atrocity crimes on the territory of a State Party, including the nationals of non-State Parties. Hence, the Court can still prosecute Israeli citizens if it is able to make arrests.

Exercising jurisdiction over States that are not State Parties of the ICC without the consent of that State is quite controversial, and the ICC has yet to exercise this power. There are three instances in which the ICC may assert jurisdiction over non-State Party nationals. The first is in situations that have been referred to the ICC by the UN Security Council. Secondly, non-State Party nationals are subject the ICC jurisdictions if they have committed crimes on the

249 The Middle East Monitor (2015).
250 Deger (2014).
251 Høgestøl (2015).
territory of a State Party, or has otherwise accepted the jurisdiction if the Court. And finally, the ICC may exercise its jurisdiction in regards to a situation in which the non-State Party has agreed to the jurisdiction of the Court with respect to a particular crime. The US, a non-State Party, has actively objected that the Court could in some cases have jurisdiction over its nationals, arguing that it contradicts international law and principles of sovereignty.

The Palestine Situation could be the first instance in which ICC will attempt to prosecute a citizen of a State not Party to the Statute. In this sense, the Palestinian situation serves as an illustration of a major institutional weakness of the Court's jurisdiction over non-State Party nationals. The ICC does not have the means to force a non-State Party, in particular, a strong State like Israel with even more powerful allies, to hand over its nationals to the Court.

In the interest of impartiality, the OTP will most likely attempt to investigate and possibly indict both Palestinian and Israeli citizens for atrocity crimes. There is no indication to the contrary. However, only Palestine will be legally bound to comply with summons or arrest warrants issued by the Court. This might create a situation in which the ICC has the legal capacity and can in theory prosecute both Palestinians and Israeli citizens for war crimes, but in reality, can only pursue Palestinian nationals. Moreover, should Israel decide to invoke complementarity and pursue its own nationals for war crimes, the ICC could be left with jurisdiction over Palestinian nationals only. It will most likely be ill received in Palestine and the Middle East if, despite its best efforts, the Court were to end up prosecuting solely Palestinian nationals for crimes which occurred in Gaza during the summer of 2014.

6.7 A Border Defining Body?

The Palestinian situation raises the rather important question of whether the ICC is the correct judicial forum to determine the borders between Israel and Palestine. Settling border disputes would certainly be a novel task for an international criminal court. Another important point is that by accepting the notion that the occupied territory is equivalent to Palestinian territory, it

253 Ibid.
255 Ibid.
would greatly undermine the jurisdiction and legitimacy of the ICC. It would make the extent of the ICC’s jurisdiction always undefined, and non-State Parties would be vulnerable to ICC suits simply by neighbours convincing the Court that a certain territory is theirs.

The unanticipated consequences of allowing for territorial jurisdiction despite uncertain territorial sovereignty are far-reaching. Finding ICC jurisdiction based primarily on a majority vote in the General Assembly would encourage numerous entities to seek statehood there, and follow it up with an ICC referral. Immediately after the Palestine vote at the General Assembly, the Sawahari Arab Democratic Republic announced they would seek a similar vote.\(^{256}\) If they succeeded, would they then be able to bring a range of ICC matters against Morocco involving purely Moroccan-administered Western Sahara before the Court?

Moldova is a UN Member State, although its eastern region, Transniesteria, has been under Russian control ever since a brief war leading up to Moldova’s independence. There is no dispute that the area is within Moldova’s sovereign boundary; can Moldova then refer a situation involving Russian settlement activity to the ICC?\(^{257}\) Serbia is an ICC State Party and a full UN member. Can Serbia refer crimes occurring in Kosovo, or the majority Serb regions of Kosovo, to the Court? This example shows that the mere fact that the UN recognizes a State does not mean it also determines its borders, in particular for purposes of the ICC’s Article 12 territorial jurisdiction requirement.

6.8 Political Pressure

Following the accession of Palestine to the ICC, and the opening of a preliminary investigation 16 January 2015, the US was quick to condemn the actions taken by the Court. A spokesperson from the State Department has stated that the US “strongly disagree with the ICCs prosecutors actions”, and that "It is a tragic irony that Israel, which has withstood thousands of terrorist rockets fired at its civilians and its neighbourhoods, is now being scrutinized by the ICC."\(^{258}\)

\(^{256}\) Kontorovich (2013) p. 984.
\(^{257}\) Ibid.
\(^{258}\) The Australian News (2015).
The US has also threatened to cut off aid to Palestine if the ICC moves forward with an investigation. Lindsey Graham, a US Senator has stated “the existing U.S. legislation would cut off aid to the Palestinians if they filed a complaint against Israel.” Furthermore at a news conference in Jerusalem, Graham called the Palestinian step "a bastardising of the role of the ICC." The U.S. and President Obama maintain, like Israel, that Palestine is not a sovereign State and, therefore, does not qualify to be part of the ICC. However, President Obama himself has not explicitly threatened to withhold aid.

