

The Decision of the International Criminal Court in the Palestine Situation: A Beginning in the Prevention of Impunity for Israeli Crimes

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DOI: 10.22034/IRUNS.2023.168478

Received: 2022-08-13

Accepted: 2023-01-27

Abstract

On 20 December 2019, in the initial examination of the Palestine situation, the Prosecutor of the International Criminal Court (ICC) sought confirmation by the Pre-Trial Chamber to ensure an immediate investigation. On 22 January 2020, the Prosecutor therefore requested a ruling, in accordance with Article 19(3) of the Rome Statute and based on the opinion of the Pre-Trial Chamber, concerning the matter of jurisdiction in the Palestine situation. On 5 February 2021, the ICC Pre-Trial Chamber decided, by the majority, that the Court's jurisdiction in the Situation in Palestine, a State Party to the ICC Statute, extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. Palestine has thus agreed to be treated as a State Party to the ICC Statute, and based on Resolution 1967 and the Advisory Opinion of International Court of Justice, has the right of referral of the situation.

Keywords: Palestine situation, jurisdiction, prosecutor, Pre-Trial Chamber, International Criminal Court (ICC).

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Introduction

50 years after the Nuremberg and Tokyo Trials, 120 countries agreed to form the International Criminal Court (“ICC”); as a result, the Rome Statute of the ICC was adopted on 17 July 1998.¹ The Rome Statute determines the situations where the ICC can exercise its jurisdiction. These situations are referred to in Article 13 of the Statute, and the ICC may exercise jurisdiction through the referral of a State Party to the ICC Statute, referral by the Security Council and the initiation of an investigation at the initiative of the Prosecutor.

In addition, Article 12(3) of the Rome Statute provides that the ICC may exercise its jurisdiction in situations where a State, which is not a Party to the Statute, makes a declaration accepting the jurisdiction of the ICC retroactively. Yet, in this case, the acceptance of jurisdiction extends to all crimes within the jurisdiction of the Court.² It is worth noting that, although the preconditions to exercise jurisdiction can be met through a declaration under Article 12(3) of the Rome Statute, this does not mean that the accepting State will become a Party to the Statute or it will be the matter of referral of the situation. However, after the declaration was made, the Prosecutor must independently conduct the necessary investigation.³

On 29 November 2012, the United Nations General Assembly accorded to Palestine non-member observer State status in the UN. On 1 January 2015, Palestine, by declaration lodged with the Registrar, accepted the jurisdiction of the ICC over alleged crimes

¹ Amir Hosein RAHGOSHA, *The legal Relationship between International Criminal Court (ICC) and the United Nations Security Council* [Persian], 1st edition. (Tehran: Majd Publication Institute. 2015), p 9.

² Mahdi ZAKAVI & Koroush BABAEI, *The Functions and Jurisdictions of the International Criminal Court's Prosecutor*, 1st edition. (Tehran: Majd Publication Institute. 2005), p 70.

³ Esmail RAJABI, “The role of ICC in dealing with the criminal acts of Zionist regime in Gaza war (22-day war)” (2015), *Quarterly Journal of Public Laws Studies*, vol. 45, No. 2, p 306.

committed in the Occupied Palestinian Territory, including East Jerusalem, since 13 June 2014.⁴ Palestine also deposited its instrument of accession to the Statute with the UN Secretary-General, in accordance with Article 125(2) of the Statute.⁵

After a preliminary examination under Article 19(3) of the Rome Statute, which states that the Prosecutor is permitted to seek a ruling from the Court regarding a question of jurisdiction or admissibility, the Prosecutor requested the Court's opinion regarding jurisdiction in the Palestine situation. Following this, the ICC Pre-Trial Chamber examined the Prosecutor's request alongside the opinions of other State Parties, organizations, experts and victim groups, and on 5 February 2021, determined the scope of the Court's jurisdiction.

I. The Preliminary Examination of the Palestine Situation

The history of Palestine's referral of the situation to the ICC dates back to 22 January 2009, when the Palestinian National Authority made a declaration under Article (12)3 of the Rome Statute accepting the jurisdiction of the ICC.⁶ This followed Israel's incursions into Gaza, which took place between December 2008 and January 2009.

However, due to the uncertainties within the international community as to the existence of the State of Palestine, the Registrar, Ms. Silvana Arbia, acknowledged receipt of the declaration on 23

⁴ The General Assembly Resolution adopted by the General Assembly on 29 November 2012 voted to grant Palestine non-member observer State status at the United Nations. The resolution on the status of Palestine in the UN was adopted by a vote of 138 in favor to nine against with 41 abstentions by the 193-member Assembly.

