CLIMBING THE LADDER OF RECOGNITION: PALESTINIAN PATH TO THE ICC

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ABSTRACT

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Building upon both recognition and commitment literature, this thesis analyzes why Palestine acceded to the Rome Statute, the treaty that established the International Criminal Court (ICC). Involving the ICC in the Israel and Palestine conflict could have legal and political repercussions. The burgeoning literature on the ICC have emphasized "sovereignty cost" of membership as the main puzzle because of the court's authority to prosecute war crimes. The status of Palestine in the international community remains as a source of disagreement and brings a new dimension to this question. This thesis examines PA's (Palestinian Authority) decision to join the ICC (International Criminal Court) at three level of analysis: international, interstate, and domestic. At the international level, the PA aims to enhance the international recognition of Palestine by getting diplomatic recognition via accession to several treaties and organizations, internationalizing the Israel-Palestine conflict, and increasing credibility by committing to the international law. At the interstate level of analysis, the PA joins the Court for the aim of prosecution of Israeli perpetrators by the ICC. Since Israel reportedly commits war crimes against Palestinians, the likelihood of being subject to the jurisdiction of the Court is probable and explains why Palestine may seek to involve the court. Alternatively, the deterrent effect of ICC may provide PA a motive to involve the court. Lastly, ICC's possible jurisdiction over Hamas as the other main actor besides Fatah, ruling party of the PA, constitutes the explanation at the domestic level. Qualitative case study method is used in this thesis to investigate Palestine's commitment to ICC at three levels with evidence from official reports and news.

ÖZET

TANINMA MERDİVENİNİ TIRMANMAK: FİLİSTİN'İN UCM YOLU

RUMEYSA BETÜL TUNCAY

SİYASET BİLİMİ YÜKSEK LİSANS TEZİ, AĞUSTOS 2020

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Anahtar Kelimeler: Filistin, UCM, taahhüt, tanınma, caydırıcılık

Tanınma ve taahhüt literatürüne dayanan bu tez, Filistin'in Uluslararası Ceza Mahkemesi (UCM)'yi kuran antlaşma olan Roma Statüsüne neden katıldığını analiz eder. UCM'nin İsrail ve Filistin'e müdahil olmasının yasal ve siyasi yan etkileri olabilir. UCM ile ilgili gelişen literatür, mahkemenin savaş suçlarına dava açma yetkisi nedeniyle üyeliğin "egemenlik maliyetini" ana bulmaca olarak vurguladı. Filistin'in uluslararası toplumdaki statüsü bir anlaşmazlık kaynağı olmaya devam ediyor ve bu soruya yeni bir boyut getiriyor. Bu tez, FY (Filistin Yönetimi)'nin UCM'ye katılma kararını üç seviyeli analiz düzeyinde incelemektedir: uluslararası, devletlerarası ve devlet içi. Uluslararası düzeyde, FY, çeşitli anlaşma ve kuruluşlara katılım yoluyla diplomatik tanınma elde ederek, İsrail-Filistin çatışmasını uluslararasılaştırarak ve uluslararası hukuka bağlı kalıp güvenilirliğini artırarak Filistin'in uluslararası tanınırlığını artırmayı amaçlamaktadır. Devletlerarası analiz düzeyinde, Filistin Yönetimi, İsrailli faillerin UCM tarafından yargılanması amacıyla Mahkemeye katılır. İsrail'in Filistinlilere karşı raporlanmış şekilde savaş suçu işlediğinden, Mahkemenin yargı yetkisine tabi olma olasılığı muhtemeldir ve Filistin'in neden mahkemeye katılmaya çalışacağını açıklamaktadır. Alternatif olarak, UCM'nin caydırıcı etkisi, FY'ye mahkemeyi çatışmaya dahil etmek için bir gerekçe sağlayabilir. Son olarak, UCM'nin Filistin Yönetimi'nin iktidar partisi El Fetih'in yanı sıra diğer ana aktör olarak Hamas üzerindeki olası yargı yetkisi, iç siyasette açıklamayı oluşturuyor. Bu tezde, resmi rapor ve haberlerden elde edilen kanıtlarla Filistin'in UCM'ye bağlandığını üç düzeyde araştırmak için nitel vaka çalışması yöntemi kullanılmıştır.

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Henüz doğmadan çok sevdiğim kızıma

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1. INTRODUCTION

Palestine has acceded to the Rome Statute on 2 January 2015, the founding treaty of the International Criminal Court (ICC) [1]. Palestine submitted another declaration under article 12(3) of the Rome Statute giving the ICC prosecutor jurisdiction over alleged grave crimes committed in the Palestinian territories beginning June 2014[2]. On 16 January 2015, the prosecutor subsequently opened a preliminary examination to determine whether a full investigation is warranted[3] .The preliminary examination has proceeded for a long time and in fact, in May 2018 Palestine made another referral[4] to the prosecutor[5]. The Prosecutor announced in December 2019 that preliminary examination into the situation of Palestine has concluded there is "a reasonable basis to proceed with an investigation into the situation in Palestine" and "war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip (Gaza)"[6] . Although Fatou Bensouda, the Chief Prosecutor, has determined that the criteria for opening a formal investigation have been met, she requested from Pre-Trial Chamber I a ruling on the scope of the territorial jurisdiction of the ICC. The reason for this specific request, according to the prosecutor is because she "is mindful of the unique history and circumstances of the Occupied Palestinian Territory"[7] and because "Palestine's Statehood under

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[1] See the accession document for the state of Palestine, available on https://treaties.un.org/doc/Publication/CN/2015/CN.12.2015-Eng.pdf

[2] See the declaration accepting the jurisdiction of the ICC, available on https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf

[3] There have been two preliminary examinations with respect to Palestine before. The first began in 2009 after Palestine's declaration and closed in 2012 and the second preliminary examination was about Gaza flotilla incident from 2010 and opened in May 2013 (brought by Comoros) and following the decision not to investigate it, closed in November 2014

[4] The latest referral, is particularly about the settlement regime, see Palestine's May 2018 referral, available online at https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf

[5] Because of this referral, the Prosecutor does not need the Pre-Trial Chamber's authorization.

[6] See Prosecutor's statement issued on December 20, 2019, available on https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine

[7] See the official request submitted on January 22, 2020 for a ruling on the Court's territorial jurisdiction in Palestine available online at https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF

international law does not appear to have been definitively resolved"[8].

These developments have taken place within the broader context of an international court that is increasingly challenged on multiple fronts and deemed irrelevant by its critics. The aim of the Court is "global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again". Since its founding, the court has issued convictions for 28 cases[9] for war crimes, genocide, crimes against humanity, and the crime of aggression. Currently, there are preliminary examinations in ten countries and ongoing situations under investigation in thirteen countries[10].

On the other hand, ICC has been criticized by different governments and for a number of reasons. The Court's involvement in ongoing conflicts raises the peace-justice debate Holding individuals accountable for the cause of establishing justice could jeopardize peace negotiations (Adem 2019, 189). "ICC indictments against government officials are not only detrimental to the prospects for peace" but also as Duursma and Müller (2019, 890) argue that "negatively affect everyday practices of peacekeepers and humanitarian workers, and through this, directly or indirectly, local population groups". Besides, ICC's investigations are criticized for taking a long time. Lack of state cooperation impedes the pace of the court as exemplified by the case of President Omar al-Bashir of Sudan[11]. At the same time, ICC is increasingly criticized by African states as a western imposition with an anti-African bias[12]. South Africa's attempt to withdraw from the court was overturned by its high court, Burundi officially withdrew.

The literature on the ICC examines why ICC is established (Fehl (2004),Deitelhoff (2009),Zschirnt and Menaldo (2014)), why states commit to this court (Mégret (2005),Simmons and Danner (2010),Hashimoto (2012)) state cooperation with the ICC (Peskin (2009), Kelley (2007)), and its role and impact in terms of ending impunity and deterring international crimes and promoting peace (Akhavan (2001), Akhavan (2009), Gilligan (2006), Ginsburg (2008), Bosco (2011), Simmons

[8]While the prosecutor acknowledges that there is no consensus over the issue of statehood, she is of the opinion that "Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law".

[9]For detailed information, see https://www.icc-cpi.int/Pages/cases.aspx

[10]Preliminary examinations and investigations: https://www.icc-cpi.int/Pages/pe.aspx

[11]For more information, see "ICC: Jordan Was Required to Arrest Sudan's Bashir", *Human Rights Watch*, May 6, 2019, available at https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir.

[12]For more elaborate discussion on the African bias and ICC, see Bekou and Shah (2006); Du Plessis, Maluwa, and O'Reilly (2013); Cole (2013).

and Danner (2010), Hashimoto (2012), Aloyo, Dutton, and Heger (2013), Gegout (2013), Kontorovich (2013), Nouwen (2013),Rodman and Booth (2013), Grono and de Courcy Wheeler (2015), Broache (2015), Jo and Simmons (2016), Prorok (2017), Appel (2018), Gissel (2018), Adem (2019), Reilly (2019), Duursma (2020)). This thesis contributes to his literature by providing a case study analysis of why Palestine committed to the ICC.

1.1 The Subject of This Thesis

Building upon the existing literature, this thesis attempts to explore why Palestine acceded to the Rome Statute even though the accession may bring some costs and carries political and legal risks.This study contributes to the commitment literature by investigating the Palestinian case e which is unique and needs to be examined separately. Also, investigating the possible explanations for why Palestine committed to the ICC, in light of the existing literature offer possible implications of the ICC intervention to the Israel-Palestinian conflict. Another contribution of this study is that it approaches hypothesized explanations in three levels of analysis: international, interstate, and domestic level.

1.1.1 Why is the Case of Palestine Special?

The research motivation of this thesis is to explore the question why states commit to the International Criminal Court with a focus on a special case, Palestine. The Palestinian case is *sui generis* that should be evaluated separately[13]. This case can potentially be the first that the Prosecutor of the Court judges a national of a non-member state (Høgestøl 2015, 200). After the PA's accession to the ICC, due to the principle of territoriality in the Rome Statute, the Israeli citizens and soldiers can be subject to the jurisdiction of the Court even though Israel has never ratified

[13]The sui generis (of its own kind) nature of Palestine here refers to the unique nature of its commitment to an international organization. Sui generis territory in international law denotes one that is unlike others and this description has been employed by Israel legal scholarship to argue Palestinian case is "not subject to strict legal regulation by any existing body of law" (Erakat 2019, 17) that stems for the mandate days.

the Rome Statute[14]. The violations of international crimes including war crimes, genocide, crimes against humanity, and torture within the territories of a member state of the ICC are investigated and prosecuted by the Court according to Article 4(2). Therefore, the Court may exert its authority of jurisdiction for a non-member state by advocating the statehood on behalf of a non-state member- the Palestinian entity (Benoliel and Perry 2010, 76). Even though Benoliel and Perry make this argument on the declaration to the ICC by the PA (Palestinian Authority) in 2009, after the accession to the Rome Statute in 2014, the non-membership of Israel and the possibility of being subject to the jurisdiction of the ICC is still prevailing.

Palestine's accession to the ICC raises "unique jurisdictional questions" specific to "the Palestine situation" (Høgestøl 2015, 198). Statehood, territorial boundaries, the impact of the Oslo Accords, admissibility of the Palestinian case in terms of the issue of complementarity and gravity, the criteria established by the Rome Statute, and such legal matters are not examined in this thesis as the main subjects. Besides, whether the ICC intervention would hinder or enhance the peace negotiations is beyond the scope of this thesis.

Considering the ongoing violence among Palestinian groups and Israeli Defense Forces (IDF), the role of the ICC is crucial. Taking into consideration the historical conflict between Israel and Palestine and given that both have committed crimes, both parties are not likely to accept "the other's assertion of jurisdiction, investigation, and prosecution" (Worster 2010, 1157). As many states have clear preferences in the conflict, an assertion of universal jurisdiction by a third party would not be readily accepted either. This is why the intervention of a neutral international court or commission, such as the ICC with limited universal jurisdiction, is long championed as a solution to these limitations (Worster 2010, 1156-7).

1.1.2 The Research Question

The ICC is a court of last resort that is established to end impunity. However, as a court that gets involved in ongoing conflicts, its role in the inherent tension between peace and justice is more complicated (Adem 2019, 188-9). Although it would be a difficult task to examine the potential consequences of ICC's involvement in the Israel-Palestine conflict before the investigations and possible prosecutions take

[14]Israel has signed the Rome Statute in 2000. See Blumenthal (2001) on possible motivations behind this decision.

place, we can observe that there are different issues at hand (Adem 2019, 189). On the one hand, the Court's intervention may reduce the conflict, bring justice, and allow parties to compromise during future negotiations. On the other hand, prosecuting crimes and holding individuals accountable may further complicate negotiations and make peace difficult for both parties. Moreover, the accession to the Rome Statute may bring some other repercussions to the member state, the state that makes the decision to commit, such as sovereignty costs and the possibility to be prosecuted by the Court. Considering the PA's systematic attempts for being a state party to the ICC, analyzing the motives behind the accession is worth studying. Also, examining the possible consequences of the intervention by the ICC shows how the PA may have disregarded the costs of being a member of the ICC Therefore, the research question is: Why did Palestine commit to the Rome Statute? In order to answer this question, the thesis examines the possible implications that may be brought by the intervention of ICC to the Israel-Palestine conflict.

The desire to seek recognition in the international community is seen as the primary reason in the literature (Boyle (1988);Boyle (2000); Quigley (2011); Quigley (2013); Worster (2010); Shany (2010); Dugard (2013);Najafian Razavi (2016)). Together with the international recognition, allowing jurisdiction over war crimes appears to be a strong motivation in the PA's decision to apply for membership to the ICC. While previous studies (Benoliel and Perry (2010);Quigley (2013);Kontorovich (2013); Ronen (2010, 2014); Høgestøl (2015); Adem (2019)) have examined the consequences of ICC jurisdiction for Israel, possible prosecution of Hamas and other Palestinian armed groups have not received similar scholarly attention (Adem 2019, 141-3). Taking these three explanations of both Palestine's motives into account, my study differs from the literature and offers a more holistic approach.

The Israel-Palestine conflict has been studied from many varied aspects by different disciplines in the literature. The subject is investigated by historians (Khalidi (2020); Anziska (2020); Smith (2004);Bennis (2012); Litvak (1998); Tessler (2009))international law scholars (Akram et al. (2010); Watson (2000); Malanczuk (1996); Boyle (2000); Worster (2010); Dugard (2013); Kontorovich (2013); Barnidge Jr (2016); Adem (2019)) and examined in the political science and international relations literature (Slater (2002); Gerner (2018); De Mesquita (1990); Quigley (2011); Benoliel and Perry (2010); Shany (2010)), including peace and conflict studies (Kelman (2018); Høigilt (2015); Clauset et al. (2010); Hallward (2011); Araj (2008); Barak (2005); Rouhana (2004)). Foreign policy and security studies have also investigated the role of different actors, including the EU (Gianniou (2016); Altunişik (2008); Tocci (2005)), the US (Kurtzer et al. (2012); Mearsheimer and Walt (2006); Quandt (2010)) and regional actors (Ayaz Avan (2019); Rabi and Mueller (2017)‘; Kostiner

and Mueller (2010)). As a case of an intractable conflict, it is beyond the scope of the thesis to cover its layers of complexities.

The aim of this thesis is to examine the emergence of a new actor that could potentially alter the dynamics of the conflict: the ICC. Instead of engaging in speculative debates on the consequences of triggering ICC jurisdiction for international crimes committed on Palestinian territory for issues on statehood and peace process, the thesis adopts a narrow focus regarding the Israel-Palestine conflict. The process of the ICC involvement is ongoing so its consequences for the conflict may not be predicted. Moreover, this thesis uncovers the possible explanations of the Palestinian Authority's accession to the ICC.

This study examines the Palestinian Authority's decision to commit to the ICC and offers three interlinked and interwoven explanations that correspond to three levels of analysis: international, interstate, and domestic. Multiple layers and multiple actors bring additional complexity to Palestine's decision to commit to the ICC. Considering the broader objective to be recognized as an equal member of the international community, including obtaining non-member observer state status[15] in the United Nations, the full membership to UNESCO, and establishing bilateral relations and diplomatic recognition by 137 states, becoming a party to the ICC treaty can be evaluated as part of the recognition ladder. International recognition of its "statehood" is arguably the most visible aim of the Palestinian Authority's decision to accede to the Rome Statute and commit to the ICC. Besides the international layer of the issue, the interstate conflict between Israel and Palestine[16] and ICC's jurisdiction over the crimes committed by Israel is another dimension. Additionally, the conflict between two main authorities of Palestine (Fatah and Hamas), the court's jurisdiction over Palestinian armed groups, including Hamas makes up the domestic (intrastate) level explanation of Palestine's commitment to the ICC. Thus, operating at three levels of analysis, I elaborate on both the relationship between PLO as the official representative of Palestine and the international community, in particular ICC, and the relationship between PA and Israel as interstate conflict, and the domestic conflict between Fatah and Hamas.

[15]The upgrade to the non-observer state status was also conceived as a change that could improve Palestine's chances to join the ICC.

[16]In the thesis, where applicable Fatah, PLO (Palestinian Liberation Organization), and the PA (Palestinian Authority) are used interchangeably. The chapter of Historical Background provides an account of these different entities . Fatah is the largest faction of the confederated multi-party PLO. The Palestinian Authority (PA) was formed after the Oslo Accords and has become the representative body of Palestinians. The President of the PA is from Fatah.