A cut in U.S. funds could make it difficult for the PNA in the West Bank and Gaza to survive. The U.S. supplies more than $400 million annually to the Palestinian Authority. In response to Palestine’s accession to the Statute, Israel was quick to freeze monthly transfers of some $120 million in tax revenues it collects for the Palestinians; however, the international community quickly condemned the move resulting in the funds being released a few months later. In April 2016, the US has yet to act on its threat to cut aid. However, the investigation is still only at the preliminary stage. Should the ICC decide to go ahead with a full investigation into the Palestinian situation, this could change. It demonstrates the vulnerable position of Palestine and the ICC, and how powerful the opposition is.

Furthermore, in the Consolidated Appropriations Act of 2015, US aid to Palestine is conditioned on the latter not “initiat[ing] an International Criminal Court judicially authorized investigation, or actively support[ing] such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians.” Yet, in either case, “initiat[ing]” the jurisdiction of the ICC is not enough to trigger a cut off in aid. There must be a “judicially authorized investigation” of Israeli nationals for alleged crimes against Palestinians as well. Unfortunately, this term is a novel one not defined by the Rome Statute, US law or been interpreted by a court.

When the “judicially authorized” language first passed in mid-2013, the UN General Assembly had already recognized Palestine as a Non-Member Observer State. With this status, Pal-

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260 Ibid.
261 Ibid.
262 Ibid.
estine had the option of joining the Rome Statute and then referring the situation regarding its territory to the Court for investigation according to Article 14, thus bypassing the "judicially authorized" requirement. As such, a cut-off of US aid would then only be triggered in one circumstance: Palestine decides not to make an Article 14 referral for an investigation and the Prosecutor seeks and receives judicial authorization to open an investigation proprio motu. However, all signs indicate that Palestine will make an Article 14 State Party referral at some stage, making the proprio motu judicial authorization requirement unnecessary for an investigation to go forward. Altogether, the circumstances militate toward the Prosecutor likely seeking judicial authorization for an investigation at some point, which she will receive provided her case is meritorious. A mandated cut-off in US aid to Palestine would then follow. It is unlikely, however, that the Prosecutor will seek this authorization anytime soon, the preliminary examination might drag on for years, and the threat of a cut-off in US aid might explain why Palestine has not issued an Article 14 State referral yet.

**6.9 Other Institutional Weaknesses of the ICC**

The Court cannot be successful without active and steadfast support from State Parties, not only by advocating their support but also, more importantly, by carrying out and enforcing the work of the ICC. The Court is one hundred percent dependent on active criminal cooperation, on the support of State Parties. As the Court has no executive powers and no police force of its own, it is entirely dependent on full, effective and timely cooperation from its States Parties. As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions. As already shown concerning the principle of complementarity, also in this respect it was the wish of the Court’s creators that States’ sovereignty should prevail.

Another very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometres away from the Court, of difficult access, unstable and unsafe. Carrying out investigations in, for example, Uganda, the Democratic Republic of the Congo, the Central African Republic or Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutors or court are faced with. Another grim reality is the noto-
rious scarcity of financial and other resources available for investigations and other work of the Court.

State Parties must draw appropriate conclusions from the well-known fact that the Court has no executive powers, no police, no armed forces or other executive mechanisms. Consequently, State Parties and the Court must in a foreseeable future develop a new system of best practices of effective criminal cooperation: direct, flexible, without unnecessary bureaucracy, with a fast flow of information and supportive measures. This system must fully take into account that the ICC can be only as strong as the State Parties make it. This concerns, in particular, unresolved questions regarding arrest warrants and transferring suspected criminals to The Hague. It is evident that the State Parties and all forces who support the ICC cannot let down the Court in respect of arrests, such as South Africa's failure to arrest the ICC-indicted Sudanese President Omar al-Bashir.
7 Conclusion

As demonstrated, there are several key legal issues that will have to be resolved before the OTP can proceed to open a formal investigation and bring the case before the judges of the ICC. First, there is the question of statehood. Although highly unlikely, the judges may review and recant the Courts earlier stance on their own accord, or following a protest from a State Party. Whether or not Palestine constitutes a State will, at some point be up for reassessment by the judges.

The second major issue is that of national boundaries and territorial jurisdiction. Deciding on the borders of Palestine is far beyond the powers of the ICC. Nationals other than Palestinians could only be investigated and prosecuted by the ICC for committing a crime within the Court’s jurisdiction in the territory of Palestine. The borders of Palestine remain largely undefined; that is likely to be a problem for the Court. Defining the boundary for jurisdictional purposes would drop the prosecutor into one of the world's most heated disputes. Whether the Prosecutor would wish to tread there remains to be seen.