⁵ Pre-Trial Chamber I, Situation in the state of Palestine, 2021, para 2, available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

⁶ John QUIGLEY, The Palestine Declaration to the International Criminal Court: The Statehood Issue, p 1, available at: https://iccforum.com/media/background/gaza/2009-05-19_Quigley_Memo_on_Palestine_Declaration.pdf.

January 2009 without prejudice to a judicial determination on the applicability of Article 12(3).⁷ On 3 April 2012, after the preliminary examination, Prosecutor Mr. Ocampo clarified that the ICC will not investigate the Palestine situation due to the fact that Palestine is not a UN Member State. The Court's refusal to rule concerning the Palestine situation occurred at a time when, apart from the crimes committed previously, numerous crimes were perpetrated during the 2008-2009 Gaza War, including targeted killings by Israeli forces. It is worth mentioning that, by the end of 2005, Israel's targeted killing program had killed at least 450 people, including 300 members of Palestinian organizations and 150 civilians.⁸

Likewise, in the Mavi Marmara ship case, which was carrying humanitarian supports, the Israeli forces killed some of the ship's occupants and injured others. Comoros, as a State Party to the ICC Statute and also as the State where the ship was registered, referred the situation to the Court in conformity with Article 12(2)(a) of the Rome Statute. However, the Prosecutor did not accept⁹ the case

⁷ Fatima EZZOHRA EL HAJRAOUI, "The Ability of ICC to Achieve the Aim of Statute and Put an Ending for Crimes Committed in Palestine" (2016), *International Journal of Sciences: Basic and Applied Research (IJSBAR)*, Vol. 26, No. 3, p 278.

⁸ Abbas Ali KADKHODAEI, Ehsan SHAHSAVARI, Bahman SAEDI, "Content analysis of the Zionist regime's performance in implementing the Policy of Targeted Killing of Israel in the light of the basic principles of International Humanitarian Laws" (2017), *Journal of Islamic Law & Jurisprudence Researches*, Vol. 8, No. 14, p 134.

⁹ The prosecutor of the International Criminal Court stated: (On 14 May 2013, a referral was received by my Office from the authorities of the Union of the Comoros, a State Party to the Rome Statute. The same day, I announced the opening of a preliminary examination "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for [the] Gaza Strip." Following a thorough legal and factual analysis of the information available, I have concluded that there is a reasonable basis to believe that war crimes under the jurisdiction of the International Criminal Court ("ICC" or the "Court") were committed on one of the vessels, the Mavi Marmara, when Israeli Defense Forces intercepted the "Gaza Freedom Flotilla" on 31 May 2010. However, after carefully assessing all relevant considerations, I have concluded that the potential case(s) likely arising from an

because of the low severity of the committed crimes.¹⁰ This may have been on the basis that the Prosecutor had to select cases of high importance for investigation and prosecution in the performance of his duties, while Israel's action did not meet the threshold set for the crime intensity to necessitate the intervention of the ICC. As Louise Arbour, the former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, put it (in the meeting of the Preparatory Committee held in December 1997):

There is a crucial distinction between domestic law and international law that is the unconditional jurisdiction granted to the international Prosecutor in domestic law since the general assumption is that all crimes beyond the minimal range will be prosecuted. However, in the international Court, particularly in a Court based on complementarity jurisdiction, the discretion to prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined and complex.

Based on the case law of these two tribunals, it is thus clear that the Prosecutor shall select a case, among the numerous light weighted and less significant cases, that are qualified for the international intervention.¹¹

The 2014 Gaza War, also known as Operation Protective Edge, was an operation launched by Israel on 8 July 2014 in the Gaza Strip. Between 2,125 and 2,310 civilians were killed during the conflict, while between 10,626 and 10,895 were wounded. Moreover, in July 2014, approximately 2,000 Palestinians were arrested by Israeli

investigation into this incident would not be of "sufficient gravity" to justify further action by the ICC. The gravity requirement is an explicit legal criteria set by the Rome Statute.), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-06-11-2014>.

¹⁰ Mohammad Hosein RAMAZANI GHAVAM ABADI, "The Recognition of a Palestinian State to the Joinder to the International Criminal Court" (2016), *The State Quarterly Studies*, Vol. 7, p 29.

