

AN EXAMINATION OF PALESTINE’S STATEHOOD  
STATUS THROUGH THE LENS OF THE ICC PRE-  
TRIAL CHAMBER’S DECISION AND BEYOND

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I. INTRODUCTION

Since as far back as the fall of the Roman Empire, the territory of Palestine has remained disputed. On November 29, 1947, the United Nations General Assembly (UNGA) adopted Resolution 181, which called for the creation of two independent states in the territory of Palestine.<sup>1</sup> One was the Jewish state of Israel, and the other the Arab state of Palestine. In the wake of two wars in 1948 and 1967, Israel expanded into the Arab lands and annexed territories including the West Bank, the Gaza Strip, and East Jerusalem, leading to hostility between both peoples. Subsequently, the two groups initiated numerous truces and peace agreements to no avail. The Israeli Defense Force and Palestinian groups, such as Hamas, have been in continuous conflict, leading to destruction and deadly violence. For example, during the 2014 Israel-Gaza conflict, groups like Human Rights Watch accused both the Israeli military and Palestinian militants of war crimes.<sup>2</sup> Because of the absence of worldwide legal recognition and support, Palestinians have remained vulnerable and devoid of protection.

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1. G.A. Res. 181 (II), at Part I(A) (Nov. 29, 1947).  
2. *Gaza: Apparent War Crimes during May Fighting*, HUM. RTS. WATCH (July 27, 2021), <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting>.

The Palestinian Liberation Organization (PLO), the legitimate representative of the Palestinian people, gained observer status at the UNGA in 1974, the same year it was formed.<sup>3</sup> The PLO represents Palestine in a diplomatic capacity, but has no authority over local governance. In essence, the PLO has no domestic legal authority. On the other hand, the Palestinian Authority (PA) is a body that has “municipal authority” over the Palestinian territories.<sup>4</sup> The PA was established as an interim governing body in 1993. While the PLO is *prima facie* superior to the PA, the latter has attained more political importance.<sup>5</sup> Accordingly, it has made several efforts to gain statehood recognition both at the United Nations and internationally, finally achieving formal recognition from the UNGA in 2012 when it received ‘non-member state’ status.<sup>6</sup>

In 2015, after accepting the jurisdiction of the International Criminal Court (ICC), Palestine became a party to the Rome Statute and lodged a declaration under Article 12(3) alleging that Israel had committed war crimes in occupied Palestinian territory since 2014.<sup>7</sup> Consequently, on February 10, 2021, the Pre-Trial Chamber (PTC) ruled that it was competent to try the alleged war crimes and formally launched an investigation.<sup>8</sup> Although traditionally “only those accorded the status of statehood can be actors who count in the international legal arena,”<sup>9</sup> this note argues that the PTC ruling moved a step forward from this traditional stance by accepting a case brought by a non-state actor, making this decision a milestone development in

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3. Robert McMahon & Jonathan Masters, *Palestinian Statehood at the UN*, COUNCIL ON FOREIGN RELS. (Nov. 30, 2012, 7:00 AM), <https://www.cfr.org/background/palestinian-statehood-un>.

4. *PLO vs. PA*, PASSIA (Sept. 2014), [http://www.passia.org/media/filer\\_public/8a/e7/8ae7c030-ac1d-4688-b3f4-606fbd50cd41/pa-plo2.pdf](http://www.passia.org/media/filer_public/8a/e7/8ae7c030-ac1d-4688-b3f4-606fbd50cd41/pa-plo2.pdf).

5. *Id.*

6. Robert McMahon & Jonathan Masters, *Palestinian Statehood at the UN*, COUNCIL ON FOREIGN RELS. (Nov. 30, 2012, 7:00 AM), <https://www.cfr.org/background/palestinian-statehood-un>.

7. Rome Statute of the International Criminal Court art. 12(3) (Rome, 17 July 1998) U.N. Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002. Article 12(3) of the Rome Statute enables a State not party to the Statute to accept the exercise of jurisdiction of the Court.

8. *See* Situation in the State of Palestine, ICC-01/18-143, ¶ 123 (Pre-Trial Chamber 1, Feb. 5, 2021) (“... the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine’s accession to the Statute.”).

9. Aeyal Gross, *Decolonizing the ICC: The Situation in Palestine and Beyond*, JUST SEC. (Mar. 8, 2021), <https://www.justsecurity.org/75204/decolonizing-the-icc-the-situation-in-palestine-and-beyond/>.

international law. This note will first examine traditional theories of statehood for the purpose of constructing the status of Palestine's statehood in international law, including constitutive and declaratory approaches. It will then analyse how the PTC approached the question of Palestinian statehood in its ruling. Finally, it will highlight the significance of this decision by establishing how and why this approach has triggered considerable progress in international law. This note concludes by arguing that the statehood of Palestine requires an assessment under the constitutive approach, rather than the declaratory one. In other words, scholars and global and international leaders should not assess Palestinian statehood by conforming to a particular theory but should evaluate the question with practical considerations in mind.