Another issue arising insofar Israeli nationals are concerned, stems from the Oslo Accords. According to the agreement, Israel retained sole criminal jurisdiction over criminal offenses committed by Israeli nationals in all zones of the West Bank. Therefore, Palestine has no jurisdiction over Israelis to delegate to the ICC in the first place. Again, it remains to be seen whether the ICC Prosecutor or judges will accept such an argument.

Moreover, labelling Israel as an occupying power does not necessarily mean that the occupied territory is Palestinian. It highlights once again the legal uncertainties that have arisen by accepting Palestine as a State Party of the ICC, without first having clarified its geographical borders.

Accepting a referral would make the scope of the ICC's jurisdiction always indeterminate – non-States Parties would be vulnerable to ICC suits simply by neighbours convincing the Court that a certain territory is theirs. Such action would also greatly discourage membership by States with disputed frontiers. Territorial jurisdiction was envisioned as useful for self-referrals of the kind the ICC has dealt with so far, and clear aggression and invasion of previously recognized sovereign frontiers. The ICC has not been understood as a border-
determination body; that role more naturally falls to the ICJ, and even then only when both parties consent to jurisdiction.

Third, there is the issue of admissibility. If Israel decides to investigate and prosecute its own nationals for the events that occurred in the summer of 2014, by the principle of complementarity, the case would be admissible. If Israel wants to guard itself against further ICC scrutiny, this would certainly be a feasible option.

It took the OTP three years to issue a statement on the status of Palestine and to reject its application in 2009. There is no time limit on a preliminary examination. It will most likely drag on for years. The prosecutors also have a history of dragging their feet during difficult preliminary examinations, as illustrated by the fact that four of the seven situations currently under examination have been ongoing for more than six years. Hence, the Palestinian situation may well be under examination for quite some time. Finally, if and when the preliminary investigation is completed the OTP has three choices: to assess the preliminary examination as incomplete and collect more information, to dismiss the case completely or to open an investigation.

Should the OTP decide to move forward with an investigation, an array of other challenges will present themselves. The lack of cooperation by Israel, as well as the problem of prosecuting nationals of non-States Parties, will most likely hinder efforts made by the ICC. What is then the likelihood of an investigation by the ICC into the Palestine situation?

Besides the aforementioned legal issues, policy and political realities need to be considered. The reality is that the ICC is heavily dependent on the support of its State Parties for any enforcement as well as for actually ensuring the attendance of suspected perpetrators at The Hague. Opening a file entitled "Situation in Palestine" is very high risk for the Court. It would open the Prosecutor's every move to political criticism. Indicting leaders from either Israel or Palestine could take momentum out of the Court's other activities. On the other hand, the Court may jump at the chance because it is currently under international scrutiny. The case of Palestine could give the Court a much-needed opportunity to get out of African wars and to do something which is very much in the public eye, and very much of public interest. That is by no means meant to imply that wars in Africa are less important. On the other hand, one
could argue that the Palestinian situation sets the Court up for failure and charges of politici-
ization. OTP has endured two recent setbacks. Faced by Kenyan government intransigence and
witness intimidation, Bensouda had to close the Kenya case against President Uhuru Kenyatta
for lack of evidence. She has also put investigations in Darfur on hold, because of lack of any
Security Council backing. Both these setbacks have made it crystal clear that the ICC can
function properly only with political support from States and international institutions. It
seems realistic to assume that "Realpolitik" and States' interest will continue, in the future, to
be important obstacles to the effectiveness of the ICC.

In conclusion, the impact of Palestine's accession to the ICC and what specifically its political
implications for the Middle East peace process will be are unknown. There are at the moment
far more questions than there are clear-cut answers. One thing, however, is certain: with Pal-
estine's accession to the Statute, the legal framework has changed, and the parties to the con-
flict would be wise to accept and respect that. The ICC is a worthy institution doing invalu-
able work, but it is also fragile and dependent on State cooperation and assistance. The last
time Palestine pursued the ICC, it took the Prosecutor three years to respond. It is doubtful
The Hague will indict and prosecute Israeli and Palestinian nationals anytime soon. Neverthe-
less, the accession of Palestine to the ICC is a major step toward justice, and the acknowl-
edgement of Palestine as a State should not be underestimated. It is an international gesture
toward Israel that Palestine is very much a recognized player in the field of international rela-
tions, and an assertion by the international community urging for a peaceful two-State solu-
tion.
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Declaration recognizing the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

Signed in The Hague, the Netherlands, 21 January 2009

For the Government of Palestine

Ali Khawan
Minister of Justice

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31 December 2014

Declaration Accepting the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3, of the Rome Statute of the International Criminal Court, (‘the Statute’), the Government of the State of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.

This declaration is without prejudice to any other declaration the State of Palestine may decide to lodge in the future.

Accordingly, the State of Palestine undertakes to cooperate with the Court without delay or exception, in accordance with Chapter IX of the Statute.

This declaration shall be valid for an unspecified period of time and shall enter into force upon its signature.

Mahmoud Abbas
President of the State of Palestine