¹¹ Otto TRIFFTERER, *Commentary on the Rome statute of the international criminal court*, second Edition, (Munchen, published by Beck/Hart, 2008), p 132.

forces without charge or trial.¹² Due to the severity of the crimes committed, the Palestinian National Authority accepted, by declaration, the jurisdiction of the ICC, and deposited its instrument of accession to the Statute with the UN Secretary-General. On 16 January 2015, the Prosecutor of the ICC announced the initiation of a preliminary examination in order to establish whether the Rome Statute criteria for opening an investigation were met.¹³

The Prosecutor will not open the preliminary examination until the criteria mentioned in the Rome Statute are established. The Statute distinguishes between the preliminary examination and the investigation. The preliminary examination to open the investigation is predicted in Article 15, and is specific to cases where the Prosecutor initiates investigations *proprio motu*. Hence, the preliminary examination includes the search for facts and evidence, while its objective is to conclude whether there is a reasonable basis to initiate investigations. If the Prosecutor concludes that there is a reasonable basis to initiate an investigation, he or she will submit to the Pre-Trial Chamber a request for authorization of an investigation.¹⁴

The Prosecutor may also seek a ruling from the Court regarding a question of jurisdiction or admissibility. The Prosecutor thus stated that Article 19(3) of the Rome Statute enables the Prosecutor to refer a case to the Pre-Trial Chamber. According to the Prosecutor, Article 19(3) is a comprehensive article, and does not impose any time limit on the Prosecutor to exercise this right or the capacity of the Court at the request of the prosecutor. The Prosecutor observes that this

¹² Marjorie COHN, US Leaders Aid and Abet Israeli War Crimes, Genocide & Crimes against Humanity, *Jurist*, Academic Commentary, available at: <http://jurist.org/forum/2014/08/marjorie-cohn-israel-crimes>.

¹³ Ezzohra el hsjaoui, *supra* note 7, p 279.

¹⁴ Antonio CASSES, Paola GEATA, John R. W. D. JONES, eds., *Power and Duties of the Prosecutor, The Rome statute of the International Criminal Court*, Volume II, (London; Oxford university press. 2002), p 1159.

interpretation is supported by an analysis of Article 19(3) of the Rome Statute, adding that the word “or” in the article suggests that the word “subject” (matter) is only applicable in the process of admissibility and not in the process of jurisdiction. Therefore, this is in line with the Court’s jurisdiction.

The Prosecutor of the ICC, moreover, notes that issuing a ruling pursuant to Article 19(3) of the Statute at this stage of the proceedings is consistent with the Statute’s objective and purpose, primarily because restricting the Prosecutor’s ability to request such a ruling would hinder the efficient fulfilment of the Court’s mandate.¹⁵ In this regard, the Prosecutor is of the opinion that the Court’s jurisdiction extends to the territories occupied by Israel during the Six-Day War in 1967, namely the West Bank (including East Jerusalem) and Gaza Strip.

Additionally, it has been mentioned that the Prosecutor is mindful of the unique history and circumstances of the Occupied Palestinian Territory, and the fact that the question of Palestinian statehood under international law does not appear to have been definitively resolved. In order to facilitate and ensure cost-effective and expeditious conduct of the investigations, the Prosecutor thus seeks confirmation of this conclusion by the Pre-Trial Chamber pursuant to Article 19(3) of the Rome Statute. The Prosecutor further pointed out that such a ruling by the Chamber at this stage would be consistent with the delicate and carefully crafted system of checks and balances regulating the exercise of the Court’s jurisdiction, and would assist and guide the Prosecution in the performance of its functions and give effect to a legal right.¹⁶

The request for a ruling from the Pre-Trial Chamber led to the issuance of the Chamber’s ruling concerning the acceptance of the Court’s jurisdiction. The decision of the Pre-Trial Chamber bears

¹⁵ Pre-Trial Chamber I, *supra* note 5, para 23.

¹⁶ *Ibid*, para 22.

arguments that have been issued mainly on the basis of Palestine being treated as a State Party to the ICC Statute and the advisory opinion of the International Court of Justice.

II. The Basis of the Chamber's Decision

Pre-Trial Chamber I of the International Criminal Court (ICC) approved the ICC's jurisdiction to examine the Palestine situation based on the following arguments:

- a. Palestine is a State Party to the ICC Statute.
- b. Palestine is qualified for the purposes stated in Article 12(2)(a) of the Rome Statute, as a State in which the said conduct has happened.
- c. Court's jurisdiction extends to the territories occupied by Israel from 1967, namely the West Bank (including East Jerusalem) and Gaza Strip, and the jurisdiction of the International Criminal Court in investigating the Palestine situation was approved.

Based on the announcement made by the Chamber, the Statute mandates that the preconditions to the exercise of the Court's jurisdiction, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under Article 119(2) of the Statute, are consistent with the purpose of ending impunity by establishing individual criminal responsibility for crimes, be assessed pursuant to articles 12(1), 125(3) and 126(2) of the Statute. Accordingly, in the view of the Pre-Trial Chamber, Palestine acceded to the Statute in accordance with the procedure defined by the Statute and, in addition, the Assembly of States Parties has acted in accordance with Palestine's accession.