## II. THEORIES OF STATEHOOD

In international law, there is no specific definition of what constitutes a 'state.' Scholars and theorists have developed several definitions, but they are not universal. According to Article 1 of the Montevideo Convention, for example, "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 other states."<sup>10</sup> James Crawford has held this to be "the best-known formulation of the basic criteria for statehood."<sup>11</sup> In essence, the state is a "sui generis legal entity operating and existing under its own authority and power."<sup>12</sup> However, because of the lack of uniform rules and definitions regarding statehood, international bodies often face the dilemma of what precise definition to apply. Specifically, entities and organizations seeking to apply the Montevideo criteria must choose between two primary theories of statehood: the constitutive theory, which takes into account the element of recognition, and the declaratory theory, which excludes this element.

According to the declaratory school of thought, the standards specified under the Montevideo Convention suffice to fulfil the criteria of statehood under international law. Recognition in this context is mere acknowledgment of the 'fact' that such an entity fulfils the criteria

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10. Convention on Rights and Duties of States (Montevideo Convention), art. 1, Dec. 16, 1934, 165 L.N.T.S. 19.

11. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (Oxford Univ. Press ed., 2nd ed. 2006).

12. Michele Pitta, *Statehood and Recognition: The Case of Palestine*, CEI INT'L AFF., 2018, at 4, [http://diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM\\_Michele\\_Pitta.pdf](http://diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM_Michele_Pitta.pdf).

set forth.<sup>13</sup> This theory is significant in that it does not provide states with the privilege of recognizing or overlooking the identity of any entity based on their “political convenience.”<sup>14</sup> Instead, an entity becomes a ‘fact,’ and a lack of recognition cannot negate its statehood. However, scholars like Michele Pitta have critiqued this theory precisely because it undermines recognition, arguing that the Montevideo criteria cannot be the sole determiner of statehood because, without the additional element of recognition, would-be states would lack international personality and would be unable to benefit from their international rights.<sup>15</sup> If a state is to exist as a ‘fact,’ then it must also exist under international law.<sup>16</sup> Therefore, if a state fulfills all of the declaratory criteria, mere lack of recognition should not prevent it from exercising legal rights bestowed upon it as a state.

The constitutive theory, on the other hand, asserts that it is the act of recognition that leads to the creation of a state.<sup>17</sup> Hence, formal acknowledgement by already existing states establishes the new entity as a state.<sup>18</sup> Mutual recognition is what forms the crux of this school of thought. Like the declaratory theory, the constitutive theory has its own challenges. Specifically, the theory fails to identify clear standards for statehood, such as the precise number of states required to grant legal recognition or the level of international recognition that an entity must receive. Additionally, in situations where only one part of the legal community recognizes an entity’s statehood, the question whether that entity is fully a state becomes murky. This is where the matter of self-determination comes into play. Self-determination is a principle of international law according to which a country can determine its own statehood by making their own government and controlling their own population. A focus on the principle of self-determination helps tip the scales in favor of Palestinian claims to statehood.

### III. STATUS OF PALESTINE’S STATEHOOD IN INTERNATIONAL

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13. *Id.* at 5.

14. *Id.*

15. *See id.* (“Thus, a state is not an international person because it satisfies Montevideo criteria, but because international law confers international personality to such factual situation[s].”).

16. *Id.* at 6.

17. *States in International Law*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/international-law/States-in-international-law#ref794948> (last updated Nov. 13, 2019).

18. *Id.*

## LAW

Having laid out the two main theories underlying the concept of statehood, it is now possible to apply them to the Palestinian context.

The declaratory theory of statehood and the Montevideo criteria struggle to support the legal recognition of Palestine's international statehood. Although Palestine does have a definitive and permanent population and Palestinians reside in both the West Bank and the Gaza Strip, the application of these criteria quickly runs into a number of challenging issues. For instance, Palestine's "defined territory" remains unclear. Some argue that the West Bank and the Gaza Strip are territories of Palestine, while others argue that those territories constitute modern-day Israel, rendering the definition of Palestinian territory ambiguous.<sup>19</sup> Furthermore, the Palestinian Authority does not enjoy exclusive authority over these territories; some parts are co-administered with Israel (e.g., parts of the West Bank) and some administered by Hamas (e.g., the Gaza Strip), meaning that Palestine can point to no single entity that possesses effective control over the territory.<sup>20</sup> Additionally, the PA's inability to retain exclusive authority over certain foreign policy decisions without Israel's cooperation creates further difficulty. Hence, under the declaratory theory, which relies exclusively on the formal Montevideo Criteria, Palestine fails to meet many of the qualifications necessary to be considered as a state.