1.2 The Methodology of This Thesis

In this thesis, qualitative research methods[17] are used. As clarified above, the Palestinian case constitutes a unique situation, hence treating it as a separate case study offers additional insights. Comparison to other cases under preliminary examination (Colombia, Guinea, Iraq, Nigeria, the Philippines, Ukraine, and Venezuela) or investigation (Uganda, the Democratic Republic of Congo, Sudan, Central African Republic, the Republic of Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi, Bangladesh, and Afghanistan) by the Office of the Prosecutor, the distinctiveness of the Palestinian case is revealed. The other listed cases refer to officially recognized states. Because the status of Palestine in the international community remains as a source of disagreement, the Palestinian case necessitates an in-depth case study rather than a comparative analysis method.

Simmons and Danner (2010) in their analysis on why states join the ICC (this thesis also borrows this theoretical explanation) argue that "evidence on governments' motive for joining the ICC is hard to come by" and in cases where these may be available, those statements "give very little insight into their true motives for supporting and joining the Court" (236). While this statement may be valid to test general propositions on why states commit to the ICC, for the unique circumstances of Palestine, an in-depth case study that takes into account multiple actors' motives, has the potential to yield more insight. Hence this study employs a single case study design. Case study is defined as "in-depth, multifaceted investigation, using qualitative research methods, of a single social phenomenon" (Feagin, Orum, and Sjoberg 1991, 2). As Gerring (2006) states that researchers are torn between "knowing more about less, or less about more" (49). In this regard, the case study method allows knowing more about less. For this reason, it can be both criticized and defended. Since it offers a holistic approach, case study privileges depth over breadth (p.50). Considering the Palestinian case, a wide analysis provided by a case study method is a viable methodological choice.

Case study often relies on the use of several resources and detailed information on that specific case (Feagin, Orum, and Sjoberg 1991, 2). Data availability is crucial in using resources. Because the process initiated by Palestine's accession to Rome Statue is ongoing, the available information is at times speculative. In conducting

[17] On the issues of conflict studies, quantitative studies are often used since they allow testing hypotheses with a large number of cases. However, quantitative methods are used in Large-N analysis. However, the scope of this thesis does not require studying the Palestinian case together with the larger universe of other states that have and have not committed to the ICC. That is why, using a qualitative case study is more appropriate and effective for this case rather than conducting the statistical research.

this case study, the thesis uses both primary and secondary sources. Reports by the ICC and submissions to the court, as well as data on alleged war crimes and other relevant crimes committed in the Palestinian territories provided by the reports by the agencies of the UN and ad-hoc fact-finding missions and non-governmental organizations (Amnesty International, Human Rights Watch, and B'Tselem) are analyzed. As supportive evidence, statements by the official authorities and developments as articulated in, newspaper articles, and website news are used. In order to uncover the motives of actors , this study employs a process tracing method to study Palestine's decision to commit to the ICC. Previous research from international law and international relations disciplines are used as secondary sources to support the empirical evidence and to provide a coherent account of this case.

As an important research method of case-based social science studies, the process-tracing method can be defined as "the use of evidence from within a case to make inferences about causal explanations of that case" (Bennett and Checkel 2015, 4). It is carried out as a within case analysis based on qualitative data (Collier 2011, 823) and primarily used for the analysis of noncomparable observations (Gerring 2006, 185) like the Palestinian case. Since the process tracing method is conducted for explaining the causal mechanisms, an analysis of the possible explanations of Palestinian commitment to the ICC fits with the method of process tracing. Moreover, the process tracing method allows me to observe the historical sequence of events in the conflict and how these could interact with Palestine's decision to join the court, focusing on critical junctures. The operations in 2009, 2012, and 2014 are investigated to examine the ongoing conflict where both Israel and Hamas have committed war crimes and potentially other international crimes that the ICC can prosecute.

Moreover, the main purpose of this thesis is to examine the motives of the PA's commitment to the ICC. However, establishing motives is difficult to study. To minimize this drawback, I analyzed actors' statements, actions and interactions between them. Therefore, besides examining the turning points with the process tracing method, I used statements of actors and interactions among them to analyze the motives behind Palestine's ICC commitment.

1.3 The Structure of This Thesis

This thesis consists of four main chapters besides the chapters of introduction and conclusion. In the introduction, the main argument of the thesis, methodology, and the structure is set out. Considering the historical continuity of the conflict, a brief history of Israel and Palestine is given to understand the roots of the conflict between the main actors: Israel, Fatah, and Hamas in the chapter of "Historical Background." The chapter covers the significant events with emphasis on turning points in the history of Israel and Palestine from the pre-1948 period to the current day and examines Palestine's previous acts and attempts in joining treaties and international organizations.

Subsequently, the third chapter provides a literature review. Since the studies examining Palestine and statehood is abundant, the recognition literature is mostly shaped by the discussions of statehood. Besides the international recognition and statehood, the literature on the ICC's possible intervention is also analyzed. At the end of the chapter, a general overview of the literature and the missing parts are given.

In the fourth chapter, the theoretical framework of this thesis is presented. First, states' motivation/s in entering international commitments and the costs of commitments are discussed from different theoretical spectrums of international relations. Also, this section explores why states commit to the ICC. The following part develops the theoretical framework of this thesis that allows us to explain Palestine's motivations to accede to the Rome Statute. This section, borrowing from the explored literature, namely deterrence theory, hand tying theory and expected-utility model lays out the interwoven and mutually supportive explanations operating at three layers of analysis.

The chapter of "Strategic Tools of the Accession to the Rome Statute" constitutes the main analysis chapter of the thesis. It includes the three interlinked and interwoven explanations operating in three levels of analysis. On the international level, the recognition of Palestine is analyzed. In the interstate level of analysis, ICC's jurisdiction over the conduct of Israel is investigated and how this could bring accountability and/or deterrence and lastly, the domestic level of analysis consists of the ICC jurisdiction over the conduct of Hamas and its ramifications. All these three explanations are discussed through the reports and news and with the theoretical basis that is framed in the previous chapter. In the sixth and last chapter, the concluding remarks and suggestions for further research are given.

2. HISTORICAL BACKGROUND

The historical background of this issue cannot be explained in this limited space. However, in order to describe the relations between the actors involved in Israeli-Palestinian conflict, a limited historical background is needed. In this section, I emphasize the significant turning points in this conflict to the extent that they are relevant to the thesis. Besides, rather than outlining only the instances of the conflict between Israel and Palestinians, my intention is to sketch out the history of relations between crucial actors, particularly Fatah, Hamas, and the state of Israel. The establishment of Israel can be seen as the beginning of the history of the Israeli-Palestinian conflict. To the extent that it is helpful to explore Palestinians' claims for self-determination and bid for statehood, this section also reviews the era before 1948, the year that Israel declared statehood.

2.1 Pre-1948 Period and the Establishment of Israel

The establishment of Israel was not a sudden development. There was an ideology that legitimizes the establishment and opened the ways for the permanence in the Palestinian lands: Zionism. Related to the issue of Israel and Palestine, the pre-1948 period had two major elements: the birth of Zionism and the Ottoman Palestine. After the birth of Zionism, Jewish migrations began and the demography of Palestine transformed over time. This section first explains Jewish immigration to Palestine that prepared the basis for the establishment of a Jewish state, then covers the period after the First World War and the British rule in Palestine and concludes by providing a short summary of the establishment of Israel in 1948.

2.1.1 Jewish Immigration

In the late 19th century, "anti-Semitism" was an increasing phenomenon in Europe. The hatred toward Jews turned violent on many occasions. Russian pogroms in the early 1880s is a manifestation of violent hatred toward Jews. Theodor Herzl as a journalist working in Paris witnessed the appeal of anti-Semitism campaigns. His experiences convinced him that even an assimilated Jew could never be accepted as an equal citizen in Europe (Bunton 2013, 1). As the Dreyfus Affair exemplified they had become the scapegoats for social, political, and economic maladies. In 1896, Herzl wrote *Der Judenstaat* (The Jewish State) and emphasized that the creation of a Jewish state would put an end to the prevailing anti-Semitism. "The world resounds with outcries against the Jews, and these outcries have awakened the slumbering idea" (Herzl 1988, preface). This idea called Zionism was defined in the First Zionist Congress in 1897 and called for the creation of a home for the Jewish people in Palestine.

On the other hand, Ottoman Palestine was already inhabited. The grand project of Zionism supposed that no one was living in Palestine. The slogan indicates this notion: "A land without a people for a people without a land." Due to the birth of Zionism and the beginning of Jewish immigrations to Palestine, 1897 is identified as the beginning of the Israeli-Palestinian conflict by many scholars.According to Bunton (2013),

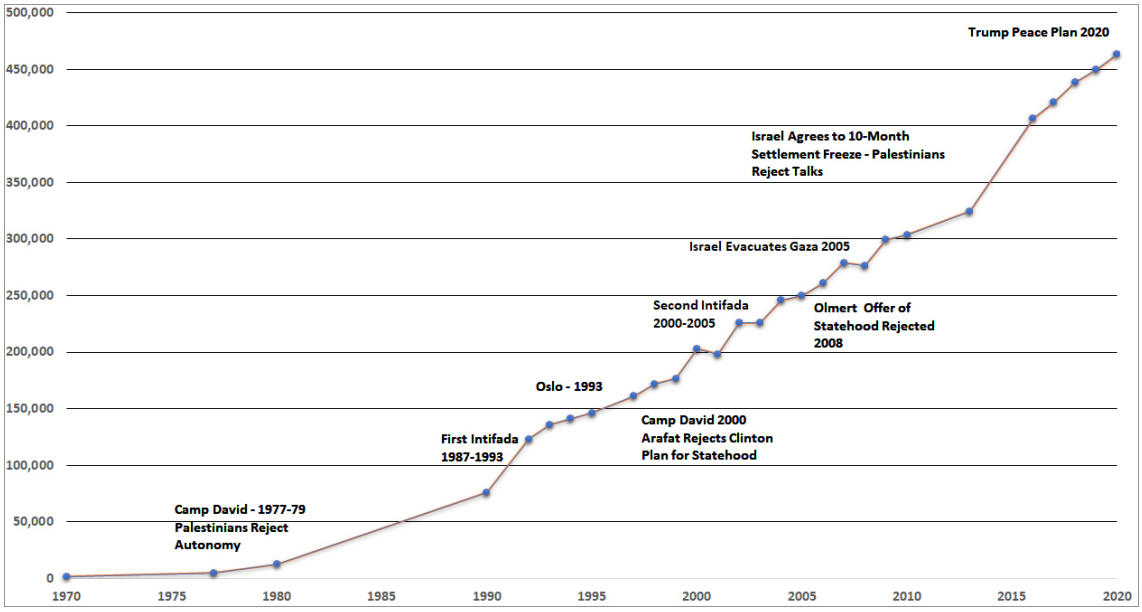
> "This hundred (or so) years' conflict is neither rooted in ancient or religious animosities nor even are its origins so much Middle Eastern or European. Just as European Jews were responding to the nationalist spirit spawned by the conditions in 19th century Europe, so too was the identity of the indigenous Arab population about to be reshaped by the sharpening of a specifically Palestinian consciousness that formed around the inhabitants' resistance to the threat that Zionism posed to their own patrimony" (2).

This argument may be open to discussion. However, it is clear that 1897 was the year that the idea of transforming this movement into a state began to emerge. Especially the waves of immigration to Palestine after the Zionist Congress prepared the demographic ground for the Jewish state. Between 1882 and 1903, 25.000 Jews entered Palestine with the First *Aliyah*[1] (Harms and Ferry 2008, 53). The second

[1]For more information on demographic change, see Neuman (2005);Aaronsohn (1996); Blumberg (1998).

wave was much bigger. On the eve of Zionist immigration, according to McCarthy (1990), there were only 15.000 Jews and 43.000 Christians. The population of Muslims was much greater; it was roughly 40.000. The total percentage of non-Jews in the total population of Palestine was 96 percent (10)[2]. As the immigration of Jews increasingly continued, the proportionality of Arab and Jewish populations gradually changed. Even the settlement attempts of Jews proceeded after the establishment of Israel.

Figure 2.1 Growth in the Jewish Population in the Disputed Territories



Source: *Graph of Jewish population growth in the disputed territories* (N.d.)

In the area where Jews increasingly migrated, the Ottoman Empire was ruling over the Arab population. The land was referred to as "Palestine" in official correspondences (Harms and Ferry 2008, 58).However, its rule was not centralized. Not only was the land ruled in three sanjaks but also Palestine was very far away from the center. There were also no people defined as Palestinians. In Bunton (2013)'s view, Palestinian national identity arose with the British invasion and consolidated itself against the British imperial rule and Zionist immigration (12). Therefore, immigration of Jews that had beeninitiated by the Zionist Congress dramatically changed the demographic distribution of ethnicities in Palestine and paved the way for the establishment of a Jewish state as envisioned by Zionism. In return, indirectly these developments helped define Palestinian identity as well.

[2]The numbers are given differently in varied sources, even so the difference in the population of Jews and non-Jews is considerably great.

2.1.2 The First World War, British Rule, and Israel's Establishment

The First World War made a significant transformation in the history of the Middle East. The British army's occupation of Arab territories ended four centuries of Ottoman rule over them. By the time the war ended, Britain signed an array of promises and declarations . Even though all these agreements are somehow related to Palestine, they did not have a direct impact[3]. However, the Balfour Declaration[4] addressed by Arthur James Balfour, the British Secretary of State for Foreign Affairs, to Lord Water Rothschild, a prominent member of the British Jewish community directly announced the establishment of Palestine as a national home for the Jewish people (Bunton 2013, 18). The Balfour Declaration can be seen as the first development in support of the international recognition of the Jewish community in Palestine and can be evaluated as the one of the founding texts of Israel (Ediz 2019, 99).

Britain officially became the mandate of Palestine in 1923 as recognized by the League of Nations. According to Harms and Ferry (2008, 76), Britain was sympathetic to the Zionist cause. The anti-Semitist stance would benefit Britain economically and the presence of Jews in Palestine would give ground for Britain's presence there . Therefore, British rule was justified by the Jewish population and Jews were supported by Britain. During the three decades under British rule, the Palestinian national movement attempted to protest Jewish immigration, land acquisition, and the British mandate and sought to prevent the establishment of a Jewish national home in Palestine(Pearlman 2011, 58). In April 1936, the Palestinian Arabs started the armed conflict against Jewish and British targets - called the Arab revolt, it lasted for three years. British administration formed a commission, the Peel Commission, to negotiate between the Jews and Arabs in Palestine. The Commission presented the "two-state solution" which proposed to give the small part of the land to the Jews and the larger part to the Arabs in accordance with the proportionality of the population. However, the proposal was not accepted, while Jewish people escaping from the carnage in Europe poured into Palestine in increasing numbers. By 1947, there were 600.000 Jews living in Palestine. After Britain could not handle the tension, it turned the issue over to the United Nations (UN) which had been established in 1945 to perform the functions of the former League of Nations. UN Resolution on "the Future Government of Palestine" adopts the two-state solution

[3]Britain and France engaged in secret alliances regarding the fate of the Middle East after the First World War : Skypes-Picot Aggreement, Sharif Hussein-McMahon Negotiations, and Balfour Declaration. For more information, see Al-Bashayreh (2012); Ediz (2019); Shlaim (2005)

[4]For the document, see UN, "Balfour Declaration- UK/ Non-UN Document", accessed in May 10, 2019, https://www.un.org/unispal/document/balfour-declaration-uk-non-un-document/

and the establishment of the independent Arab and Jewish states(Assembly 1947). However, after the resolution, Jews made the counter move by declaring themselves an independent nation called the state of Israel. On May 15,1948, the Arab states of Egypt, Syria, Lebanon, Jordan, and Iraq declared war to prevent its establishment. The result was disastrous for the Arab side. Having declared its statehood, Israel, maintained its territory. It even gained more land than the UN partition plan had recommended (Gunderson 2004, 15-6).

In sum, in the pre-1948 period, the Jewish immigrants and land acquisition transformed the demography and territorial distribution in Palestine and paved the way for the establishment of Israel. The secret alliances that were signed during the First World War constituted the diplomatic dimension of the establishment. Balfour Declaration and Britain's sympathetic stance toward the Jewish community catalyzed the Zionist goal of statehood in Palestine.

2.2 Israeli-Palestinian Conflict: Actors and Dynamics of Recognition

1948 was the most transformative date for the Israeli-Palestinian conflict because the Jewish community declared statehood in Palestine in that year. After the declaration, the defeat of Arab armies by Israeli forces and the immediate recognition of Israel by multiple states and the international community consolidated the claim of statehood. The Arab population residing in former Palestine constituted a source of threat for the existence of Israel. In return, Palestinian Arabs sought for political rights and independence through varied means and national liberation movements, producing different political actors and entities including PLO, Fatah, and Hamas. This section examines the process after the declaration of Israel's statehood. The international recognition of Israel was consolidated following the defeat of Arab states by Jewish forces. The consolidation of statehood in the international community triggered the formation of the Palestinian liberation movements, first Fatah, then PLO . In the late 1980s, Hamas, established itself as another actor in the Palestinian liberation movement. This section briefly evaluates the historical continuity and change of the relations between different Palestinian groups and Israel, and among Palestinian groups themselves.

2.2.1 International Recognition of Israel

Before the establishment of Israel, the relations between Jewish and Arab residents were tense. Fighting on the ground had started during the British administration. From November 1947 to May 1948, there was a civil war between Palestinian Arab society and *Yishuv*, Jewish residents in Palestine. The second phase of this conflict was the regional war in the Middle East. The Arab League and neighboring Arab countries had previously expressed their strong d opposition to the declaration of Israel as an independent state in Palestine. Following the declaration on May 14, 1948, Arab states took military action against the newly formed state, resulting in the 1948 Arab–Israeli War. Israeli forces defeated the Arab states and assured its strength and claim for statehood. The independent state of Israel was established within expanded boundaries that comprised 78 percent of the former British mandate of Palestine including the western part of Jerusalem (Bunton 2013, 54-5).