Considering its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute, and be treated as any other State Party would. Moreover, Palestine's accession has not been challenged under Article 119(2) of the ICC Statute. Palestine is

therefore a State Party to the Statute, and, as a result, a “State” for the purposes of Article 12(2) (a) of the Statute.¹⁷

a) Palestine: A State Party to the Statute

One of the restrictions that hinders the Palestine situation from being investigated by the ICC was the issue of recognizing Palestine as a “State”. On 26 December 1933, the Montevideo Convention defined the criteria for statehood, providing that, under international law, the state must possess a permanent population, a defined territory, political authority and capacity to enter into relations with the other States.¹⁸

In this regard, although there are disputes concerning the exact borders of Palestine, this issue does not prevent Palestine from being called a “State”. Similarly, it is arguable that these disputes do not lead to non-recognition and not becoming a member of international organizations. In fact, recognition should be announced and not established.¹⁹ Recognition and admission (acceptance) are two closely related concepts. In other words, recognition is associated with a State’s relationship with another, whereas admission concerns a State’s relationship with an international organization. Being treated as a State is regarded as a preconditions for membership in international organizations.

In 1974, the Palestine Liberation Organization (PLO) was granted “observer status”. After the Palestinian Declaration of Independence by the Palestinian National Council was adopted on 15 November 1988, the UN General Assembly on December 1988 adopted a resolution upgrading Palestine to non-member observer State status as a replacement for the PLO. The General Assembly granted observer status to Palestine on 7 June 1998.²⁰ Palestine submitted a

¹⁷ Ibid, para 112.

¹⁸ Montevideo Convention on The Right And Duties of State, Article 1.

¹⁹ Ramazani Ghavam Abadi, *supra* note 10, p 4.

²⁰ Ibid, pp 7-8.

request to join the UN on 23 September 2011, in accordance with Article 2 of the UN Charter.²¹

Also, on 29 November 2012, the UN General Assembly adopted Resolution 1967 upgrading Palestine to non-member observer State status, with the number of votes as follows: 9 voted against, 41 abstained and 5 absent States.²² In the same Resolution, the General Assembly recalled other similarly-worded resolutions, and emphasized, in particular, the need to enable the Palestinian people to exercise their sovereignty over the occupied territories since 1967.

The UN General Assembly moreover stressed that occupied territories since 1967, namely East Jerusalem, are still occupied by the military, and Palestinians have the right of self-determination and sovereignty over their territory. The General Assembly also stressed the need for respect for and preservation of the territorial unity and integrity of all of the occupied Palestinian territory, including East Jerusalem.²³ It furthermore recalled relevant Security Council resolutions.

The ICC Pre-Trial Chamber has likewise acted in conformity with UN Resolution 1967, reaffirming the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967.²⁴ It must be noted that, in 2011, UNESCO's General Conference approved Palestine's membership in the UNESCO by a vote of 107 in favor to 14 against, with 52 abstentions²⁵. The difference between Palestine's

²¹ Tavakol HABIBZADEH, "Resistance of Palestinians based on the Right to self-determination and the Obligations of International Community in this regard" (2016), *Quarterly Journal of Public Laws Studies*, Vol. 46, No. 4, p 835.

²² The United Nations General Assembly passed resolution 1967, On 29 November 2012, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/479/74/PDF/N1247974.pdf?OpenElement>.

²³ Pre-Trial Chamber I, *supra* note 5, para 117.

²⁴ *Ibid*, para 116.

²⁵ UNESCO votes to admit Palestine as full member, available at: <https://news.un.org/en/story/2011/10/393562-unesco-votes-admit-palestine-full-member>.

membership in the UNESCO and the UN is that while Palestine is approved to be a Member State in the UNESCO, it is considered to be a non-member observer State at the UN.²⁶

b) Advisory Opinion of the ICJ on the Legal Consequences of the Construction of the Wall

The occupying power, Israel, has been transferring the civilians into the occupied territories, and for a long time, this has been an apparent and systematic government policy that has been implemented on a large and systematic scale. State's involvement in relocation, establishment, and stay in the West Bank is a full package. It consists of incentives across the State: free and subsidized land, financial benefits to individuals and local municipalities; quality road infrastructure allowing easy access to Israel's metropolitan area, military protection including restrictions on Palestinian access and movement, assimilation of the law in the settlements to that which applies in Israel alongside legal sanctions on individuals' refusal to conduct economic and cultural relations with the settlements, and most importantly, the management of the settlements is fully integrated within state administration.²⁷

According to the UN Office for the Coordination of Humanitarian Affairs, since 1967 Israel has officially established approximately 150 settlements in the Occupied Palestinian Territory, in addition to some 100 settlements erected by Israeli civilians without formal authorization. The Israeli civilian population in the Occupied Palestinian Territory was estimated at 520,000.²⁸ The settlements were transferred to the Zionist residents with the permit under the title of "Status of State's Land". By determining these settlements,

²⁶ Ramazani Ghavam Abadi, *supra* note 10, p 9.