The constitutive theory of state recognition, on the other hand, provides greater support for Palestinian claims to statehood. Under this theory, Palestine meets the criteria of statehood if other states recognize its statehood.<sup>21</sup> Such a formal acknowledgement may have come in the form of the UNGA's 2012 resolution on the status of Palestine's statehood.<sup>22</sup> The resolution received 138 votes in favor, 9 against, and 41 abstentions.<sup>23</sup> Consequently, Palestine was granted non-member observer state status in the United Nations.<sup>24</sup> While General

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19. See, e.g., *Israel's Borders Explained in Maps*, BBC NEWS (Sept. 16, 2020), <https://www.bbc.com/news/world-middle-east-54116567> (explaining that numerous treaties and wars have prevented the creation of a fixed border, despite encroachment on Palestinian lands by Israel and vice-versa).

20. MALCOLM SHAW, *INTERNATIONAL LAW* 330 (Cambridge Univ. Press ed., 7th ed. 2014).

21. *Id.*

22. G.A. Res. 67/19 on the Question of Palestine (Nov. 29, 2012).

23. Meetings Coverage, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Meetings Coverage GA/11317 (Nov. 29, 2012), <https://www.un.org/press/en/2012/ga11317.doc.htm>.

24. See G.A. Res. 67/19 on the Question of Palestine, ¶ 2 (Nov. 29, 2012).

Assembly Resolutions are not *per se* legally binding on U.N. member-states, leaving this decision's impact on the legal determination of Palestinian statehood under international law unclear, they do assist in shaping the formation and content of international law, laying stronger foundations for more formal recognition.<sup>25</sup>

The fact that a majority of nations (138 in total) recognized Palestine's statehood renders the constitutive theory an appealing instrument for Palestine to legally construct itself as a state. Nevertheless, complexities arise because the final vote was merely partial, not unanimous. Still, this partial recognition from the Resolution undoubtedly amounts to progress for Palestine in two aspects. First, it can fulfil the fourth of the Montevideo criteria, i.e., it can enter into relations with other States, bringing it a step closer to satisfying even the declaratory theory test. Second, even partial recognition may confer important benefits. For instance, the *Institut de Droit International's* 1936 Resolution declares that "the existence of new States with all connected legal effects is not affected by the refusal of one or more States to recognize."<sup>26</sup> Such language speaks in favor of Palestine's recognition as a state even in the face of non-unanimous acceptance of the international community.

While a declaratory approach leaves Palestine's statehood disputed, under the more creative constitutive approach, it does satisfy qualities of a recognized state under international law. It is this latter approach that the PTC relied on in its ruling recognizing Palestine as a state for purposes of ICC jurisdiction.

#### IV. ANALYSIS OF THE RECENT ICC PRE-TRIAL CHAMBER DECISION

On February 5, 2021, the ICC-PTC declared that it had territorial jurisdiction over the "Situation in Palestine."<sup>27</sup> The PTC further stated that its jurisdiction extended to Gaza, the West Bank, and East Jerusalem.<sup>28</sup> In making this determination, the PTC faced the question

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25. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) ("Customary international law ('CIL') is one of two primary forms of international law, the other being the treaty. CIL is typically defined as a general and consistent practice of states followed by them from a sense of legal obligation.").

26. *Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments*, 30 AM. J. INT'L L. (SUPPLEMENT: OFFICIAL DOCUMENTS) 163, 185 (Oct. 1936).

27. Situation in the State of Palestine, ICC-01/18-143, ¶ 118 (Pre-Trial Chamber 1, Feb. 5, 2021).

28. *Id.*

of whether Palestine was a state such that it could bring a case before the ICC or whether it would be inconsistent with the objective of the Rome Statute to declare its jurisdiction over this extended territory. Generally, the ICC is not “constitutionally competent”<sup>29</sup> to decide issues of statehood.<sup>30</sup> Therefore, for the purposes of conferring jurisdiction in the context of the Rome Statute, the PTC concluded that because Palestine is a state party to the Rome Statute, Palestine is a ‘state’ for the objectives of Article 12(2)(a) of the Rome Statute.<sup>31</sup>