The Israeli forces were composed mainly of the Jewish defense force, Haganah, along with the LEHI and Irgun terrorist groups. They were better-trained and organized than Palestinian Arabs who were leaderless since the Arab revolts of the 1930s. The offensive attacks by Israeli forces were atrocious and inflicted important toll on Palestinian militant groups, Arab armies and civilians (Harms and Ferry 2008, 91-3). By the end of this phase of the war in 1948, 750.000 Arabs had fled or were expelled from their homes in Palestine. While 1948 was a victory for Israel with a small number of losses, it was a catastrophe for Palestinian Arabs and called *nakba*. Israeli people swiftly settled in the former lands of Palestinian refugees. However, until the 1967 war, the international community viewed Palestinians more as a humanitarian problem than as autonomous political actors (Bunton 2013, 55).

In the two decades following the 1947-9 fighting, the civil struggle between Arab and Jewish inhabitants transformed also into an interstate rivalry referred as the Arab-Israeli conflict. Internationalization of the conflict also includes the recognition of Israel by states and international organizations. The Israeli provisional government was recognized by the U.S. President Truman on the day it announced its establishment as the *de facto*[5] authority of the State of Israel. Even before the declaration, Truman had recommended the admission of 100.000 Jewish refugees to Palestine that would increase the Jewish population and somehow legitimize the statehood claim (Gal 1991, 206). Iran also *de facto* recognized Israel, followed by Guatemala, Iceland, Nicaragua, Romania, and Uruguay. By the end of 1948, 21

[5] *De facto* and *de jure* recognition is explained in the "Strategic Tools of the Accession to the Rome Statute" chapter .

countries had recognized Israel. The Soviet Union was the first country to grant *de jure* recognition to Israel on 17 May 1948.

The first election of Israel made a justifying impact on its pursuit for recognition. The United States de jure recognized the country after the first Israeli election in 1949. One day after the declaration of its statehood, Israel had applied for membership to the United Nations[6], but its application was not initially accepted by the Security Council. Israel's application was renewed in 1949 after the first elections[7]. Following a Security Council resolution, two-thirds majority in the General Assembly approved Israel's admission to the UN. After the first elections in 1949, 33 countries had recognized Israel. By the late 1960s, Israel developed diplomatic relations with many countries in Western Europe, North and South America, and Africa. In the wake of the Six-day War in 1967, eight members of the Arab League pledged not to recognize Israel. Although some states like Bolivia, Cuba, Mali, Niger suspended the relations with Israel following the Arab- Israeli War of 1973, after Israel established relations with PLO, those states restored the diplomatic relations with Israel. As of August 2020, 163 of the 193 UN member states recognize Israel. Among UN member states, 25 countries have never recognized Israel. They are mostly members of the Arab League that had issued the "Khartoum Resolution" and the Organization of Islamic Cooperation (*"Israel International Relations: International Recognition of Israel"* N.d.).

The international recognition of Israel was a gradual process that was consolidated by first, the defeat of Arab armies in the 1948 War, and then, the first election of Israel. It is important to clarify that the relation between Israel and the Palestinian community somehow affected the foreign relations of Israel with other states because many states restored their relations only after Israel's recognition of PLO. Therefore, the emergence of Palestinian liberation movements is examined in the subsequent sub-section in order to highlight how these developments impacted the issue of Palestine's recognition. Yoffie (2011) argues that such gradual recognition of Israel as a state, directed Palestinian leaders to "Plan B" which he describes as "a multifaceted approach consisting of recognition from four major international bodies: the UN Security Council, the UN General Assembly, the International Court of Justice, and the International Criminal Court"(499).

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[6]The application letter from Israel to UN General Secretary: *Israel's application for UN membership - Declaration - Letter from Israel* (N.d.)

[7]The Security Council resolution 69 (March 4, 1949): *UNSC Resolution 69* (1949) and General Assembly Resolution 273 (May 11, 1949): *UNGA Resolution 273* (1949)

2.2.2 Palestinian Struggle: Fatah and PLO

After the 1948 war, the Palestinians' national consciousness dramatically increased but there were no national and political institutions to embody it. The national identity was sharpened by the daily life struggle against the Israeli state. Especially the dispersion of the Palestinian population to surrounding Arab states prevented the emergence of a settled organization. After Israel's occupation of Sinai and the Gaza Strip in 1956, Palestinian struggle groups emerged solely for the aim of Palestinian liberation.

Fatah, also spelled Fath, meaning conquest or opening in Arabic, is also known as Palestine National Liberation Movement. It was founded in the late 1950s by Yasser Arafat and Khalil al-Wazir with the aim of wresting Palestine from Israeli control by waging low-intensity guerilla warfare. In the early 1960s, Fatah did not use direct political violence but adopted a more peaceful method by focusing on building international support. The armed struggle between Fatah and Israel began in 1965. Until the war of 1967, Fatah mostly conducted acts of sabotage. In this regard, Fatah used guerilla strategies in committing acts of sabotage and targeting Israeli security personnel. After 1968, it also began to attack Israeli civilians and thus we can argue that it switched to employing domestic terrorism (Daase et al. 2015, 225).

Palestinian struggle against the established Jewish state was not organized and united until the formation of the Palestinian Liberation Organization (PLO). This disorganized form of Palestinian activism mainly consisted of independent national movements. PLO was formed in 1964 by the Arab League to keep those diverse activist groups under control(Khalidi 2007, 138). The Palestine Liberation Organization was designed as a general organizational framework within which all Palestinian organizations - trade unions, professional associations, prominent national figures, armed groups like Fatah – unite for Palestinian liberation (Hamid 1975, 90). PLO called for united action "within Palestine", not "in offices". It performed guerilla activities in 1965 and 1966. Between 1964 and 1967, the PLO developed diplomatic relations with the Arab world and with some international quarters. It represented Palestine at Arab Summit Conferences (p.96-97).

In the meantime, Fatah had rapidly gained followers in universities and refugee camps. On the initiative of Fatah, a meeting of commando organizations was held in Cairo on January 17-20, 1968. The continuation of armed struggle resulted in political gains for Fatah rather than weakening support from Palestinian people and the Arab States. Fatah took over the PLO in February 1969 (Tessler 2009,

429). Fatah, formerly the Palestinian National Liberation Movement, is currently the administrative wing constituting the Palestinian National Authority and the largest faction within the PLO. Therefore, especially after 1969, PLO, largely led by members of Fatah came to denote the same leadership.

Before reviewing the implications of the Fatah's takeover of PLO, it is worth exploring the role of the Arab states in the conflict and the Six Days War in 1967 and the situation that it created for Palestinians. The armistice agreements after the defeat of Arab states in 1948 had not provided a peaceful settlement in the Middle East. Given that the problems over borders and refugees remained untenable, another round of fighting started in 1956 between Egypt and Israel regarding the Suez Canal. In 1967, Israel's air force launched a surprise attack on air bases throughout Egypt. It achieved the upper hand in the conflict and after six days, Israel occupied the entire Sinai Peninsula, the West Bank, and the Golan Heights (Bunton 2013, 67-8).

In the late 1960s, Fatah adhered to the principles of pan-Arab nationalism, reflecting the call they made for unreserved Arab support for the Palestinian national struggle. The Palestinian struggle was a unifying force among Arab states against the common rival in the region, Israel. Because of the unifying character of the aim, Arab states both individually and collectively had sought to convert the Palestinian resistance into an internationally recognized national movement with limited territorial goals based on the United Nations Security Council Resolution 242[8] (Sela and Maoz 1997, ix).

The aftermath of the 1967 war created a new situation for Palestinians. Israel now occupied the entire Palestine and parts of Syria and Egypt and appeared to be pursuing an expansionist policy within them. The necessity for national unity among Palestinians brought the attempt of the establishment of a new National Council (Hamid 1975, 98). The first Palestinian National Council (PNC) was held in May 1964. It is designed as the legislative body of PLO and elects the PLO Executive Committee. It serves as the parliament that represents all Palestinians inside and outside the Palestinian territories (*Council Establishment* N.d.). The largest single component was Fatah, "the leading commando organization" (Hamid 1975, 101). Its strong position in the PNC helped consolidate the power of Fatah. The takeover of PLO by Fatah in 1969 led to the emergence of a united representative of Palestinian people (in exile) until the birth of Hamas.

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[8] After the Suez Canal Crisis between Egypt and Israel in 1956, a ceasefire was called by the General Assembly. As Israel's occupation of lands in the Middle East continued, following the Six Days War, UN Security Council issued the Resolution 242 and called for a peaceful solution and Israeil forces withdrawal: https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136

The ongoing repressions by Israeli forces and increasing continuation of the occupation gave rise of the *intifada*, the Palestinian uprising that erupted in the West Bank and the Gaza Strip in December 1987. It had a number of consequential outcomes, including the consolidation of PLO as the main representative of Palestinian people, declaration of independence, PLO's turn to diplomatic methods, rise of popular support for Hamas, increased international sympathy for Palestinian cause and ultimately the signing of the Oslo Accords, which led to the creation of the Palestinian Authority, an interim self-governing body to administer parts of West Bank and Gaza Stript. The following part reviews these outcomes in terms of the emergence of new actors and entities, i.e Palestinian Authority and developments regarding Palestine's international recognition.

2.2.3 Palestinian Struggle: PA and Hamas

The ongoing repressions by Israeli forces and increasing continuation of the occupation gave rise of the *intifada*, the Palestinian uprising that erupted in the West Bank and the Gaza Strip in December 1987.Although this was a mass civil uprising and Fatah was not necessarily behind the riots, it was able to lead it (Daase et al. 2015, 230). *Intifada* led to the birth of Hamas in the same year. In December 1988, a few weeks following its declaration of independence, which is further examined below, PLO stated that it recognized Israel's right to exit and renounced terrorism (Lohr 1988). Fatah's last act of domestic terrorism was carried out in March 1988 (Daase et al. 2015, 230). According to Biene and Daase (2015, 31), Famas' switch to "a policy of restraint" was in order to gain and maintain international recognition(231). However, the increasingly moderate approach of Fatah, the largest faction of PLO, toward Israel and search for diplomatic solutions instead of fighting for Palestinian liberation created discontent among some Palestinians and the ongoing uprising. The dialogue with the United States, the Madrid Conference in 1991 (where PLO was not officially represented), rounds of negotiation in Washington and finally with the signing of Oslo Accords in 1993 PLO and Israel agreed on a framework to resolve the conflict.

It was not just disagreement over the means that separated Hamas from Fatah-led PLO[9]. The Islamists were also critical of Fatah's secular view. *Intifada* had become an Islamist awakening for some Palestinians and gave birth to the establishment

[9]Hamas' first use of violent tactics was a suicide bombing, Beit El bombing in 1993; before then another militant group called Palestinian Islamic Jihad had carried out a suicide attack in 1989.

of Hamas, providing an Islamist alternative to Fatah's secular nationalism (Løvlie 2014, 119). In the 1960s and 1970s, Fatah was popular among Palestinians because it was perceived to be a true expression of the condition of resistance. The popular support accorded by Palestinian people endorsed the feasibility of Fatah's revolutionary undertaking. On the other hand, Islamists did not participate in the revolutionary projects of Fatah but instead joined Hamas' activities, which helped weaken the popularity of Fatah (Hroub 2000, 5). Therefore, the First Intifada not only revealed the resistance potential of Palestinians but also gave rise to the second most powerful political movement among Palestinians: Hamas (Kılınç 2018, 176).

Gradually the idealistic and passionate goals of Fatah transformed into a more realistic and moderate stance toward Israel. *Intifada* had also demonstrated the growing role of the Palestinian leadership, mostly identified with Fatah. Although this was a community-led outburst, when Jordan ended its administrative authority in Jordan, PLO found itself with a stronger claim for being the representative of Palestinian people.

This claim was enhanced when on September 13 of 1993, Israeli Prime Minister Yitzhak Rabin and PLO leader and chairman of Fatah Yasser Arafat signed the Declaration of Principles, also known as the Oslo Accords and Israel recognized the PLO as the legitimate representative of the Palestinian people in exchange for Palestinian leadership's official recognition of Israel's right to exit. But Hamas, the rival Islamic group committed to armed struggle, strongly opposed the deal.a. The Declaration called for the Palestinian Interim Self-Government in the West Bank and Gaza for a transitional period of five years. The declaration also stressed that two sides were ready to negotiate the implementation of United Nations Security Council Resolution 242, which provides for the acknowledgment of sovereignty, territorial integrity, and political independence (McKinney 1994, 93). The most striking aspect of the Oslo Accords was Israel's acceptance of the Palestinian Administration in the West Bank and Gaza Strip which even the existence of Palestinians was in denial by then (Kılınç 2018, 177). The following year the Palestinian Authority (PA) was established to govern the emerging Palestinian autonomous regions, and Gaza city became Fatah headquarters. It has expanded its jurisdiction over Palestinian areas as Israel withdrew its forces. As the majority party, Fatah has been the primary negotiator with the Israeli government. It has adopted the two-state approach to resolving the conflict, agreeing in principle to a partition of Palestine between a Jewish and a Palestinian state (Jaeger and Paserman 2006, 45). Unlike Fatah, Hamas does not believe in the possibility of a two-state solution which is one of the main breaking points in the relationship between Fatah and Hamas.

2.2.4 International Recognition of Palestine

Israel defeating the Arab states in the 1973 War revealed once again the difficulty of the military resolution of the conflict and the need to include Palestinian entities in the peace process (Daase et al. 2015, 226). Such consideration led Arab states to first secretly (in 1973) and then officially (in 1974) recognize PLO as the only representative of Palestinian people. PLO joined the Arab League and developed its relations with the member states. This was followed by recognition of PLO by the Non-Aligned Movement, African Union and the Soviet Union similarly promised recognition in exchange for moderation and following Fatah-led PLO's renunciation of international terorism, granted recognition to PLO. These developments were followed by the recognition of PLO by the United Nations when the General Assembly also granted it observer status[10].

The Palestinian authorities have been in the pursuit of international recognition especially after Israel got recognized in the international community and the armed struggle with Israeli forces did not bring independence and sovereignty for Palestinian people. The Fatah-led PLO, as it moderated its strategies of resistance, also gradually received recognition from other states and international organizations. But in fact, international legal institutions and international organizations, tasked with enforcing international law by intervening in internal matters may infringe state sovereignty. However this claim depends on how we define sovereignty[11]. For the type of sovereignty that involves issues of authority and legitimacy, as opposed to control, international law can function as a "step ladder", not a "stumbling block" (Yoffie 2011, 502). In other words, international law and organizations with mandates can actually have sovereignty-enhancing potential for aspiring states like Palestine (Yoffie 2011, 503). Such international bodies may help "enhance international legal sovereignty, which Krasner defines as 'practices associated with mutual recognition, usually between territorial entities that have formal juridical independence'" (Yoffie 2011, 503).

On 15 November 1988, the Palestine National Council, the representative body of PLO, operating from Algiers declared the independence of Palestine, basing its legitimacy on the General Assembly resolution from 1947 that divides the land but "continues to attach conditions to international legitimacy that guarantee the

[10] See UNGA Resolutions 3236 and 3237: https://undocs.org/en/A/RES/3236(XXIX)

[11] Krasner (2001)provides four different attributes of sovereignty: international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.

Palestinian Arab people the right to sovereignty and national independence"[12]. As a result of the diplomatic shift inherent in the declaration of independence, Yasser Arafat was asked to give an address at the General Assembly. With the Resolution 43/177, the body acknowledged Palestine's proclamation independence and decided to switch to "the designation 'Palestine' in the United Nations system, replacing the PLO designation[13]. Among the 144 states that have voted for this resolution, 98 accepted, 44 remained abstain and the United States and Israel voted against (Quigley 2011, 4).

Following the declaration, Palestine first sought membership to the World Health Organization (WHO), the UN's specialized agency for international health and attempted to accede to Geneva Convention of 1949 by sending ratification documents to Switzerland[14] (Quigley 2011, 4). Both efforts were not successful. Seeking both bilateral and multilateral recognition, immediately after the PNC meeting, Palestine received recognition from more than 30 countries. The recognition of Palestine can be evaluated in respect of bilateral recognition by states and the recognition by an international organization. However, these two forms are interrelated. In the report of request for admission to UNESCO, the authority of Palestine National Council enlists the countries that have recognized the State of Palestine in the year that Palestine declared statehood, 1988. It is argued that "Recognition is regarded by some as evidence for statehood which militates in favor of admission. This holds good of the State of Palestine, which has now been recognized by 98 states" (*Request for admission of Palestine to UNESCO - Executive Board 131st Session* 1989, 12). Like WHO, UNESCO also postponed its decision on Palestine membership application, although many states did grant recognition in 1988.

2.2.5 The Failure of Oslo Accords and the New Push for Recognition

The Oslo Accords failed to realize a resolution of the conflict. It had created a new entity, PA with the authority to exercise a limited self-rule but in fact its leadership overlapped with Fatah-led PLO. Oslo Accords, while making the parties commit to

[12]The Declaration of Independence stipulates that "The State of Palestine declares its commitment to the principles and aims of the United Nations" (*Palestinian Declaration of Independence* 1988). See the PLO's letter to the UN Secretary- General (18 November 1988): https://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392

[13]See UNGA resolution 43/177 (15 December 1988): https://unispal.un.org/UNISPAL.NSF/0/146E6838D505833F852560D600471E25

[14]Palestine also submitted a request for admission as a member state to UNESCO: https://unesdoc.unesco.org/ark:/48223/pf0000082711_eng

peace, did not end Israel's military occupation of Palestinian territory even though negotiations continued. The Oslo process could not overcome the deadlock amidst eruptions of violence, fruitless negotiations and changes in leadership[15].