²⁷ Yaël, RONEN, "Taking the Settlements to the ICC? Substantive Issues" (2017), [American Journal of International Law](#) Unbound, Vol. 111, p 60.

²⁸ Michael G. KEARNEY, "On the Situation in Palestine and the war crime of transfer of civilians in to occupied territory", *Criminal Law Forum* 28:1-34 (2017), p 5.

which are called lands with national priority, the State shall pay 69% of the purchased land cost and \$25,000 as a loan to build.²⁹

Article 22(2)(b) of the Report of the International Law Commission (1991)³⁰ states that the establishment of settlers in an occupied territory amounts to a serious war crime. In the draft, it is also mentioned that the establishment of settlers in occupied territories and applying changes to the demographic composition of an occupied territory is considered a crime. The establishment of settlers in an occupied territory is a serious misuse of power, and can be considered a tool to accession to the occupied territory.³¹

According to the Report of the “independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem”, the settlements were established for the exclusive benefit of Israeli Jews, and are being maintained and developed through a system of total segregation between the settlers and the rest of the population living in the Occupied Palestinian Territory.³² It is worth noting that, in 2020, the Committee on the

²⁹ Daoud KUTTAB, Israeli Outposts Remain Illegal Under International Law, available at: <https://www.al-monitor.com/originals/2013/05/israeli-outposts-settlements-westbank.html>.

³⁰ For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory.

³¹ Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991), UN Doc A/46/10 (1991) 2 YBILC 2, 105, para 7, available at: https://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf.

³² Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/22/63, 7 February 2013, para 103, available at:

Elimination of Racial Discrimination called on Israel in the Periodic Observation Report to take immediate measures to prohibit and eradicate any such policies or practices, which severely and disproportionately have affected the Palestinian population in the Occupied Palestinian Territory.³³ It thus follows that the actions by Israel may amount to crimes against humanity.

Explaining its refusal to vote in favor of the adoption of the Rome Statute due to the inclusion of Article 8(2) (b) (viii), Israel's delegate asked: "Can it really be held that such an action really ranks among the most heinous and serious war crimes, especially as compared to the other, genuinely heinous ones listed in Article 8?"³⁴ Israel thus supported the deletion of the phrase "the action of hostile State, directly or indirectly, to transfer of a civilian population to an occupied territory" and particularly deletion of "directly or indirectly", which had no basis in international law, since Israel is providing tax incentives to its citizens to move to the occupied territories.³⁵ This action may be seen as evidence of indirect transfer of a civilian population.

In response to Israel's actions in erecting and constructing the wall, the UN General Assembly requested the International Court of Justice's advisory opinion as follows:

What are the legal implications of Israel, as an occupying power, constructing the wall in the occupied Palestinian territories, which includes the in and out of East Jerusalem in according to the Secretary-General, following the rules and principles of international

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf.

³³ Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel, CERD/C/ISR/CO/14-16, 9 March 2012, para 24, available at: <https://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>.

³⁴ Kearney, *supra* note 28, p 2.

³⁵ *Ibid*, p17.

law particularly the Fourth Geneva Convention (1949), United Nations Security Council and UN general meeting resolutions?

By a vote of 14 in favor to 1 against, the Court deemed the construction of the wall resulting system contrary to international law.³⁶ As the International Court of Justice stated in its advisory opinion: “As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” In fact, this provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court suggests that, since 1977, Israel has conducted a policy, and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, of the Fourth Geneva Convention. The UN Security Council has thus taken the view that such policy and practices “have no legal validity”.³⁷ The International Court of Justice has also referred to the Palestinian people and their right of self-determination under international human rights law, based on which constructing the wall in the Occupied Palestinian Territory is regarded as a violation of international law.

³⁶ Elisabeth LAMERT – ABDELGAWAD, “Advice opinion regarding the retaining wall in Palestine: the International Court of Justice (ICJ) and the right to compensate victims of grave violations” (2005), Translated by Salman OMRANI, *Govah Legal Journal*, (4, 5), p 58.

³⁷ Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion, [2004], I. C. J. Reports 2004, p 136, para 120.

b-1) Self-determination

Self-determination has two dimensions, internal and external. The internal dimension concerns the people's relationship with the respective State based on which it has the right to decide for themselves without outside interference. The external dimension, on the other hand, relates to the right of people to define their place within the international community.³⁸ The right to self-determination has been recognized in the United States Declaration of Independence (1776) and the Declaration of the Rights of Man and of the Citizen (1789). This right is also recognized in Articles 1 and 55 of the UN Charter, as well as in UN Resolution 181, which was adopted on 29 November 1947.