The PTC anchored its decision in the text of the Rome Statute. The majority argued that because Palestine had already acceded to the Rome Statute as a state party, not admitting it would be conflicting and inconsistent with the objectives of the Rome Statute.<sup>32</sup> This resolved a previous lacuna in the statute’s procedure for admitting a party as a state to exercise its jurisdiction. As a prerequisite for ICC jurisdiction, the Rome Statute requires the conduct in question to have occurred on the territory of a “state,” and therefore acknowledges Palestine as a state party to the statute.<sup>33</sup> While the judges remained silent on the status of Palestine as a state in general under international law and were careful to limit their holding to the ambit of the Rome Statute, the crucial point is that the majority also depended on several UNGA resolutions.<sup>34</sup> For instance, the chamber alluded to the 2016 Security Council Resolution 2334, which reiterated the idea of a Palestinian state, the illegality of Israeli settlements in Palestinian Territory, and the subsequent obstacles to achieving Palestinian Statehood.<sup>35</sup> It also referenced the 2012 General Assembly Resolution 67/19, which addressed the right to Palestinian self-determination.<sup>36</sup> The majority also affirmed that the decision by the ICC should be in accordance with internationally recognized human rights, including self-determination.<sup>37</sup> In this context, the majority further noted that

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29. *Questions and Answers on the Decision on the International Criminal Court’s Territorial Jurisdiction in the Situation in Palestine*, INT’L. CRIM. CT. (Feb. 15, 2021), <https://www.icc-cpi.int/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf>.

30. Gross, *supra* note 7.

31. See *Situation in the State of Palestine*, ICC-01/18-143, ¶ 112 (Pre-Trial Chamber 1, Feb. 5, 2021).

32. *Id.* at ¶¶ 104-09.

33. *Id.* at ¶ 104.

34. Gross, *supra* note 7.

35. *Situation in the State of Palestine*, ICC-01/18-143, ¶ 121 (Pre-Trial Chamber 1, Feb. 5, 2021).

36. *Id.* at ¶ 116.

37. *Id.* at ¶¶ 119-20.

international bodies such as the United Nations and the ICJ had already recognized Palestine.<sup>38</sup>

The Prosecutor, while agreeing with the PTC's stance regarding jurisdiction, conveyed an alternative, more forceful position. While the PTC essentially limited its focus on self-determination in order to ensure the case would fall within the scope of ICC jurisdiction, the Prosecutor asserted that Palestine should enjoy statehood under international law generally, extending beyond the mere right to self-determination.<sup>39</sup> The Prosecutor also attempted to support an argument for statehood by delegitimizing the Montevideo criteria, claiming that the presence of Israeli settlements in Palestinian territory obviated Palestine's need to fulfil such strict criteria as a defined territory.<sup>40</sup>

Furthermore, the Prosecutor stated that statehood in international law should be a natural outcome of situations in which people enjoy a recognized right of self-determination.<sup>41</sup>

Ultimately, the PTC's decision is important because, as a formal international legal body, it can change the contours of the discussion on Palestinian Statehood under international law. Even though it cannot determine matters of statehood or bind the international legal community to its decisions, it can nevertheless help influence discussions that take place in other bodies regarding Palestine, progressively leading towards stronger and more formal recognition.

## V. CONCLUDING REMARKS: A DECLARATORY OR CONSTITUTIVE

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38. *Id.* at ¶ 121.

39. *Id.* at ¶ 24.

40. *See* Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18-12, ¶¶ 137-38 (Jan. 22, 2020) [hereinafter Prosecution Request] (“[T]here appear to be several reasons why a case-specific application of the Montevideo criteria to Palestine is warranted, including] the detrimental impact of the ongoing breaches of international law on Palestine's effective authority over the Occupied Palestinian Territory and on the realisation of the right of self-determination of its people.”). In contrast, scholars such as Ronen argue that Israel's effective control as occupier in itself negates fulfilment of the Montevideo criteria by Palestine, “regardless of how far reliance on the right to self-determination may lower the bar.” Yaël Ronen, *Palestine in the ICC: Statehood and the Right to Self-Determination in the Absence of Effective Control*, 18 J. INT'L CRIM. JUST. 947, 966 (2020).

41. *See* Prosecution Request, *supra* note 40, at ¶ 138 (averring that “the internationally recognised right to self-determination of the Palestinian people in the Occupied Palestinian Territory” militates a case-specific application of the Montevideo criteria).



## APPROACH TO STATEHOOD?

This note aimed to highlight why the question of Statehood should be assessed under a constitutive, rather than declaratory approach. Instead of being constrained by the strict and formal requirements of the traditional Montevideo Convention, the best way to uplift a population in dire need of legal protection is to emphasize its right to statehood. International organizations like the United Nations and the ICC have made decisions in recent years that support this constitutive view of statehood. After the 2012 General Assembly Resolution set the stage for the PTC to proclaim ICC jurisdiction over Palestine by according it non-member observer status, the PTC made use of this opportunity to fill a lacuna in the Rome Statute by recognizing Palestine as a state for purposes of the ICC's jurisdiction. Although none of these actions are conclusive on their own, Palestine can remain hopeful that it will someday soon achieve full recognition of its statehood status.