Yasser Arafat's death in 2004 closed a long era in Palestinian politics. Arafat was one of the founding leaders of Fatah in the late 1950s, he had become the chairman of the Executive Committee of the PLO in 1969, and in 1996, he was elected as the president of the Palestinian Authority (PA) (Khalidi 2007, 140). Mahmoud Abbas, a founding member of PLO who had held diplomatic positions, such as leading the negotiations department, was seen as a moderate leader. Before Arafat's death, with the international pressures he was appointed as the prime minister of PA and after his death in 2005, Abbas was elected as the president of PA. As one of the key architects of the Oslo Accords, throughout the escalating cycle of violence Abbas remained a believer committed to negotiations. However, he could not persuade Israel to ease life in the occupied territories and shook the credibility of Fatah. In contrast to the fragmentation and disarray of Fatah, Hamas' power and influence grew. In the elections of 2006, Hamas took the upper hand against Fatah. The victory of Hamas, which made it the actor likely to sit in the negotiation table complicated the relations between Israel and Palestinian groups(Bunton 2013, 101-3). Hamas gained the control of Gaza after its electoral victory and became a distinct authority representing a part of the Palestinian people. The Palestinian Authority officially split into two: Whereas Fatah maintained control of the West Bank, Hamas had control of Gaza.

During the second intifada, which started in September 2020, Israel began constructing a wall as a barrier against Palestinian political violence. The UN General Assembly in 2003 requested an advisory opinion on its legality from the International Court of Justice (ICJ), the principal judicial organ of the United Nations. ICJ in 2004 delivered that "The construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality." The ICJ Wall Opinion stated that for the peace and security in the region, the problem should be solved "on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004, para.162).This was a non-binding opinion with no bearing on Israel. Israel and PA did continue negotiations But the ongoing expansion of Israeli settlements and the escalating hostilities did not make it

[15]In the aftermath of Oslo, numerous meetings and agreements took place including Oslo II Accords in 1995, Wye River and Sharm el-Sheikh Memorandum in 1998 and 1999, Camp David Summit in 2000, Arab Peace Initiative of 2002, Sharm el-Sheikh Summit in 2005 and the 2007 Annapolis Conference.

possible to implement the Road Map for Peace supported by the Middle East Quartet (UN, US, EU and Russia). Supported by a UN Security Council Resolution, it called for a two-state solution based on three principles: nonviolence, recognition of Israel, and acceptance of previous agreements[16]. But after Hamas won the parliamentary elections in 2006, the international community refused to deal with it. Following a military conflict between Fatah and Hamas, Hamas took control of Gaza and Israel launched military operations (the Operation Cast Lead (December 2008–January 2009). Obama administration facilitated direct talks between PA and Israel but it reached a deadlock when Israel announced that it would not extend a freeze on settlement construction. Abbas communicated that he viewed UN membership as an option if the peace talks collapsed: "We are determined to appeal to the UN in September if the attempts at renewing negotiations with Israel fail". The new push for international recognition via international law and organizations came in response to lack of progress in peace talks that advocated for a two-state solution to the conflict.

Under the presidency of Mahmoud Abbas, the Palestinians have adopted a strategy of intensifying their efforts to upgrade the status of Palestine at the United Nations (Mirilovic and Siroky 2015, 272). Palestine did apply for full membership to the United Nations in 2011[17]. At the time, Hamas viewed it as a ploy to continue negotiations with Israel and did not give support. But the application to the Security Council was declined. In 2012, Palestine was accepted as an "entity" in the status of a non-member observer state with 138 votes against 9 negative votes. In the UN General Secretary, 41 member states abstained and 5 of them did not participate in voting (Aybay and Oral 2016, 283). In the words of the Palestinian President Mahmud Abbas, the General Assembly thus issued the "birth certificate to the Palestinian state" (*Mahmoud Abbas's speech to the UN General Assembly* 2012). Before that, the PA's acceptance of the ICC jurisdiction in 2009[18] was declined on April 3, 2012. However, the Prosecutor Moreno-Ocampo said that the upgraded status of Palestine by the United Nations would "inform the current legal status of Palestine for the interpretation and application of article 12 [of the 1998 Rome Statute of the International Criminal Court (Rome Statute)] (Barnidge Jr 2016, 110). The date of UN's upgrading status of Palestine corresponds with a major operation of Israel against Palestinians, Operation Pillar of Defense (November 2012). The PA's application to the UN and its approval by the majority of votes "strengthened the

[16]See *UN-Two-State Solution* (2003)

[17]See *Application of Palestine for admission to membership in the United Nations* (2011)

[18]See *"Declaration Recognizing the Jurisdiction of the International Criminal Court"* (2009)

PA's international status" (Brom 2012, 71).

Also, Israeli assault on the Gaza Strip in July-August 2014, known as Operation Protective Edge led the PA to apply to the ICC by accepting the jurisdiction over its territories. The application letter was accepted by the Prosecutor and Palestine became a state party to the Rome Statute on January, 2015. Therefore, we can argue that the attempts of recognition by the UN in the aftermath of the Operation Pillar of Defense both contributed to the international recognition of Palestine and paved the way for the acceptance of membership in the ICC whose application was triggered by the Operation Protective Edge. Both the detailed analysis on the operations and their association with the recognition of Palestine are examined in the "Strategic Tools of the Accession to the Rome Statute" Chapter.

To sum up, besides the historical developments in the relations among actors, Israel, Fatah/PA, and Hamas, the issue of recognition is a fundamental factor affecting the dynamics among these three actors. As noted above, 163 of the 193 UN member states recognize Israel as of 2020. Although its position in the international community is stronger, 25 countries have never recognized Israel and most of them are in the Arab League. Such overwhelming recognition provided Israel to gain an upper hand in the conflict against other Palestinian actors Fatah and Hamas. In return, Fatah representing Palestinian National Authority attempted to gain recognition in the international community via several means. The accession to the ICC is also a part of recognition attempts as one of the main arguments of this thesis. Palestine's becoming a member of the Rome Statute brings a new dimension to the conflict. Even though Israel is not a signatory member of the ICC, the crimes can be subject to jurisdiction after the membership of Palestine since the court has jurisdiction over citizens of the member state and via the referral from the Palestinian National Authority. The subsequent chapter examines the previous studies on international recognition of Palestine, with a special emphasis on the ICC factor and its implications in the literature.

3. LITERATURE REVİEW

This thesis has a multifaceted focus. It is neither only about the international recognition of Palestine nor merely the conflict dynamics between Israel and Palestinian forces or among themselves. The goal is to explain why Palestine has acceded to Rome Statue and joined ICC, in this section, I will review scholarly studies on first, the international recognition process of Palestine and similar cases; second, membership to ICC and its implications, and lastly the factors of Israel and Hamas in the membership process. Finally, I will highlight some of the shortcomings of the literature and explain how this thesis contributes to the literature.

3.1 Palestine and International Recognition

Theories on Recognition

Even though the recognition by other states or international community does not exist in the Montevideo Criteria[1] for statehood, in practice it matters[2] in its impact. Under international law, there are two kinds of recognition as *de facto* and *de jure*. The political act of recognition (*de facto*) means that "the recognizing state is willing to enter into political and other relations with the recognized state or government" (Kelsen 1941, 605). In such kind of recognition, states are not obliged to enter diplomatic relations such as signing treaties. *de facto* recognition of a state or a government is an act which lies within the arbitrary decision of the recognizing state without an emphasis on legality of legitimacy. On the other hand, *de jure* recognition

[1]For full text of the convention, "Montevideo Convention on the Rights and Duties of States", signed at Montevideo on 26 December 1933, entered into force 26 December 1934, available at https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml(*Montevideo Convention on the Rights and Duties of States* N.d.)

[2]It does include "capacity to enter into relations with other states"(*Montevideo Convention on the Rights and Duties of States* N.d.)

means full, complete recognition. Rather than the recognition of existence with the practical attributes of a state and government, *de jure* (legal) recognition is related to its legality and legitimacy. Thus, the relations between recognizing state and de jure recognized state are legally binding such as imposing sanctions, limiting trade etc. (Bailes 2015, 214). The main difference between the two doctrines is that while declaratory theory holds that recognition has no substantive effect on statehood and only requirement is the fulfillment of the criteria of statehood, the constitutive theory of recognition argues that recognition is a criterion for statehood [3] (Brown 1942; Crawford 1990; Grant 1999; Kelsen 1941; Lauterpacht 1943; Oppenheim 1905).

According to the constitutive theory, legitimacy is the core criteria, thus a certain entity could be qualified as a state with the recognition by the members of the state community. When effectiveness became more significant for recognition, the combination of a territory, a people, and an effective state authority constitutes a state. The act of recognition clarifies the legal quality of the state. In the support of constitutive theory of recognition, Oppenheim (1905) argues that,

> It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has towards other members ... There is no doubt that statehood itself is independent of recognition. International law does not say that a State is not in existence so long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law (110).

In the declaratory theory, recognition is a legal consideration which automatically appears after the fulfilment of statehood criteria (127). Therefore, a state is defined according to these criteria: a territory, a people, and an effective authority[4]. Even though the existence of a state is not directly linked with the recognition in the declaratory theory, the importance of recognition has increased as the international law became more central. Especially in the decolonization period, third world countries declared their independence and expected to be recognized by other states, since both the colonizer and the colonized had a claim on the same territory. Thus, especially for newly established states and in disputed territories, the issue of

[3]The recognition of Israel by the United States demonstrates the distinction between *de jure* and *de facto* recognition. The United States has *de facto* recognized the state of Israel while it was under temporary authority in 1948. After a government emerged with the elections, the recognition turned into *de jure* form (Aybay and Oral 2016, 279).

[4]See *Montevideo Convention on the Rights and Duties of States* (N.d.)

recognition is a vital matter for the declaration of existence. Despite the fact that recognition is a core factor in the analysis of this study, the way that international law doctrines understand recognition is beyond the scope of this thesis.

According to Agné et al. (2013), the politics of recognition has the tendency of escalating or perpetuating the conflicts. However, especially considering the case of Palestine, recognition is highly related to discussions of statehood and to provide analytical context for the next chapters, here I will first examine how recognition by international organizations and other states has been examined in previous studies.

Borovci (2018) stresses the role of international organizations in the recognition or non-recognition of states. The membership to an international organization admits a state's factual recognition of statehood and catalyzes the integration process to the international relations as a legitimate actor (144). He argues that the recognition of statehood is possible via membership to international organizations. When it comes to the groups engaged in struggles for self-determination, international recognition especially by the United Nations General Assembly improves the bargaining position of the recognized group and provides the upper hand position against the non-recognized group in territorial compromise (Shelef and Zeira 2017).

Within the context of impact of recognition by international organizations, several scholarly works examine Palestine's membership to international organization and accession to international treaties. Some of these studies define membership to each international organization as a continuing process of recognition; others examine Palestine's admission to an organization and highlight the relationship between the particular organization and Palestine, and the implications of membership. For example, Keane and Azarov (2012) draw their framework on the challenges of UNESCO after the acceptance of Palestine as a member of the Convention, Johnson (2011)'s focus is the implications of UNESCO membership for Palestine's status in the UN. These two studies approach the relationship between UNESCO and Palestine from different perspectives. As detailed in the last section of the previous chapter on historical background it is not only the international organizations, but also more than 130 states have formally recognized the statehood of Palestine. However, literature on bilateral recognition of Palestine by states is very limited. Persson (2015) examines Sweden's recognition of Palestine as a model that would show snowball effect and lead to the collective recognition at least by other European countries regardless of the recognition of the EU as in Sweden's example. Another study by Mirilovic and Siroky (2015) explores the influence of religion on states' decision to offer or withhold recognition, specifically in the context of recognition of Israel and Palestine Based on empirical results, they find that transnational religious ties in

Muslim majority states have a high impact on recognition decisions. It is within this context that some international law scholars draw attention to how collective recognition or non-recognition can influence statehood. It is within this context that some international law scholars draw attention to how collective recognition or non-recognition can influence statehood (Cerone 2011).

For some legal scholars, membership to international bodies is part of a recognition process that has the potential to achieve statehood in the eyes of the international community. Accordingly, for Palestine recognition from the four major international bodies, namely, the UN Security Council, the UN General Assembly, the International Court of Justice (ICJ), and the International Criminal Court (ICC) is conceived not just an alternative when the peace talks fail but could advance its claims for state sovereignty (Yoffie 2011).

Similarly Elgindy (2011) views Palestine's attempts to be recognized by the UN as "a new strategy of statehood" Accordingly this diplomatic initiative is to acquire membership to UN as an "existing state", rather than a way to fulfill statehood criteria. Quigley (2013) similarly argues that Palestine has been a state. The UN General Assembly's decision to grant Palestine non- member observer State status "represents a step in a process that has been in motion for some decades".

Palestinian statehood has been on the international agenda since the 1920s (Quigley 2013, 8).However international law scholarship does not have a consensus on the link between recognition and statehood. Vidmar (2013) argues that the UN general Assembly's upgrade to Palestinan's satus and recognition as a non-member observer state, does not change or confirm its legal status. Vidmar's position is that "procedural tricks via international treaties and organizations" do not create statehood but can serve as evidence of it. This interpretation leads him to conclude that Palestine can demonstrate its capacity to act like a state by becoming a party to the ICC Statute and/or bringing a case to the International Court of Justice. Both the non-member observer state status of Palestine in the United Nations and the conflict between Palestine and Israel over the same territory repeatedly bring the debates on whether Palestine is a state or not[5]. The issue is further complicated by the fact multiplicity of Palestinian actors, most significanty after the Hamas takeover of Gaza in 2007, Palestine could not claim to possess national unity (Elgindy 2011). In other words, "While supporters of Palestine's accession had argued for a long time that it was a state due to its legal entitlement as a self-determination unit and widespread recognition by other states, sceptics held that the fragmented con-

[5]The expectation that Oslo Accords (Declaration of Principles) between Israel and PLO that would lead the way to Palestinian statehood, after the interim period has not materialized (McKinney 1994).

trol exercised by the Palestinian National Authority under Israeli auspices lacked, among other things, the required effectiveness and independence for Palestine to qualify as a state" (Grzybowski 2017, 410). However, according to Rosen (2011), "Both the Hamas-controlled Palestinian entity in Gaza and the rival Fatah-governed Palestinian entity in the West Bank can be said to meet all four of these criteria of the law of statehood". While some scholars support for the argument that Palestine has already fulfilled the criteria of statehood in international law (Boyle 1988, 2000; Dugard 2013; Najafian Razavi 2016; Quigley 2011, 2013), as well as support for the opposite (Barnidge Jr 2016; Benoliel and Perry 2010; Crawford 1990; Ronen 2014), and and the position that Palestine is a quasi-state (Shany 2010; Worster 2010).

Regardless, the Palestinian's claims for statehood is caught the clash between rhetoric and realpolitik in the United Nations (Eden 2013). In terms of rhetoric, Palestine has long declared its statehood in Palestinian Declaration of Independence in 1988, but in terms of realpolitik, since Palestine does not have the support of U.S.A and some the United Nations members, it is being questioned.

Similar cases to Palestine's recognition have been examined in the literature.Scholarship is rich with analysis on Kosovo, Somaliland and Taiwan. Also, while some studies adopt the comparative approach, others embrace the case study method by examining one entity's recognition. Ryngaert and Sobrie (2011) scrutinize the evolution of state recognition through the examples of Kosovo, South Ossetia, and Abkhazia. They criticize the gap in the theory of recognition that cannot explain the realpolitik after the dissolution of Yugoslavia. Likewise, Fabry (2010) argues that recognition by countries mostly depends on atypical interpretation of existing norms.

Looking at the example of Kosovo, Orakhelashvili (2008) asserts that there are both supporters and opponents in both regional and global level to the independence of Kosovo. But since major players such as India, China, and Russia are opposed to Kosovo's independence, Kosovo will not gain the general recognition and will not be admitted to the United Nations. According to Wilson (2009), despite the fact that Kosovo fulfills the statehood criteria, a clear majority of states have not recognized Kosovo's independence because its formal recognition may cause further secessionist movements. But recognition can have a positive impact for security and peace.

Similarly, Farley (2010) defends the positive impact of recognizing Somaliland on the regional security and stability. Even though Somaliland is also created through secession like Kosovo, the author argues that recognizing Somaliland would not violate any African norm that precludes secession. However Somaliland, despite being a well-functioning entity, is not recognized by the international community.

Taiwan can be the closest model to Palestine because each faces a state that claim sovereignty over their territories. Attix (1994) argues that even though states imply the recognition of Taiwan by entering trade relations, they also recognize the PRC's (People's Republic of China) claim to Taiwan. Recognizing both sides aggravates the situation. However, the recognition of Palestine does not directly depend on the non-recognition of Israel according to the literature. Through the examples of Tibet, Taiwan, and Palestine, Stokes (2016)'s thesis questions why some entities are politically recognized as states while others are not. The author argues that "opportunities for recognition" is the determinant factor for one entity's recognition in which political opportunities and state interests are in strong alignment. Acquired and missed opportunities define the level of recognition. The author conceptualizes it as an "opportunity structure for recognition" which emerges "during times when political opportunities and state interests are in strong alignment, favoring an entity's political recognition as a state" (Stokes 2016, v). Through a comparison between these three cases, Stokes deal with the dynamics of recognition and find that Palestine has been more successful than Tibet and Taiwan because of "greater alignment of interests, political opportunities, patronage, and resources" but also because Palestine but it has also been more involved in military conflict with Israel, compared to Taiwan and Tibet's approach to China (Stokes 2019).