Based on Article 21 of the Universal Declaration of Human Rights and Article 1(1) (2) of the Covenant on Civil and Political Rights, it can be understood that the right to self-determination goes beyond the nation's right to independence and external autonomy; it also includes people's right to participate in the administration of the community. Having the qualities of a nation is considered to be a criterion for the right to self-determination. The Palestinians, as a single nation independent of common objective features such as a certain history in a given territory with a distinct culture, have the will and capacity to gain autonomy.³⁹

In its advisory opinion, the International Court of Justice held that the construction of the wall, together with measures taken previously, considerably "impedes" the Palestinian people's right to exercise self-determination, and is therefore, a violation of Israel's commitment to comply with this right.⁴⁰ The Court characterized the right to self-determination of the Palestinian people as an important

³⁸ Habibzadeh, *supra* note 21, p 831.

³⁹ *Ibid*, p 832.

⁴⁰ Legal consequences of the construction of a wall in the occupied Palestinian territory, *supra* note 37, para 122.

part of the rules and principles of international law. It furthermore noted that the right to self-determination has been complied with in the UN Charter, and as referred to in UN Resolution 2625, each State shall be obliged to avoid any enforcement action that deprives tribes of their right to self-determination.

Importantly, both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights pointed to the right to self-determination and, following the content of Charter of the United Nations, the Member States shall be obliged to realize and comply with this right. Regarding the right of people to self-determination, the Court also pointed out that the existence of the Palestinian people is no longer an issue. Such existence has moreover been recognized in the exchange of letters of 9 September 1993 between Yasser Arafat, President of the Palestine Liberation Organization (PLO), and Israeli Prime Minister Yitzhak Rabin.⁴¹

In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security”, and made various other commitments. In response, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and their legitimate rights. The Court considers that those rights include the right to self-determination, as the UN General Assembly has recognized on a number of occasions.

In view of the foregoing, the Court described the construction of the wall to be a violation of the Palestinian people’s right to self-determination and contrary to Israel’s international obligations as an occupying power. It, moreover, held that three measures associated

⁴¹ Ibid, para 122.

with the construction of the wall, including changing the demographic composition of the occupied territories, the forced migration of Palestinians and the practical accession of the territory, which also undermined territorial sovereignty, are violating the right to self-determination.⁴²

In its defense, which was presented to the International Court of Justice regarding the Wall case, and in a request for applying humanitarian rights in the Occupied Territories, Israel reminded the Court of the condition of civilians and their immunity from attack: “Even the harshest of Israel’s critics are also forced to admit that such attacks violate international humanitarian laws and public international law, and are unjustifiable”.⁴³ It would seem that this sentence implicitly admits the transfer of civilians to occupied territories since Israel has requested compliance with international humanitarian law norms, which it also shall comply with.

Additionally, the Court noted that “Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as the depositary State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not as a depositary in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” inter alia to the Fourth Geneva Convention “can be considered as an instrument of accession”.⁴⁴

⁴² Rozita KAHRIZI, “The right to self-determination in the jurisprudence of the International Court of Justice (ICJ)” (2019), *Journal of Public Law Knowledge*, vol. 16, pp 72-73.

⁴³ Written Statement of Israel on Jurisdiction and Propriety, 29 January 2004, para 3.51, available at: <https://www.icj-cij.org/public/files/case-related/131/1579.pdf>.

⁴⁴ Legal consequences of the construction of a wall in the occupied Palestinian territory, supra note 37, para 91.

The Court also held that

The territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.⁴⁵

The Court observed that the “legitimate rights” of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement “include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions”, and that certain measures adopted by Israel in areas of the West Bank “severely [impede] the exercise by the Palestinian people of its right to self-determination”, while stressing the risk that “further alterations to the demographic composition of the Occupied Palestinian Territory would result from the construction of the wall”.⁴⁶

In a similar vein, the UN General Assembly has adopted resolutions, emphasizing the Palestinian people’s right to self-determination and the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory. More recently, this was further reaffirmed by the UN Security Council, where it called on States not to recognize acts in breach of international law in the Occupied Palestinian Territory, “condemning all measures aimed at altering the demographic composition, character and status of the Palestinian

⁴⁵ Ibid, para 78.

⁴⁶ Ibid, para 118-122.

Territory occupied since 1967, including East Jerusalem". The Council thus:

- Reaffirmed that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace.
- Underlined that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the Parties through negotiations.
- Called upon all States, by taking paragraph 1 of this resolution into account, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.⁴⁷

b-2) International humanitarian law

One of the subject matters pointed out by the International Court of Justice is associated with international humanitarian law concerning the retaining wall in the Occupied Palestine Territory. Here, the Court found that although Israel is not a Party to the Fourth Hague Convention of 1907, the relevant provisions⁴⁸ of The Hague Convention can take effect because these provisions have crystallized into a rule of customary international law, which are binding on all States, including Israel. It must be recalled that, following the approval of Article 154 of the Fourth Geneva Convention, the Convention bylaw will complete Sections 2 and 3 of the Hague Regulations, where Section 3 concerns Military sovereignty over the territory of a hostile country.