Palestinian recognition has also been evaluated in comparison to South Sudan and ISIS. Analyzing the cases with respect to the Montevideo criteria, Muslu (2018) concludes that the criteria of an effective government is not necessary for statehood. State creation does not depend much on the entities' own dynamics but the decisions of other countries by recognition or non-recognition.

Overall, the literature on Palestine's recognition by the international community and how this is related to claims of statehood is limited and dominated by international law scholarship. Palestine's decision to seek ICC membership has added another dynamic to this issue of non-recognition and added a new dimension to Israeli-Palestinian conflict.

3.2 Membership to the ICC and Its Implications

As Vidmar (2013) explains membership to the ICC is different from its application for full membership to other international organizations like the UN and its

agency UNESCO. Palestine's admission to ICC sees the value of studying in the literature. Over the last decade, the use of international law by civil society and state institutions in the Palestine–Israel context has increased significantly. In the wake of the Israel-Gaza 2008-09 armed conflict and recently commenced process at the International Criminal Court (ICC), the debates on whether a Palestinian state exists or not arose again. The scholarship mostly deals with this issue of recognition and statehood but also provides abundant discussion on possible scenarios regarding ICC's action or inaction. Before examining how the literature evaluates possible implications of Palestine's ICC membership, I will first provide a general background on the International Criminal Court to explain why as a legal institution, it is fundamentally different from other international organizations.

Although the International Criminal Court is a new international court, international criminal law has developed step by step since World War II. First, the Nuremberg and Tokyo trials were set up for war crimes and crimes against humanity. Following these trials, new ad hoc courts were created after the Cold War to judge international criminal violations. The International Criminal Tribunal for former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994 were established by United Nations to prevent collective guilt and endorse individual accountability for war crimes like genocide, torture, rape, etc. These ad hoc tribunals were available only in special circumstances, there was clearly a need for a permanent, established criminal mechanism (Hafner-Burton 2013, 52-3). After months of negotiation, Rome Statute of the International Criminal Court was accepted on July 17, 1998. It entered into force with the acceptance of the 60th state on July 1, 2002 (Aybay and Oral 2016, 444). The Court, based in Hague, Netherlands, was created as a freestanding court and is not part of the UN system. However, "there is a relationship agreement between the ICC and the United Nations that establishes the legal foundation for cooperation within each organization's mandate". The two organizations interact frequently but "the ICC has its own mandate, which supports the Charter of the United Nations" (Hafner-Burton 2013, 217).

The Court is open to membership by all governments and as of 2019, it has 123 members. It is funded by member states as well as charitable donations from governments, international organizations, businesses, and individuals. It has jurisdiction in accordance with Rome Statute with respect to those crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (the state parties adopted an amendment in 2010 that include the crime of aggression as an actionable crime) (53). Since it has no retroactive jurisdiction, the ICC deals with crimes committed after the Statute entered into force.

The court's ability to exercise jurisdiction over such crimes is possible when "the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter" (*How the Court works* N.d.). Therefore, the court only has jurisdiction over citizens of countries that recognize it, or on referrals either from the UN Security Council, or a member state, or ICC's Prosecutor (Hafner-Burton 2013, 53). Because the prosecutor does not need state referral but can start investigating cases based on his/her initiative which is referred as delegation-based jurisdiction[6]. Simmons and Danner (2010, 229) argue that ICC is "much more independent of state control in the initiation of cases and far less protective of state sovereignty than was originally contemplated or has ever existed in modern history."

One of the main principles of the ICC is complementarity. The jurisdiction of ICC is complementary to the jurisdictions of national courts. The Court encourages and assists the national courts to investigate and prosecute grave crimes of concern to the international community (*Rome Statute of International Criminal Court* 2011, article 17). In this regard, the jurisdiction of ICC comes to the table only when national courts are unable or unwilling to act .

Another fundamental feature of the Court is the individual responsibility of the guilt rather than collective punishment of the state like ICJ . In the context of the Israel-Palestinian conflict, the notion of collective guilt causes two parties to come to terms with the history of conflict and it is more destructive than constructive for the relations between Israelis and Palestinians. On the other hand, ICC's way of conduct is crucial in establishing the truth because the real perpetrators of the crimes rather than a large group stand trial at the Court (Adem 2019, 191-2).

Among international law scholars, there is no consensus on the implications of involving ICC in the Israeli-Palestinian conflict. Most scholarly works that address Palestine's accession to Rome Statue, associate it with issues of statehood.Writing before UN recognition in 2012, Worster (2010) argues Palestine is considered a state only in certain context. In terms of the fulfillment of statehood criteria, Palestine can be seen as a quasi-state, but with regards to the accession to the Rome Statute and the acceptance of ICC jurisdiction, Palestine acts as a state internationally. On the other hand, writing before Palestine's upgrade to UN status, Ronen (2010) asserts that ICC jurisdiction over crimes allegedly committed in the Gaza

[6]In the delegation-based jurisdiction, ICC may exert its authority of jurisdiction over nationals of a non-member state based on universality and territoriality principle (Scharf 2001, 116).

Strip would not have any legal ground, because PA has not recently made statehood claims.Therefore, for Ronen granting such jurisdiction may jeopardize the credibility and legitimacy of the Court. In contrast, Shany (2010) claims that PA shows at least the characteristic of a quasi-state which has the legal personality to seek the jurisdiction of ICC over past crimes that took place in territory over which it claims authority. Yet, both Shany and Ronen reach the same conclusion that ICC's jurisdiction has limitations which may force it to reject exercising its jurisdiction. Even though PA's lack of statehood is insignificant for the ICC's delegation-based jurisdiction, Oslo Accords that established PA restricted the exercise of jurisdiction over Israelis. He proposes that domestic accountability mechanisms can be applied by Israel and PA for the war crimes in the territory instead of the jurisdiction of the Court. Highlighting the limitations in ICC jurisdiction, Kontorovich (2013) states that after the accession to the Rome Statute, ICC may exert jurisdiction for crimes that took place in territory of Palestine. This is because Israel is not a state party. Yet, what is meant by Palestinian territory remains undefined. Moreover, because Palestine sought ICC involvement to address Israeli settlement construction, such jurisdiction may violate territorial integrity of Israel. Besides, as also argued by Shany, Kontorovich indicates that the Oslo Accords can become an obstacle for ICC's exercise of criminal jurisdiction. This is because Oslo Accords had given Israel exclusive criminal jurisdiction over Israelis (and hence settlements) even in the territory of Palestine (Dugard 2013).

When Palestine had recognized the jurisdiction of the ICC back in 2009 and asked the court to review acts committed in the territory of Palestine since 2002, the prosecutor initially stated that he had no authority to determine whether Palestine qualified as a 'state' but also indicated that ICC could in the future open investigation "should competent organs of the UN or eventually the Assembly of States Parties (ASP) resolve the legal issue relevant to the assessment of article 12" (Dugard 2013, 567). According to Dugard (2013), having being recognized as a non-member observer state in 2012, the issue of statehood for the purposes of Rome Statue, should no longer be an issue and if still, ICC's preliminary examination does not turn into an investigation rested on the excuse of Palestine's non-statehood, this would mean political bias. When in fact, Palestine signed the document to accept the jurisdiction of the ICC, it did so with reference to Art. 12(3) of the 1988 Rome Statute of the ICC which provides for a "State which is not a party to this Statute" to accept the ICC's jurisdiction on an ad hoc basis and this was followed by Palestinian accession to Rome Statue (*Declaration Accepting the Jurisdiction of the International Crimina Court* 2014). For Barnidge Jr (2016), this raises not only technical issues but also risks the rapprochement between Israel and Palestine.

We can observe from the above overview that the literature on Palestine' referral/application to ICC is dominated by international law scholarship that concerns itself over the issue of statehood and technicalities related to jurisdiction and admissibility. Almost all scholarly studies focus on whether or not Palestine is qualified for the accession to the Rome Statute and what ICC's reaction to Palestine's case would be. It is clear that the statehood of Palestine is a clear debate among scholars. Whereas those argue that Palestine is not a state also oppose the ICC's involvement in the conflict (Benoliel and Perry 2010; Crawford 1990; Ronen 2010); a number of scholars defend the statehood claim and support Palestine's accession to ICC and possible investigation by the Court (Boyle 1988, 2000; Dugard 2013; Quigley 2011, 2013). Also, there is another group that defends the quasi-statehood but differs in the view of the relations between Palestine and ICC (Shany 2010; Worster 2010). Furthermore, the literature could not reach a common perspective regarding the limitations and prospects of ICC's investigation. While some studies direct their attention to ICC-based explanations, some of them stress on the impact of the relations between Israel and Palestine. In return, the literature on the impact of domestic conflict on ICC accession is very narrow. Even though the conflict between Hamas, Fatah, and Israel has been investigated in varied aspects[7], none of the recent studies addressed how with ICC membership, there is a new actor in this conflict that may possibly affect the dynamics.

In brief, the aim of this thesis differs from the literature.First, most deal with the issue of recognition and how international organizations (including the ICC) impacts statehood claims. Because international law scholarship mostly deal with Palestinian statehood from a legal aspect, this thesis will not engage with this debate. Besides, almost all scholarly studies focus on the process but never the possible outcomes and how this factors into Palestinian decision in 2012 and later in 2014 to accede to the Rome Statute in order to recognize ICC jurisdiction. Lastly, as mentioned above, there are no studies on the dynamics of the domestic conflict between three major actors, namely, Israel, Hamas, and Fatah and how ICC membership plays into it. My aim is to fill this gap in the literature.

[7]Different disciplines such as history, international law, international relations, and conflict studies have approached to the conflict in varied aspects. These are indicated in the Introduction chapter.

4. THEORETICAL FRAMEWORK

Different perspectives in international relations literature have examined the behaviors of states or state-like entities'[1] in the international arena. The Westphalian system initiated in the 17th century was based on an understanding that nation-states were sovereign and built upon the notions of non-interference and territorial integrity. On the other hand, the relations between states became more internationalized from 19th century onwards. International theories are shaped by such changes experienced by the international order. While neorealism[2] in line with the Westphalian assumptions focus on the power of states and international anarchy, neoliberalism[3] examine cooperation and interdependence among states. As the relations between states developed, international and supranational organizations emerged bringing together states under a unified structure first with the League of Nations, then the United Nations, and then with regional organizations like the European Union. Some of these organizations are established based on a treaty, convention or covenant and some of them have binding mandates on states that have signed the treaty. A commitment[4] for an international organization may be both costly and profitable. Considering the costly aspect of commitment and assuming that states, in their own free will , a question arises: Why do states make international commitments? More specifically, why does Palestine pursue accession to the ICC? Why does a state commit to an international court capable of exercising delegated jurisdiction based on individual accountability? In other words, what explains Palestine's decision to commit to ICC?

Regarding the decision of Palestinian authorities to accede to the the ICC, this chapter examines the theoretical basis of the rationale behind the decision to join an international organization, with specific focus on the ICC. Considering both costs

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[1] As the previous chapter outlined Palestine's statehood is debated, referring to it as a 'state-like entity' helps us avoid this matter.

[2] For more information on the views of neorealism, Jervis (1978, 1999); Mearsheimer (1994); Waltz (2001)

[3] For more information on the views of neoliberalists, Grieco (1988); Keohane (1984); Nye (1988)

[4] Commitment here is understood as the decision to ratify the treaty

and benefits for the states or state-like entities, I examine the explanatory theories on states' accession to international treaties and commitment to international organizations. Then, I present the dilemma of the ICC membership and put the theoretical framework of this thesis by answering why Palestine willingly accepted the authority of the ICC.

4.1 Theoretical Approaches to International Commitments

Not only states but also international organizations have become major decision-makers. Their role and authority are not deniable in the globalized world. Even though Bull (1977) refers to sovereignty as the constitutive principle of the international system (8-9), the power of international organizations and regimes somehow limits the power of sovereign states. As Hurd (2014) explains, international organizations

> "..... are constituted by international law as independent entities, separate from states that make them up as their founders and their members. The practical expression of this independence varies greatly across organizations, but in a formal sense they are corporate 'persons' much like firms are 'persons' in domestic commercial law. This means that they have legal standing, with certain rights and obligations, and can sue and be sued."(29)

Even some may exert sanctions if members fail to abide by their rules. International relations scholarship across the theoretical spectrum reveal different explanations on the costs and benefits of international organizations and states' commitments.

According to the rationalist-institutionalist perspective, international organizations bring centralization and independence, thus they enable states to achieve their ends (Abbott and Snidal 1998). Independence is defined as "the ability to act with a degree of autonomy within defined spheres" (5). It enables international organizations to ease state interactions as a neutral actor, mediate and solve the disputes between member states, and elaborate international norms (9). Therefore, international organizations promote cooperation and collaboration among states by increasing information and liability and decreasing uncertainty as defended by liberal theorists.

Another factor that may push states' to initiate for the membership of an international organization is reputation. Keohane (1984) argues that

> "A government's reputation, therefore, becomes an important asset in persuading others to enter into agreements with it. International regimes help governments to assess others' reputations by providing standards of behavior against which performance can be measured, by linking these standards to specific issues, and by providing forums, often through international organizations, in which these evaluations can be made."(94)

Committing to an international organization and its set of rules may increase the credibility and reliability of states because that act is essentially a legal promise to abide by the rules.

Neo-realists argue that states achieve their self-interest through international organizations that contribute to peace and security (Bayeh 2014, 348). However, constructivists like Barnett and Finnemore (1999) criticize the view that an international organization's main function is to fulfill the member states' self-interest (706). According to them, an international organization is legitimate rational-legal authority that shapes members' interests and identities and enables a larger normative and cultural environment (706-7). According to Finnemore and Sikkink (1998)'s 'norm life cycle' model, norms embraced by states and having a fundamental role in political change transitions in three stages: 1) norm emergence; 2) norm cascade; 3) norm internalized (894). The final stage of the norm transition is directly linked to states' desire to be a member of international society. Using a rationalist approach to constructivism, Grant and Hamilton (2016) examine South Africa's membership to African Union and the ICC from norm dynamics and find that competing norms within international organizations allowed it to construct and reconstruct its identities and interests. Up until the membership to the ICC, South Africa had no proper domestic legal mechanism to prosecute international crimes such as war crimes. The normative basis in the decision of membership to the ICC enabled it to construct and reconstruct the legal identity of South Africa . In this regard, according to the constructivist approach, a country's multiple international identities and how they interact with norm dynamics explains its decision to commit to an international organization. Therefore it is the changing identities and norms that explain evolution of a state's commitment to an international organization.

International actors, including states rely on international law and by designing treaties and building other arrangements, they are able to address problems. Ab-

bott and Snidal (2000, 455) call this increasing trend legalization and define it as "a strategy through which actors pursue their interests and values; it also supplies a body of norms and procedures that shape actors' behavior, interests, and identities". However, commitment to an international organization also involves costs. Especially, sovereignty cost is a disincentive to states' accession to international organizations. If an international commitment impinges on the relations between a state and its citizens or territory, sovereignty cost is at the highest (Abbott and Snidal 2000, 437). But on the other hand, by making a legal commitment, "using hard law in their relations" international actors reduce transaction costs, add to their political strategies, reduce uncertainties and most significantly, strengthen the credibility of legalized commitments (422). In short, legalization involves a trade off where states have to calculate the benefits of hard legalization through commitments to international agreements and the cost of sovereignty.

To be more specific in our theoretical discussion we can evaluate the costs and benefits of joining the International Criminal Court (acceding to Rome Statue). As an international tribunal, it carries risks of commitment beyond the sovereignty cost: It may bring leaders and commanders of member states to the Court and prosecute if they commit international crimes such as war crimes, crimes against humanity etc. Then, why do states commit to the Rome Statute, founding treaty of the ICC, even though the Court may judge individuals from member states?

4.2 Commitment to the ICC

According to the current records of the ICC[5], 123 states have ratified or acceded to the Rome Statute. Nine countries including Israel, the United States, and Russia have signed the Rome Statute but have not ratified it. Others including Turkey, India, and China are both non-signatory and non-party of the ICC. Signing the Rome Statute and accession to the ICC is a voluntary act for states. Why states voluntarily accept the jurisdiction of the ICC, granting the Court to prosecute them is a dilemma. There are different explanations for this dilemma in the literature.

The mainstream theories of International Relations, realism, neoliberalism, and constructivism, provide their own set of explanations for why states join the ICC. By ratifying the Rome Statute, states make a formal commitment to the international

[5]See *ICC- State Parties to the Rome Statute* (N.d.)

community (Simmons and Danner 2010, 234). Because power and sovereignty are central in the realist paradigm, the expectation is that because states would be restrained by such an international court, states that fear its capacity to limit their sovereignty would not likely commit to it. This helps explain why the is not a state party to the Rome Statute and has also tried successfully in some cases to get other countries to sign non surrender agreements to ensure that they will not be surrendering Americans to the ICC. With respect to state commitments to the ICC, Kelley (2007, 573) argues that "states are constrained by their commitments because, once made, their behavior is not only about the substantive issue of commitment also about the principle of keeping commitments". However, joining the ICC may bring benefits as well. Neorealists assume that states when making cost and benefit calculation, look for relative gains. From the perspective of neoliberal institutionalist, anarchy, understood as the lack of a common government that can enforce commitments, does not mean cooperation is difficult. Neoliberal institutionalism, assuming rationality of actors, view the creation of institutions such as ICC as " a strategic choice by self-interested actors to resolve recurrent cooperation problems relating to the transaction costs of renegotiations and monitoring and enforcement problems" (Deitelhoff 2009, 40). In the case of ICC, it is the interest to promote an end to impunity because otherwise, "impunity impedes international peace, security, and justice" (Schiff 2008, 91). With respect to its specific design, neoliberals would argue that prosecuting international crimes is a collective action problem and only a "hard-law regime" such as ICC would be able to respond to it. Neoliberals argue that instituions can alter states' view on what is their self-interest.

According to constructivists, states join the ICC because decision-makers are aware of the new justice norms embedded in the Statute that greater cognition of victim's interests and social reconstruction after massive crimes (Schiff 2008, 89). As Sikkink (2011) explains with the term "justice cascade", the creation of the ICC is the final step in the search for accountability for international crimes. Since no other institution has the claim of such global mission of justice, governments are attracted to the normative function served by the ICC by committing to this court (5). Despite the normative and institutional explanations underlined by neoliberals and constructivists; one should not forget the burden of states' ICC accession: sovereignty cost.

According to Hathaway (2003), the cost of commitment is not uniform or random for all states . Rather, the empirical evidence from investigating the cost of commitment and states' behavior to commit to human rights treaties reveals that "the higher the cost of commitment—a cost defined by the interaction of a country's divergence from the human rights standards outlined in the treaty and the likelihood that the

country will actually put those standards into place if it joins—the less likely a nation is to join a human rights treaty" (32-33). Also, the study suggests that international organizations may foster the ratification rate among states by decreasing the cost of compliance, especially democratic states with poor domestic legal mechanisms can be persuaded (33). However, in the case of the ICC, member states carry the risk that their leaders, military personnel or citizens may stand trial at the Court if the ICC prosecutor chooses to investigate and finds evidence of international crimes. The expansive jurisdiction of the ICC and its objective to provide more tough enforcement of international crimes put member states into a potentially costly position in terms of sovereignty (Simmons and Danner 2010, 226). But on the other hand, ICC has been criticized for relying on state cooperation to enforce compliance. The non implementation of arrest warrants are clear examples of how ICC lacks an enforcement mechanism against the state parties who refuse to cooperate with it (Phooko 2011)[6].

Sovereignty problem is a major cost for states and may prompt them to abstain from ICC membership. Specifically for case of Palestinian commitment to ICC, there are additional costs. According to Mills (2015), both Israel and the US may impose sanctions against Palestinians. Israel has already refused to transfer to Palestinian Authority more than $100m per month from the collected taxes because of Palestine's decision to joining the ICC. Even pro-Israel lobby in the US have also advocated cutting all economic assistance to the PA after it joins to the ICC. Such sanctions may cause to the collapse of the Palestinian Authority, and accordingly more radicalization of Palestinians.

Nonetheless, the Court serves as an alternative mechanism for justice to domestic mechanisms and it can exert its authority only when domestic courts have failed to prosecute. The principle of complementarity, on which the ICC is based, is the solution for sovereignty cost (Bacio Terracino 2007; Sandholtz 2014; Schiff 2008). According to Dutton (2011), if a state has good human right practices and strong domestic law enforcement mechanisms, ratifying the ICC treaty is not overly costly (483). Following the same pattern, Chapman and Chaudoin (2013) find that while democracies with strong legal systems and low internal violence are the most likely to join the ICC, non-democracies with weak legal systems and a history of domestic political violence, tend to avoid ratification. Related to the complementarity principle, having a strong or weak domestic enforcement mechanism is a major factor for states' decision to ratify the Rome Statute. Regardless, because ICC eliminates a sovereign state's own choice to decide when to initiate prosecutions, it does have

[6]There is growing scholarship that show even without effective enforcement, ICC is able to change states' behavior, see for instance Gilligan (2006).

internal sovereignty costs (Simmons and Danner 2010, 226).

Credible Commitment and Hand Tying Theory

Simmons and Danner (2010) argue that potentially vulnerable states with credible domestic means to hold criminal leaders accountable are less likely to be party to the ICC (225). In this regard, the authors offer credible commitment theory *credible commitment theory*[7] that first, governments assume they will never be subject to the Court's jurisdiction and second, some governments rationally become state parties to the ICC in order to tie the hands of their opponents and legitimize their prosecution by the ICC (231). Despite the existence of ex post costs of governments that have accepted the jurisdiction of the ICC, i.e.domestic audience costs[8] and sovereignty costs, governments may enhance credibility by making the non-cooperative alternatives more costly. The authors set out the hand tying theory that states use ICC ratification as a way of signaling (mainly to a domestic audience). By committing to the Rome Statute, they tie their own hands in the sense that they commit to reduce violence (Bosco 2010). On the one hand, the government makes a promise to its domestic audience, including its political opponents/rebels, that it will be reducing the intensity of the conflict and on the other hand, it does commit to international mechanisms to subject them to the Court's jurisdiction. This, in return may create incentives that prompt the rebel groups to change their violent behavior (Simmons and Danner 2010, 234).

Palestine's accession can partially be evaluated in the light of the hands-tying theory set out by Simmons and Danner. Because according to these scholars, those states that have violent conflict but weak domestic accountability mechanisms are more likely to commit to the ICC[9]. The absence of effective mechanism[10] to hold its own domestic leaders accountable may explain why Palestine commits to the ICC The examples of Afghanistan and Peru which have a recent history of civil wars but weak domestic institutions of accountability also fit this explanation. Those states that can actually prosecute those that commit such crimes in their home institutions would do without giving up their sovereignty (Simmons and Danner 2010, 235). The next chapter will examine whether with committing to the ICC,

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[7]For more information on credible commitment and hand- tying, see Fuhrmann and Sechser (2014); Leeds (1999); Leeds, Mattes, and Vogel (2009).

[8]According to Simmons and Danner (2010, 234) domestic audience costs are a more concern for states that break a commitment because by committing to the ICC, that government raises the society's expectation that its government is committed to peace.

[9]Countries whose nationals are not likely to be subject to ICC because they are ruled by an accountable government and have no recent civil conflict are also very likely to join the ICC.

[10]The lack of effective mechanism is explained below.

Palestine can credibly tie the hands of Fatah and convince Hamas to change its own behavior. With respect to Hamas, Fatah-led PA may calculate that ICC would be exercising its jurisdiction on the crimes perpetrated by its main rival group-Hamas. An alternative (but not necessarily mutually exclusive) explanation is that Palestine's decision to commit to the ICC is in order to deter further conflict with Israel and Hamas (Mills 2015).

Deterrence

Focusing on the normative and institutional aspects of the ICC, the literature has argued that states become part of the ICC regime because of its deterrent effect on international crimes[11] — that is, "punishment as a way to prevent other people from committing crimes" (Hafner-Burton 2013, 38)[12]. Others are skeptical about ICC's ability to deter by basing their arguments on the lack of support by the United States and the ICC's inability to punish atrocities because "human rights abusers tend to hide behind walls of national sovereignty"(Goldsmith 2003; Goldsmith and Krasner 2003; Krasner 2001). Yet empirical studies have confirmed that ICC ratification does play a deterrent role (Jo and Simmons 2016). For example, it decreases the likelihood of torture because the costs of committing a crime is higher than its benefit (Aloyo, Dutton, and Heger 2013).

Appel (2018) argues that it is not only the threat of imprisonment for individuals in the case of committing violations, but also the ICC may deter ratifier states because of a variety of domestic and international audience costs (4). Studying the negotiations that established the ICC, Zschirnt and Menaldo (2014) argue that for former autocracies and transitional states, empowering the ICC was conceived as "insurance against backsliding toward autocracy"(1). For governing elites in such transitional states, represented at ICC negotiations, have advocated for an empowered court not because they had been socialized into international norms but because they believe that the ICC have a deterrent effect and prevent relapse to autocracy(6).

To be more specific, Jo and Simmons (2016) argue that there are two ways that deterrence works in the case of the ICC. One is prosecutorial deterrence and the other is social deterrence. *Prosecutorial deterrence* is "a direct consequence of legal punishment: it holds when potential perpetrators reduce or avoid law-breaking for fear of being tried and officially punished". *Social deterrence* is "a consequence of the

[11] For more information, see Aloyo, Dutton, and Heger (2013); Hashimoto (2012); Jo and Simmons (2016).

[12] At individual level, sanctions by themselves cannot explain why some are deterred while others are not. Criminologists argue that deterrent effects depend more on the certainty that punishment will be delivered than the size of possible punishments (Hafner-Burton 2013, 38).

broader social milieu in which actors operate: it occurs when potential perpetrators calculate the informal consequences of law-breaking" (4). It results from extra-legal costs associated with law violation. Against the common assertion that the ICC has no teeth, social deterrence theory holds that the ICC's authority produces multiple mechanisms -legal, social, international, and domestic- that can deter law violation . For example, the ICC jurisdiction mobilizes domestic actors and leads to important domestic reforms like in the cases of Uganda, Kenya, and Côte d'Ivoire (5). Besides, actors are likely to be deterred when they are sensitive to social pressure (7). The deterrent effect of the ICC is conditional on the working of these mechanisms.

Besides the domestic pressure mechanisms, concern for international norms are also effective for deterrence. The authors compare the deterrent effect on state actors and rebel groups. On average, the likelihood of deterrence is more effective for governments than rebels. However, according to the social deterrence theory, as rebels are more concerned with the legitimacy of their cause in the eyes of the international community, they are more likely to be deterred by the possible jurisdiction of the ICC. Besides, rebel groups see the prosecutions by the Court as a real risk and a possible prosecution may have greater costs for rebel groups. Deterrence is conditional on whether the international norms affect the behavior of the actors. We expect ICC to be able to deter crimes when those norms that are being challenged are strong. Applying Jo and Simmons (2016)'s social deterrence theory, we would expect that Hamas to be more 'deterrable' than Israeli Defense Forces. Even though commitment to the ICC may not resolve conflict but its deterrence effect can mitigate the use of violence (Adem 2019, 197).

The other mechanism of deterrence- *the prosecutorial deterrence* refers to the positive improvements in the conduct of actors because of fear of sanctions resulting from the legal prosecution (Jo and Simmons 2016, 8). Prosecutorial deterrence is effective if the likelihood of the punishment is real: "Investigations, indictments, and especially successful prosecutions" make actors' fear of sanctions more substantive and encourage deterrence (10). Adem (2019) argues the threat of prosecution or the 'shadow effect' of the prosecutor does in fact affect Israeli conduct (198). The likelihood of Israeli soldiers being subject to the ICC jurisdiction is high as demonstrated in the reports analyzed in the subsequent chapter. Therefore, prosecutorial deterrence may offer an explanation for Palestine's decision to commit to the ICC.

The ICC may also indirectly exert prosecutorial deterrence at the national level. The court operates according to the complementarity principle which creates incentives for state actors to improve the domestic judicial systems so that they have their own capacity to investigate those crimes that would be in ICC's jurisdiction (Jo and

Simmons 2016, 18). This insight raises the possibility that in order to refrain from the ICC's jurisdiction. To recap, prosecutorial deterrence that may also provide an explanation in the interstate level of analysis for the Palestinian accession and the possible implications of this commitment. In the next sub-section, I provide three interlinked/interwoven explanations that correspond to three levels of analysis in order to frame the theoretical ground for the Palestinian commitment to the ICC. The theories discussed above will be incorporated to provide an answer to the following question: Why did Palestine accede to the Rome Statute and voluntarily accept the Court's jurisdiction?

4.3 Palestine's Motives for the Accession to the ICC

As explained in the literature review, Palestine and the ICC have been separately examined much in scholarly works. Those works on Palestine's accession to the ICC generally stressed on the process of membership related to whether Palestinian entity is a state or not. Many studies do not go beyond the statehood issue. Different than the existing literature, the objective of this thesis is to highlight the motives of Palestinian Authority in acceding to the ICC, which in return may inform us possible consequences of the Court's jurisdiction over Palestinian territory- however grounded in our theoretical framework, this discussion would be mostly speculative.

On the other hand, the existing theories on why states commit to the Rome Statute are inadequate to explain the Palestinian case comprehensively. Simmons and Danner's hand tying theory may provide an explanation, but the special attributes of the Palestinian case does not allow us to solely rely on it. Accession to the ICC by the Palestinian Authority, dominated by Fatah actors, may convince Hamas to give up violence because PA is making a credible commitment t. This explanation offers us an opportunity to examine the decision to commit at the domestic level. Deterrence (its two dimensions: prosecutorial and social) may also help explain why Palestine committed to ICC: to deter Israel. However, this thesis argues that there are mutually supportive motives that correspond to three levels of analysis.

This is why this study fundamentally differs from other studies. My contribution to the literature is providing comprehensive explanations operating in three levels of analysis. Neither the argument of international recognition, nor the conflict between Israel and Palestine, and the domestic conflict among Palestinian authorities merely

explain the imperatives of the ICC accession. Rather, one should take all three explanations into consideration. The motives can be explained in three levels of analysis: international, interstate, and domestic level.

Even though some states recognize the state of Palestine, the lack of consensus on its statehood is a lingering issue of Israeli-Palestinian conflict . As the Historical chapter showed, neither the armed struggle against Israel nor negotiations for peace ended the occupation and afforded sovereignty for Palestinians living in Palestinian territories. In fact, the Palestinian authorities have been in the pursuit of international recognition before the establishment of Israel but the attempts for diplomatic recognition gained momentum after Israel's independence. As Yoffie (2011) states, international bodies can actually enhance international legal sovereignty in the Israeli-Palestinian context (503). Palestine reached several international bodies and became a member to most of them such as UNESCO, the G-77, the League of Arab States, the Organization of Islamic Cooperation and so on[13]. The UN General Assembly did upgrade Palestine's status by recognizing it as a non-member observer status. Therefore, Palestine's accession to ICC can be conceived as a step in the recognition ladder. Besides, the ICC official document on "Joining the International Court" indicates that "Joining the Rome Statute is a powerful foreign policy statement" (*Joining the International Criminal Court* N.d.). Such commitment also enhances credibility via international law because of being bound by the rules of international organizations. So, commitment to the international judicial system as its foreign policy empowers Palestine in the international community. The first and the most visible motive for the Palestinian Authority, in acceding to the ICC is the international recognition.

The preamble of the Rome Statute announces the fundamental mission of the Court: "Determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes" (*Rome Statute of International Criminal Court* 2011, preamble). To emphasize again, due to the complementarity principle of the ICC, the Court fights impunity if international crimes including genocide, crimes against humanity and war crimes are not punished by domestic means. So, the ICC remains a court of last resort with the mandate to prosecute individuals only when "the State is unwilling or unable genuinely to carry out the investigation or prosecution" (article 17 p.13). Considering the reported acts of international crimes in the territory of Palestine by Israel and Palestinian armed groups, particularly Hamas, ICC offering a remedy to against impunity may possibly be another source

[13]In fact, Palestine became the chair of G77 in 2019.

of motivation in PA's accession to the Rome Statute.Based on the principle of complementarity, after Palestine's accession, ICC is empowered to investigate crimes committed Palestian territory under investigation. (Jo and Simmons 2016) prosecutorial deterrence theory helps us explain this motivation from an interstate level of analysis. When the likelihood of being investigated and prosecuted is high, actors may be deterred from violating laws, rules and norms. Taking into consideration Israeli soldiers' violent activities and possible violations of international humanitarian law and human rights, PA may possibly seek prosecutorial deterrence .As previously noted, according to ICC's complementarity principle (*Rome Statute of International Criminal Court* 2011, article 17) the ICC may become involved only if a state is either unwilling or unable to prosecute alleged perpetrators. Considering the shortcomings of the judicial system and enforcement mechanism of both Palestine and Israel, which will be further elaborated in the next chapter, we can speculate that ICC as a court of last resort has the potential to become an important actor in this conflict.

While explanations that examine Fatah/PA's relation to Israel offer an interstate level of analysis, Fatah's dynamics vis-à-vis Hamas provide us an explanation at the domestic level. The difference in dynamics is because Palestine and Israel can be regarded as separate states, but Hamas and Fatah are both representatives of Palestinian people and their relations are internal affairs. In committing to international organizations, in particular to the ICC, states decision-makers make cost and benefit calculations to maximize the benefit and minimize the cost. Hashimoto (2012) argues that leaders trade off the risk of prosecutions against the deterrent threat of prosecutions on political rivals and domestic enemies. Accordingly,the primary motive for accepting the ICC's jurisdiction is to marginalize political rivals, who may either be looking the oust the incumbent and willing to commit anti-regime violence or secessionist/terrorist groups who may pursue ousting the leadership by using violent means (6). The court's jurisdiction provides the incumbents with the threat of bringing such political rights to the Court and can also alter the calculation of their supporters, domestic or foreign. Based on the *expected-utility model* of the decision to accept the court's jurisdiction, leaders are torn between the threat of being subject to ICC prosecution and political turnover. Leaders choose to accept the Courts' jurisdiction because they calculate that its effect on political actors who threaten their incumbency/survival is a greater good than the possibility of being subject to the ICC's prosecution. (62). Hashimoto's theory is applicable to Palestinian case[14]. Hamas has control over Gaza, so the authority in the Palestinian

[14]One of the mechanisms that Hashimoto's model gives, is the expectation that ICC jurisdiction will also alter the calculation of foreign donors because they would want to avoid ICC prosecution (or investigation publicity), they could cut funding to the incumbents' rival or give incriminating evidence to the Court. This

territories is internally divided. In this regard, accepting the court's jurisdiction would lower the risk of losing office and of facing anti-regime violence and could potentially be a motivation for Fatah/PA's decision to join the ICC. Accordingly, Fatah accepts the jurisdiction of the ICC for political turnover against Hamas by decreasing audience costs among Palestinian citizens and gaining international support. Besides, comparing the behaviors of Fatah and Hamas, Hamas is more likely to be prosecuted by the Court because of high rates of international crimes.