⁴⁷ Pre-Trial Chamber I, supra note 5, para 121.

⁴⁸ Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907.

Considering that Israel became a Party to this Convention on 19 July 1951 without reservation, Article 154 of The Hague Convention is also applicable in the case of Israel. Israel made an argument based on Article 2 of the Fourth Geneva Convention, pointing out that the provisions of the Convention can be applied to territories that are brought under the sovereignty of a State Party to the Convention during a military operation. Since the occupied territories in 1967 were not previously under the sovereignty of Jordan, Israel argued, Article 154 of the Convention would not be applicable in the given case.

However, Israel's argument seems unfounded in that even before the approval of the Fourth Geneva Convention 1949, military occupation was possible in case of a conflict between two States. Indeed, according to Article 2(2) of the Fourth Convention, the Convention is applicable to all cases of partial or total occupation of the territory, even if the said occupation meets with no armed resistance. Following the above argument, military occupation can be realized without war and conflict.

Furthermore, the laws of military occupation can be applied to non-international armed conflicts because, following the adoption of Article (4) of Protocol (1977) additional to the Geneva Conventions, armed conflicts, in which peoples are fighting in the exercise of their right of self-determination, must comply with the Geneva Convention and Protocol I. According to Article (3) of the Conventions and Protocol I, these provisions shall be applied to any non-international armed conflicts occurring within one of the State's territories.⁴⁹

It may thus be argued that the resulted situation in the occupied territories was the implication of a conflict. In other words, although the Fourth Geneva Conventions, the Rome Statute and the document

⁴⁹ Lesani, Sayed Hesam aldin LESANI, *The Position of Military Occupation Rights within International Humanitarian Law*, (Tehran: The PhD thesis, Tehran University, 2010), pp 23-24.

examining the elements of crime have not defined the term “conflict”, it would seem pretty clear that the conflict shall be about relying on armed forces. This argument is confirmed by the definition of conflict, as provided by the Appeal Chambers of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the Tadic case:⁵⁰ “Conflict exists whenever there is a resort to armed force between two States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁵¹

As the ICTY Appeals Chamber concluded:

Conflicts among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992, and these hostilities exceed the intensity requirements applicable to both international and internal armed conflicts in a way that there was protracted an large-scale violence between the armed forces of different States and organized insurgent groups.⁵²

The International Court of Justice thus rejected Israel’s argument and considered two conditions in order to apply Article 2 of the Geneva Convention: (1) a military conflict shall be started whether or not the war has been declared and (2) the conflict shall be started between two States Parties to the Convention. Also, the Convention’s objective is to support civilians living in the occupied territories. Hence, it is reasonable to argue that the Convention should be applied

⁵⁰ Zahra TAGHIZADEH & Fatemeh HODAVANDI, “A Legal Scrutiny through the First International Criminal Court regarding the Enlisting and Conscripting the Child Soldiers in National or International Armed conflict” (2012), *Legal Research Journal*, vol. 22, pp 204-205.

⁵¹ Prosecutor v. Dusko Tadic a/k/a “Dule”, Decision On the Defence Motion for Interlocutory Appeal on Jurisdiction, para 70, available at: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

⁵² Reza ESLAMI & Alireza KAZEMI ABADI, “The customary concept of non-international armed conflict in the precedent of international criminal courts with an emphasis on the rulings of the International Criminal Tribunals for the former Yugoslavia (ICTY)” (2017), *Legal Research Quarterly* Vol. 20, No. 79, p 333.

to the occupied territories since 1967.⁵³ The violated provisions by Israel, according to the Court, are as follows:

- Violation of human rights and making an attempt to the annex of territories, Violation of the principle of not using threat or force for the purpose of occupation (Article 2 - 4 of Charter and General Assembly Resolution 2625).
- Violation of article 49 (6) of the Geneva convention by employing the policy of transferring Jews to Palestine territories
- Violation of provisions of the Fourth Geneva Convention (1949) by establishment settlements for Zionists within the occupied territories
- Violation of the principle of self-determination
- Forced transfers of Palestinians following by constructing the wall and creating security regions around it (violation of Article 49 of Geneva Convention and Article 17 of Protocol II Additional to the Geneva Conventions).
- Violation of international humanitarian laws (Provision of The Hague Convention 1970 and the Fourth Geneva Convention)
- Violation of Fourth Geneva Convention by doing extensive destroys which weren't part of the necessities of war.⁵⁴

Therefore, although Israel maintains that Article 49(6) of the Geneva Convention only prohibits forcible transfers, this view is hardly tenable in light of the wording and purpose of this provision, and has been rejected by the International Court of Justice.⁵⁵

⁵³ Mahdi ESMAEILI, "A brief discussion concerning ICC's advisory opinion about the retaining wall within Palestine territories" (2004), *Govah Legal Journal*, Vol. 2, p 70.