As Simmons and Danner (2010) noted, states have two straightforward motivations in acceding to the ICC: First, states may anticipate that their nationals will not stand trial by the Court - while this may be the calculation of all countries, it is especially relevant for peaceful countries. Additionally states in committing to the ICC, may presume that as state actors, they are the less violent actors. Second, the commitment to the ICC may bring potential gains than costs because ICC may be instrumentalized as a punishment mechanism (231). Therefore, the PA may rationally appeal to the ICC to legitimize the prosecution of its domestic political opponent that has committed violent activities.

Taking into account that Palestine has inadequate and weak domestic enforcement mechanisms, PA's commitment to the ICC can be explained if we understand the court as an instrument to not just reduce violence by credibly committing and therefore tying its own hand but also those of its political opponents (rebels). Simmons and Danner (2010)'s application of credible commitment theory to states' decision to voluntarily join the ICC offer this additional motivation. Accordingly states tie their own hands and this can help convince opponents/rebels that the government is no longer interested in violent strategies and hence create incentives for other actors (rebels) to change their behavior as well. Remembering the 2007 military conflict in Gaza between Hamas and Fatah, this domestic level explanation helps explain why the possibility of ICC jurisdiction over the conduct of state actors and Hamas members may have prompted Fatah/PA's decision to commit to the court. Even though Hamas is a rebel non-state actor for the ICC, the atrocities committed against Palestinians or Israelis in the Palestinian territories would be subject to the Court's jurisdiction and possible prosecution. This reality, in return may help rebels to give up violence against the state actor (alter its behavior) or face the possibility of ICC punishment. Therefore, one theory is not adequate to explain this multifaceted issue and multi-actor conflict. By examining Palestinian's decision to commit to the ICC with three levels of analysis, we can engage with different theories in the literature that this chapter explained above.

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thesis is unable to examine such dynamics between Fatah and Hamas, because of language and method limitations, the outlined mechanism is not factored into the analysis.

To sum up, Palestine's accession to the ICC can be explained in three levels of analysis: international level, interstate level, and domestic level. These explanations are interlinked and interwoven operating in three levels. In the Palestinian side, the attempts of being a member of international community starts before the establishment of Israel and even accelerates after its establishment. Considering signing many international treaties and becoming a member to several organizations, accession to the ICC is a step in the international recognition ladder. Besides the objective of achieving international recognition, Fatah may expect that the ICC jurisdiction could potentially investigate crimes committed by both Israel and Hamas. Hashimoto's expected-utility model that states commit to the ICC to marginalize their opponents and lower threats to their incumbency help explain the dynamic with Hamas. Simmons and Danner (2010)'s hands-tying theory offers us an explanation where joining the ICC is essentially "a form of self-binding commitment" that can induce rebels to change their violent behavior (234).

Also, the prosecutorial deterrence theory offers an interstate level explanation. Accordingly the expectation that Israel may be deterred because of the likelihood of ICC jurisdiction and/or be incentivized to improve its domestic accountability system, explains why Palestine commits to the ICC. Fatah accepts the jurisdiction of the ICC because both Hamas and Israel can be prosecuted by the Court in addition to the recognition of Palestine. The next chapter, with evidence from reports and official statements will trace different possible motivations of Palestine based on three levels of analysis.

5. STRATEGIC TOOLS OF THE ACCESSION TO THE ROME STATUTE

As explained in the previous chapter theoretically, states commitments to international law and organizations can be costly and the reasons of commitment are worth analyzing. Most particularly, the Palestinian Authority's (PA) accession and commitment to the ICC can lead to Palestinian citizens being investigated and prosecuted by the Court. The puzzle this thesis tries to answer is why the PA acceded to the ICC and through this evaluate possible implications of the ICC's intervention. This chapter will provide empirical evidence based on the official reports and news to flesh out this question.

Approaching PA's decision to commit to the ICC from the international level of analysis, we can argue that international recognition has been an objective. Analysis will demonstrate that the PA uses the strategic tools of diplomatic recognition, internationalization of the Palestinian cause, and credibility via international law for its overall objective of receiving international recognition. This perspective sees accession to ICC as a part of Palestine's long pursuit of international recognition.

The second explanation operating at the interstate level of analysis understands the PA's commitment to the ICC as involving the court to exert jurisdiction over Israeli conduct in Palestinian territories. The ongoing crimes against Palestinians can be investigated by the Court based on some form of limited universal jurisdiction. To help support the explanation (Jo and Simmons (2016)' *prosecutorial deterrence theory*) here I rely on reports prepared in the aftermath of military conflict between Israel and Palestine, as well as official statements from leaders involved.

The domestic level of analysis refers to possible ICC jurisdiction over Hamas. The PA's accession to the Court can also lead to Hamas' leaders and soldiers being investigated and possibly be prosecuted. Hamas' reported war crimes against Israeli citizens in Palestinian territories and the possible jurisdiction by the Prosecutor are evaluated through the lens of Hashimoto (2012)'s *expected-utility model*. Alternatively, by credibly committing to the ICC, Fatah/PA may also give incentives to

Hamas to give up violent strategies against itself. Simmons and Danner (2010)'s *hand tying theory* give theoretical support for this motivation.

5.1 International Level- The Recognition of Palestine

The PA representing Palestine has shown a visible effort in committing and being a state party to the ICC. From an international level of analysis, seeking the recognition of Palestine in the international community is why Palestine acceded to the Rome Statute. This is one of the main pillars of the explanations argued by the thesis. Being a state party to the ICC is not the first step in the recognition history of Palestine. Rather, previous commitments to international organizations confirm that Palestine has been climbing the ladder of recognition and the ICC is a step in this direction. In addition, lodging commitments to international organizations increase the credibility of Palestine because the act provides the consent to be bound by the rules of the international community. At the international level of analysis, the desire to construct a diplomatic image of Palestine bounded by the rules of international law and the attempts to be a part of international community by signing treaties and becoming member to international organizations constitute the theory of recognition in explaining the PA's accession to the ICC in terms of international level of analysis.

5.1.1 The Relation between Recognition and Statehood

Recognition can be described as "the determination of the nature and the extent of the relations between states" (Brown 1950, 617). One of the early studies on recognition argues that recognition consists of a political act and a legal act. The distinction between political and legal forms of recognition is also called *de facto* and *de jure* recognition [1].

The issue of recognition for Palestinian case is vital in understanding the dynamics of the accession to the ICC. The complexity of the issue can be demonstrated by

[1] The difference between de facto and de jure recognition are explained further in the Literature Review Chapter

the fact that "Israel is a United Nations member with the largest number of non-recognition from other United Nations member states, and Palestine is the United Nations non-member with the largest number of recognition by United Nations members" (Mirilovic and Siroky 2015, 264). Besides, since both Palestinian Authority and Israel have a claim on the same territory, the recognition decisions are mostly interrelated. The likelihood of one state's recognizing Palestine also to recognize Israel is low (264). As the most visible example, the United States recognized Israel as soon as it declared the Israeli state in 1948. The United States both did not recognize Palestine as a distinct state and attempted to prevent the recognition by international organizations.

Being a state is fundamentally significant in international law. Not only the founding members of the United Nations are states but also only states can be members of the United Nations. Also, only states can be sided in the International Court of Justice. Also, International Court of Justice can only settle disputes between states. Besides, in 2009, the Palestinian Authority called for the ICC to investigate war crimes committed by Israel over Operation Cast Lead but was rejected for not being a state. The application for full membership in the United Nations was rejected in 2011 but was granted the status of non-member observer state the following year. The upgraded status in the UN-led to the ICC accepting the membership of Palestine.

The definition of statehood in international law is mostly formed with the Montevideo Treaty in December 1934. According to 1st article of the treaty, to be counted as an international law member, a state must include these criteria: a permanent population, a territory, a government, and a capacity to enter into relations with other states[2] (Aybay and Oral 2016, 151-4).

The question of whether the Palestinian entity satisfies the traditional criterion for statehood has been examined in the literature[3]. The Palestinian population in the West Bank and Gaza Strip fulfills the requirement of a 'permanent population'. However, the territory, West Bank and Gaza Strip, internationally regarded as the Palestinian state is occupied by Israel. Crawford (1990, 141-2) concludes that the Palestinian Authority controls a population, not a territory . Besides, the power of the Palestinian Authority is limited by Israeli-Palestinian agreements (Megiddo and Nevo 2013, 196). The criteria for statehood have been formulated in different ways. However, the various formulations share the common premise that independent and

[2]Even though this criteria is accepted in the international community, the last criteria (capacity to enter into relations with other states) has been criticized because of not being implemented in practice. For more information, see Malanczuk (2002); Ranjbarian and Farahzad (2015)

[3]See Becker (1998); Boyle (1988); Crawford (1990); Quigley (2011)

sovereign governmental control is the *sine qua non* of statehood (Becker 1998).

On the other hand, Ronen (2010) puts Palestine into the category of "quasi-states" which are "entities that fulfill the traditional requisites for statehood: a permanent population in a defined territory, under an effective government" (25). Nevertheless, quasi-states do not claim to be states as exemplified with Taiwan which is not independent from the People's Republic of China as Palestine is not independent from Israel (26-27). Regarding statehood, Ronen (2010) argues that the claim of statehood from a particular act does not necessarily mean full-fledged statehood. UNESCO's admittance of Palestine as a member state illustrates the notion of "the statehood-for-a-limited-purpose" (50-51).

According to Quigley (2011), five fundamental arguments affirm Palestinian statehood. First, Palestine declared its statehood in 1988 with the Palestinian Declaration of Independence[4] and got wide recognition from states worldwide. Second, the declaration was not of a new statehood but an existing one. Third, the sovereignty of Israel in its territory is not affected by the existence of a Palestinian state. The fourth contention is that Israel also recognized Palestine as a state. The fifth and last argument is that state recognition should be tacit and formal. The international legal practice of the Palestinian Authority especially during Oslo Accords, discussions on the two-state model, and the official declaration of the formal policy of PLO tacitly confirm the statehood of Palestine.

Besides Quigley's arguments on statehood and particularly the Palestinian Declaration of Independence, the recognition of Palestine by states and international organizations solidify the claim of statehood in a more concrete way. UN's upgrading the status of Palestine to a non-member observer state status in 2012 was a turning point in its pursuit of recognition and gave away for the accession to the Rome Statute. The Rome Statute is formed upon a state-based system in which states can be part of the Court and access its jurisdiction. In this regard, Palestinian membership in the ICC supports the claim of Palestinian statehood (Benoliel and Perry 2010, 76).

Regarding the statehood issue, some argue that the non-member observer state status in the UN does not demonstrate the confirmation of the legal status of Palestine because the status of a non-member State is not necessarily granted only to States. But especially the strong vote in the UN. General Assembly demonstrated Palestine's capacity to enter into international relations. Besides, Palestine is a member of several international organizations, including the Non-Aligned Movement, the

[4]See full text of the declaration: *Palestinian Declaration of Independence* (1988)

G-77, the League of Arab States, the Arab Monetary Fund, the Organization of Islamic Cooperation, the Islamic Development Bank, and the Economic and Social Commission for Western Asia (Erikat 2013, 23). Also, Vidmar (2013, 1-2) argues that becoming a party to the Rome Statute and bringing a case to the ICC and ICJ could be seen as an implicit confirmation of statehood.

A new state's emergence is based on the fulfillment of Montevideo Criteria. Whereas other states may recognize a new state as *de facto* recognition (declaratory), the collective recognition or non-recognition by the overwhelming majority of states may affect the question of statehood (Cerone 2015). Regarding the treaty action of Palestine, the statehood issue and the criteria of treaty-making capacity in the Montevideo Criteria are worth analyzing. All states have treaty-making capacity. Yet do entering into international commitments and signing treaties make an entity state? There are signatory states, contracting states, and state parties in the law of treaties. A signatory state is a state that has signed a treaty. The expression of consent to commit the treaty fulfills, then the signatory state becomes the contracting state. After ratification, the treaty enters into force and the contracting state evolves into a state party (Cerone 2015). Considering the Palestinian case, the Rome Statute has entered into force on April 1, 2015, for Palestine and it became a state party. Evaluating the situation specific to the Rome Statute, only states can sign the treaty, Palestine's attempt to allow the ICC's jurisdiction has been denied before in 2009 on the account that for the purposes of the Rome Statute, it could not be defined as a state. The upgraded status to non-member observer state in the UN (the United Nations) in 2012 improved the position of Palestine vis-à-vis the ICC. The upgraded recognition of Palestine went one step further in its recognition effort and allowed it to accede to treaties and join UN agencies. This is why Palestine could accede to the founding treaty of the Court in 2015 and become a state party to the Rome Statute.

Najafian Razavi (2016, 6) asks "What happens if a state not recognized by all the states in the world joins the ICC?" This is the case of Palestine that differentiates it from other states' membership to the ICC. The majority of states in the western hemisphere do not recognize Palestine, but both according to the UN and many states, Israel is a state. As a result of Palestinian membership to the ICC, the controversy over the recognition of Palestine arises again.

5.1.2 The Road of Palestine to the ICC

Palestine's road to the International Criminal Court began in response to the armed conflict in Gaza between December 2008 and January 2009. In this period, the ICC Office of the Prosecutor OTP received 326 communications from individuals and non-governmental organizations (NGOs), notably from Palestinian groups, repeatedly demanding an investigation of the events (Benoliel and Perry 2010, 75). The Minister of Justice for the Government of Palestine recognized the jurisdiction of the International Criminal Court (ICC) on 22 January 2009. The Office of the Prosecutor (OTP) examined the relevant issues including whether the alleged crimes fell within the category of crimes defined in the Rome Statute. On 3 April 2012, the OTP issued a decision concerning its preliminary examination in Palestine (*ICC-Situation in Palestine* 2012). According to the Rome Statute, ICC was unable to take the case because Israel was not a signatory party and ICC had no jurisdiction over Israel. Benoliel and Perry (2010, 76) point out that the Israel-Palestinian case in the ICC is unique, since the Court may need to expand its reach by advocating the Palestinian side for statehood as a precondition for assessing jurisdiction.

After the Palestinian Authority declared the acceptance of ICC's jurisdiction, the statehood issue of Palestine has been also scrutinized by ICC in the process of evaluating whether the PA meets the statutory requirements. Such evaluations have taken place since 2009 until 2015. In this period, as the armed conflict in Gaza accelerated, the correspondences and visits between the prosecutor of ICC, Fatou Bensouda, and the president of Palestine, Mahmoud Abbas, continued. Upon receiving demands, ICC opened several preliminary examinations on the Gaza conflict. PA's call for full investigation and jurisdiction did not bring an outcome where ICC could exert its jurisdiction over Israeli conduct where ICC could exert its jurisdiction over Israeli conduct. After Palestine's status in the UN upgraded to "non-member observer state", Palestine could finally accede to the Rome Statute on 2 January 2015. The Rome Statute entered into force on 1 April 2015. On the other hand, "the ICC Prosecutor still needs to determine whether the situation referred meets the legal criteria established by the Rome Statute to warrant an investigation" (**?**).

In this regard, the explanation based on the international level of analysis is examined under three factors, each contributes to the international recognition of Palestine. Diplomatic recognition, internationalization of the Palestinian cause, and the credibility via respect to the international law are three sub-explanations of the rationale of international recognition in acceding to the Rome Statute.

Diplomatic Recognition

Even though Palestine deposited its instrument of accession to the Rome Statute on 2 January 2015, the Court did not immediately accept the accession because of the statehood criteria. However, UN had upgraded the status of Palestine to non-member observer state in 2012[5]. This update in the status of Palestine could enable the acceptance of its accession to the ICC on 1 April 2015 as the 123rd state party to the Rome Statute (Høgestøl 2015, 194). The recognition by the UN despite the fact that it has not recognized it as a full member[6] has improved its representation in the UN and allowed it to later accede to the Court.

Before the accession to the Rome Statute, Palestinian authoritative bodies sought to accede to various multilateral treaties and to gain admission to international bodies. On 3 and 7 April 2014, the state of Palestine signed fourteen international treaties including the Convention on the Rights of the Child (with Optional Protocol), the ICCPR, the ICESCR, the Genocide Convention, the Vienna Convention on the law of treaties, and CAT (Bracka 2017, 103).As the Historical Background Chapter explains, efforts to obtain additional bilateral recognitions and admission to the United Nations havee been continuing Palestinian diplomatic initiative. According to Erikat (2013, 27), this diplomatic activity is consistent with agreements signed between Israel and Palestine. "Gaining recognition and admission for the State of Palestine is not intended as a diplomatic stunt in response to Israel's intransigence. Rather, it is an existential matter for both the Palestinians and Israelis" (29).

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[5]For the resolution on the status of Palestine in the United Nations, see the report of 67/19 (4 December 2012),*UN- Statute of Palestine in the United Nations* (2012)

[6]Palestine 194 initiative is a campaign to achieve full membership to the UN. The name of the campaign is a reference to Palestine becoming the 194th member state of the UN. It was first articulated by Mahmoud Abbas, chairman of PLO and president of PNA in 2010. For more information, see Schanzer (2014).

After the US sponsored peace negotiation broke down in 2011, the PA has sought UN recognition in the form of full membership. At the time, U.S. President Barack Obama expressed opposition to the Palestinian plan: "Symbolic efforts to isolate Israel at the United Nations in September won't create an independent state" (*UPI Top News- Palestinian Statehood Recognition Split* 2011). In return, the head of the Palestine People's Party, Bassam Al-Salhi, said that "All of these stances affirm the conspiracy of the United States' cover for Israel and backing for its continued occupation, allowing Israel to escape the implementation of UN decisions. The US stance against the Palestinians seeking UN (recognition) is offensive towards Palestinians and their rights on the one hand and against the UN and its bodies on the other" (*Palestinian objections stopped Quartet"s joint statement: Yediot Ahronot* 2011).