⁵⁴ Ibid.

⁵⁵ Ronen, *supra* note 27, p 59.

Another argument by Israel was that, according to the Oslo II Accord (1995), the Palestinian territories were divided between Palestinian and Israeli governments, noting that West Bank is divided into three administrative divisions: Areas A, B and C as follows:

- Area A comprises 18% of the West Bank in which urban areas are under the control of the Palestine government,
- Area B comprises 22% of the West Bank in which Palestine's rural areas are mostly located (Palestinian civil control and Israeli security control)
- Area C comprises 60% of the West Bank that is under full control of Israel.

Most settlements were constructed within Area B. However, Oslo II Accord cannot be taken to be a basis for determining the borders.⁵⁶ Also, following the armed conflicts between Israel and Palestine in the early 2000s, including the hostilities that occurred during April 2002, Israel took control of most parts of Area A, which were under Palestinian political and military control according to the Oslo II Accord. Therefore, Israel, which had security control over Area B and Area C according to the Oslo II Accord, captured most parts of Area A.⁵⁷ Nonetheless, the Prosecutor of the ICC, Palestine and victims have maintained that the Oslo Agreements did not affect the Court's jurisdiction, although, in the view of some commentators, these agreements could affect matters of cooperation with the Court.

⁵⁶ Saleh AMIRI, Maryam SAEEDI SHAHSAVARI, Hedié GHOLAMREZAEI AZAD, Mohammad GHORBANZADEH, "Investigating the violation of International Humanitarian Laws concerning the construction of outposts within the occupied Palestinian territories at the International Criminal Court (ICC)" (2020), *Quarterly Journal of Interdisciplinary Studies on Strategic Knowledge* Vol. 38, pp 210-211.

⁵⁷ Sayed Ahmad TABATABAEI & Mahvash MONFARED, "The Legal Regime Applicable to the Policy of Targeted Killing of Israel on the Territory of Palestine" (2018), *Quarterly Journal of Public Laws Studies*, Vol. 50, No. 2, p 620.

The ICC Pre-Trial Chamber concluded that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on Article 19 of the Statute, rather than in relation to a question of jurisdiction, in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under Articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments.⁵⁸

Conclusion

The crimes committed by Israel during Operation Protective Edge led the ICC to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community. However, uncertainty in treating Palestine as a "State" prevented the issue from being addressed. Given the ruling of the ICC regarding the subject matter of retaining wall, Israel's action in constructing settlements was recognized as contrary to international law, in part because it violates the right of the Palestinian people to self-determination. In addition, according to UN Resolution 1967, Palestine has agreed to be recognized as a non-member observer State; this appears to reduce the uncertainty as to Palestine's statehood status, at least to some extent.

On 1 January 2015, the Palestinian government issued a statement based on Article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC. On 2 January 2015, Palestine deposited its instrument of accession to the Statute with the UN Secretary-General according to Article 125(2) of the Statute. Fatou Bensouda, the Prosecutor of the

⁵⁸ Ibid, p129.

ICC, requested a ruling regarding the jurisdiction, in accordance with Article 19(3) of the Rome Statute, and based on the opinion of the Pre-Trial Chamber. Following the acceptance of the Court's jurisdiction on 5 February 2021, the Chamber noted that, in accordance with Resolution 1967, the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967 is recognized, and the "State on the territory of which the conduct in question occurred" is a Party to the Statute or has accepted, by declaration, the ICC's jurisdiction.

The Chamber concluded that Palestine is a Party to the Statute, and is qualified for the purposes stated in Article 12(2)(a) of the Rome Statute, as a State in which the said conduct has happened. It therefore appears that the Court's jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank including East Jerusalem. Indeed, it can be said that the Chamber's decision is well-established, given that it is based on some previous decisions made by other international organizations such as the UN (i.e., when it adopted Resolution 1967) and the International Court of Justice.

The decision made by the Chamber of the ICC is based on the premise that Palestine is a "State", Palestine acceded to the Statute in accordance with the procedure defined by the Rome Statute, and has acted in accordance with the State Party's accession. In the view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute, and be treated as any other State Party would. Furthermore, Palestine's accession has not been challenged under Article 119(2) of the Statute. Palestine is therefore a State Party to the Statute, and, as a result, a "State" for the purposes of Article 12(2)(a) of the Statute. Following this decision, it is possible to argue that everything leading to uncertainty in the exercise of the Court's jurisdiction was eliminated, and by treating Palestine as a "State", the

Sajjad Abbasi ————— **The Decision of the International Criminal Court in the...**

path has been paved to prosecute the perpetrators of crimes committed in the occupied territories.