The failure of Israel-Palestine Peace Process led the Palestinian Authority to seek international support for two-state solution through diplomatic means. Kittrie (2016) argues that the accession to the ICC is a non-violent method of Palestinian Authority as a response to the U.S. and Israel. While signing the ICC application papers, Mahmoud Abbas said "There is aggression practice against our land and our country, and the Security Council has let us down – where shall we go? We want to complain to this organization" referring to the ICC and the refusal of the Security Council to consider its application (quoted in Kittrie (2016, 211)). On the other hand, the Palestinian Authority's (PA) diplomatic breakthrough was perceived by Israeli officials as 'unilateralism and aggression' damaging the peace process (*MFA-The campaign to defame Israel* 2014). Palestine's draft resolution and signing of Rome Statute were conceived as an existential threat for Israel. The Israeli Prime Minister argued that this was a diplomatic attack that "is designed to deny us our very right to defend ourselves and seeks to deny us the legitimacy of our very existence" (*MFA-Statement by PM Netanyahu* 2014) . PM Netanyahu, as a reaction to Palestine's accession to the Rome Statute, contented that the PA is not a state but an "entity that maintains an alliance with a terrorist organization [Hamas]" (Ravid 2015).

Internationalization of the Palestinian Cause

Rather than looking to provoke Israel's reactions with its ICC bid, PA by involving the ICC have sought internationalizing the Palestinian cause. Internationalizing the Palestinian cause may also advance the position of Palestine in future peace deals. According to Adem (2019, 200) "the Palestine authorities' unilateral move to internationalise the Palestine cause, at least from the Palestinian perspective, allows a more promising multilateral approach to address the cause. It could be

argued that internationalising the Palestinian cause could help cement support for self-determination and to implement details of future peace deals". The recognition of Palestine as a state party of the ICC helps consolidate its position under international law and thus gives Palestine a better stance in future negotiations.

According to Kittrie (2016), internationalizing the Palestinian cause as a legal matter enables Palestine to get the upper hand in negotiations. Mahmoud Abbas, the president of PA had previously argued that the UN recognition of Palestine as a member state "would pave the way for the internationalization of the conflict as a legal matter, not only a political one" (Kittrie 2016, 1). According to Abbas, such recognition would also enable us "to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice" (1-2). Because ultimately Palestine was not recognized as a full state, the route offered by the ICJ which settles disputes between states, was not available to Palestine. The ICC, as another international court, albeit for specific international crimes and exercising individual criminal accountability, for the purposes of internationalizing the Israeli-Palestinian conflict offers an alternative. For example, the alleged war crimes of Israel and the possibility of the Court's intervention to the conflict led some of the companies doing business with Israel to withdraw and stop doing business with Israel (Adem 2019).

Internationalizing the Israel-Palestine conflict allows the PA to pursue a multilateral approach to it, which may help garner support for self-determination. The ultimate goal of such internationalization attempts and multilateralism by the PA are to gain support for self-determination. The ultimate goal of such internationalization attempts and multilateralism by the PA is to gain the support towards a 'tangible international framework for statehood' and 'recognition as a legitimate actor' in the international community (Huber and Kamel 2015, 5-6). Besides, multilateralism could serves as a framework to push negotiations for a two-state solution and bring an end to Israeli occupation. The attempts by PA for the international recognition of the state of Palestine is not subject to the outcomes of negotiations. "Negotiations should settle the conflict issues, but recognition and the end of occupation is represented as a right (the right to self-determination)" (Huber and Kamel 2015, 7).

Credibility via Respect to International Law

As Keohane and Nye Jr (1998) point out, as states can see other states who engage with the rules of international organizations as more credible than states who are not a part of the international organizations, or that choose not to comply with the terms of the international organization. Forming coalitions through transnational networks increases the transparency and credibility of states (92). Palestine's ICC

bid case can be regarded as a way for Palestine to build its credibility by accepting to be bound by international law and committing to an international organizations.

After the Palestinian Authority submitted a referral in January 1, 2015 to the International Criminal Court (ICC) calling on prosecutors to open an investigation into alleged Israeli crimes in the occupied Palestinian territories, the Palestinian Authority Foreign Minister Riyad al-Malki said that this is a great step of justice for Palestinians. Besides, "This referral is Palestine's test to the international mechanism of accountability and respect for international law" (Tahhan 2018). PA by joining the ICC accepted to be bound by the rules of international criminal law and hence increase its credibility in the international arena.

After the accession to the Rome Statute, the Mustafa Barghouti, the leader of the Palestinian National Initiative, said that "This means that the impunity Israel has had for 67 years is over, and it will face accountability in front of international law. It's a declaration that the Palestinian state is subject to the rules of international law, and Israel is subject as well, as the occupying force of the Palestinian land" (Booth 2015). In this regard, the PA is shown as the legitimate actor abiding by the rules of international criminal law and Israel as the violator of international criminal law which may increase the support to Palestine and weaken the image of Israel in the eyes of the international community.

Huber and Kamel (2015) point out that the PA's engagement with several international conventions and treaties including the Rome Statute demonstrates his position as an actor working in the framework of international law. As a response to Israel's policies of violence and settlements, PA can present itself as the actor that embraces international law to end the Israeli occupation. An international level of analysis, besides the issue of diplomatic recognition, ICC membership also allows Palestine to internationalize the Israeli-Palestinian conflict and present itself as a credible member of the international community that is committed to the rules and codes of the Rome Statute. Considering that the ICC's main function is to end impunity, ICC membership could potentially lead to prosecution Israeli conduct. Whether and if, Palestine's membership can bring about accountability for Israel's war crimes is to be seen. Approaching Palestinian commitment to the ICC at T the interstate level shows that even without prosecution, the Court's deterrent effect could impact Israeli-Palestinian conflict.

5.2 Interstate Level - ICC Jurisdiction over Israeli Conduct

Israel is not a state party to the Rome Statute. Neither is obliged to cooperate with the ICC and or hand over its citizens to the Court. Nevertheless, the Court can still have the power to prosecute Israeli citizens because of the territorial jurisdiction principle of the Rome Statute. It enables the Court's jurisdiction over all individuals who have committed international crimes including crimes against humanity, genocide, war crimes, and crimes of aggression on the territory of a member state. Since Palestine became a member state to the ICC as of 1 April 2015, the ICC can exert jurisdiction over Israeli individuals regardless of the fact that their state is not a member (Høgestøl 2015, 200). In that sense, as Azarov and Weill (2012, 253) argues that bringing international crimes committed in the Palestinian territory to the Court would at least have a deterrent effect on Israel's practices and provide for the protection of the rights of Palestinian people. Jo and Simmons (2016)' prosecutorial deterrence theory may help in explaining why Palestine acceded to the Rome Statute and what possible consequences can be brought by this accession when we observe the rationale from an interstate level of analysis.

The Office of the Prosecutor (OTP) is the officer that determines whether there is ground to open an investigation. The ICC preliminary examination can be initiated in three ways. The source of referral can come 1. from information from individuals, groups, states, intergovernmental organizations or NGOs, 2. from a state party or the Security Council, 3. a declaration accepting the jurisdiction of the court, submitted by a state that is not party to the Rome Statute. This means that even though Israel has not joined the ICC and the Security Council would not refer the conflict to the court, the prosecutor can refer to a situation and begin preliminary examinations. In other words, the threat of ICC jurisdiction can actually deter future violence.

According to Jo and Simmons (2016) there are two types of deterrence: prosecutorial and social deterrence. Prosecutorial deterrence refers to positive change in the actors' committing violence because of the fear of legal punishment. As explained elaborately in "Theoretical Framework" chapter, the likelihood of the punishment increases the effect of prosecutorial deterrence. That is why, evaluating the reports that documented the alleged war crimes committed by Israeli Defense Forces (IDF) is crucial to evaluate Israeli conduct in Palestinian territories and the possible workings of the effect of prosecutorial deterrence.

ICC's complementarity principle adds a dimension to whether the court can actu-

ally play the role of deterrent. The lack of an effective enforcement mechanism in Palestine and Israel's unwillingness to allow accountability for the perpetrators of the conflict in its domestic legal system open a way for the ICC's action. Therefore, in order to assess the prosecutorial deterrence may work in deterring Israel and how the complementarity regime strengthens the ICC's ability to do so[7], this section first examines the relationship between the two sides of the conflict (Israel and Palestine), supported by the official and news reports, on international crimes as grounds for the ICC. Since the jurisdictions are not finalized in the Court, a clear and systematic conclusion may not be possible. Instead, two main factors can verify the Palestinian cost-benefit calculation and decision to be a member of the Court: the relatively higher rate of alleged crimes committed by Israel and the effect on its conduct after the formal accession of Palestine, and Israel's inability or unwillingness to investigate the perpetrators of crimes in the Israel National Court.

As it was elaborately explained in the "Historical Background" chapter, Fatah makes up the largest faction of PLO. After the Oslo Accords, which created the Palestinian Authority (PA), Fatah also led this self-government body. In its early years, Fatah did not use direct political violence but adopted a more peaceful method by focusing on building international support. However, starting from 1965 but more significantly after the Six Day War (1967), the peaceful methods of recognition turned into guerilla strategies and domestic terrorism (Daase et al. 2015, 225). Such diversion in the attitude is caused by first, state repression by Israel and second, the awareness that a peaceful state in the face of repression is ineffective (White 1989, 1277). Daase et al. (2015, 226) argue that the lack of international recognition prompted Fatah to adopt terrorism in order to draw international attention to the Palestinian cause. However, after Arab states were defeated in the Yom Kippur War (1973), Fatah changed tactics. The involvement of Arab states for the cause of Palestinian national struggle converted the Palestinian resistance into internationally recognized national movement with limited territorial goals based on the 1967 United Nations Security Council Resolution 242 (Sela and Maoz 1997, ix). According to Daase et al. (2015), for the Fatah-led PLO "recognition played a major role in incentivizing restraint". The sporadic escalations of violence deescalated as Fatah was forced to show restraint. Although the emergence of militant groups like Hamas, led Fatah to adopt violence as well, the last instance of domestic terrorism was in 1988 (230). Ultimately Fatah that was previously known as the Palestinian National Liberation Movement, transformed into a more realistic and moderate actor and until 1993, it did not commit any acts of violence (32).

[7]The theory advanced by Jo and Simmons (2016) helps explain how the ICC may have a deterrence effect for governments and rebel groups that are seeking ways to gain legitimacy. This section relies on this explanation vis à vis governments, namely Israel in this conflict.

In 1993, PLO signed a peace agreement (the Oslo Accords) and built peaceful relations with Israel in comparison to Hamas, proponent of armed struggle, in response to the secret deal committed acts of violence. With the Oslo Accords, in return for recognizing the right of Israel to "exist in peace and security", Israel recognized PLO as the legitimate representative of the Palestinians and a negotiating partner. However, their relationship has not necessarily been calm. For over two decades, Israeli propaganda concentrated on delegitimization of PLO with fake news. Also, from the perspective of Fatah, negotiating with Israel was a realistic method to achieve international support when using political violence had not brought much success. Fatah's desire to negotiate with Israel can be evaluated as a pragmatic response in its struggle for a Palestinian state.

Built upon an intense relationship between Israeli state and Fatah, Israel's violation of international crimes has been reported by several organizations including UN documents. Particularly, the documented ongoing violence by Israeli soldiers against Palestinian citizens generated the ground for a possible jurisdiction of Israel which is one of the tools of the Palestinian Authority in acceding to the Rome Statute.

5.2.1 Reports on Israel's Violation of International Crimes

In the conflict between Palestinians and Israel, international law has been repeatedly disregarded. We can cite numerous Security Council resolutions that have been vetoed or have not reached the floor, ICJ's advisory opinion on the construction of a wall in West Bank, fact-finding mission reports of the Human Rights Council, reports of Office of the United Nations High Commissioner for Human Rights in the occupied Palestinian territory, reports of the special committee on Israeli practices[8], as well as reports of UN special rapporteurs for occupied Palestinian territory.

According to the submission to ICC in March 2020 on behalf of Palestinian victims in the Gaza Strip, international NGOs, UN-mandated Fact-Finding Missions (on 2009 Gaza Conflict) and Commission of Inquiry (2014 Gaza Conflict) and scholars have called for ICC investigations for more than 10 years (**?**). Gaza victims' representatives in this submission to the ICC argue that the pursuit of justice is sought "as a tool of deterrence against the recurrence of the grave crimes they continue to be subjected to with complete impunity for perpetrators" (**?**, article 73).

[8]The committee reports to the General Assembly and its full name is Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People.

Another submission to the ICC on behalf of the Palestinian child victims killed by Israeli forces and their family members, the Rome Statue has a clear deterrence objective and failing to find jurisdiction would "perpetuate systemic impunity in a situation where the Prosecution has already determined there is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and Gaza" (article 73). The next section examines the three operations that took place in the last decade, namely the Operation Cast Lead (December 2008–January 2009), Operation Pillar of Defense (November 2012) and. Operation Protective Edge (July–August 2014). In doing so, the main objectives are to examine the scope of war crimes and crimes against humanity committed in Palestinian territories and to trace how the interstate explanation that ICC membership may deter future crimes may have prompted the Palestinian decision to accede to Rome Statue.

Operation Cast Lead

Following Israel's Operation Cast Lead, in September 2009, the UN Fact-Finding Mission on the Gaza Conflict, established by the Human Rights Council, published a report to present *prima facie* evidence of violations of international law committed by both Palestinian authorities (PA and Hamas) and Israel that took place between 27 December 2008 and 12 January 2009 in the Gaza Strip and Southern Israel. The report concludes that:

> What occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a **deliberately disproportionate attack** designed to punish, humiliate and **terrorize a civilian population**, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability [emphasis added] (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, article 1690, 525)(quoted in McGreal (2009)).

The Goldstone Report delivered a clear message that Israel violated international law during its 22-day assault on the Gaza Strip, and that those responsible must be held accountable (Barnette 2011, 140). Moreover, following the Operation Cast Lead, human rights groups and newspapers have accused both Israel and Hamas of war crimes and called for further independent investigations, including referring the case to the ICC.

For example, Human Rights Watch (HRW), as one of the leading non-governmental

organizations reporting the violations in the Gaza Strip and West Bank committed by both Israel and Hamas, wrote a letter to EU Foreign Ministers to address those alleged crimes and express the need for a proper investigation. Because of poor accountability mechanisms of Hamas and Israel, a reliable third party like the EU should take the initiative to investigate the war crimes "for pursuing accountability and combating impunity around the world". Besides, "the current UN Board of Inquiry investigation is limited to selected attacks on UN facilities, while the planned investigation mandated by the UN Human Rights Council would focus only on Israeli conduct". In the letter, the main message is to press the UN Security Council to establish a reliable UN commission of inquiry. Also, the letter touches upon the lesser role of the ICC because Israel has not ratified the Statute, so the court would not be able to claim jurisdiction over the acts of Israel (*Human Rights Watch-Letter to EU Foreign Ministers to Address Violations between Israel and Hamas* 2009).

In the Goldstone report, parties were requested to conduct national investigations as well (Azarov and Weill 2012, 905-6). Whereas Palestinian authorities conducted national investigations, Israeli investigative system for allegations of international crimes was biased and impartial, also shield the higher political and military men from criminal liability (909). Besides, even though several local and international human rights organizations published reports examining Israel's practices of violating international crimes including war crimes, Israel High Court of Justice showed unwillingness to investigate the crimes written in these reports (Azarov and Weill 2012, 258). Also, the Prime Minister of Israel, Benjamin Netanyahu reacted to the Goldstone Report as "Goldstone Threat"(*Israel hits Hamas targets in Gaza* 2009).

The UN Fact Finding Mission in the Goldstone Report after revealing the violations of international crimes by both sides of the conflict gives recommendations to UN, Israel, the Palestinian Authority, and the international community. Accordingly, the UN should establish an independent committee to investigate crimes. Both Israel and the Palestinian Authority should start national investigations and prosecute those responsible in national courts for those commit crimes. Also, the Mission recommends that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts by using universal jurisdiction (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, 423-7). Despite these recommendations as expressed in the previous section of this thesis, Israel did not conduct national investigation for reported crimes. The initiations of the UN did not go further than examinations and reporting the crimes so that the accountability and universal jurisdiction to end impunity did not become reality.

In the absence of good-faith investigations as recommended in the Goldstone Report, the Israeli state has shown some improvements in the legislative and judicial system (Adem 2019, 198). Besides, even though Israel has been critical of the Goldstone Report, the Report has led the Israeli Defense Forces (IDF) to adopt some significant reforms regarding its war fighting policies. Training courses have included the study of international law with an emphasis on the rules of war. Commanders have begun to consult with legal advisers not only in the planning stages of operations but also during the fighting. The IDF has decided to minimize the civilian casualties. Besides, IDF has taken step to improve relations with Israeli NGOs (Helller 2011). These developments suggest how ICC's deterrence effect may play out.

It was within this context, on January 22, 2009, the PA submitted a declaration with the ICC accepting the jurisdiction of the ICC for events that took place in the Palestinian territories since 2002. According to *Rome Statute of International Criminal Court* (2011, article 12.3) states that are not party to this treaty may still accept its jurisdiction on an ad hoc basis. The Goldstone report had recommended that Security Council refers the situation in Gaza to the Prosecutor of the ICC and the Prosecutor with regard to Palestine's ad hoc declaration make the legal determination as soon as possible as it is required to ensure "accountability for victims and the interests of peace and justice in the region" (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, 424).

The preliminary investigation, which is possible even without ratification of the statute, continued but in April 2012, ICC determined that it could not exercise jurisdiction if UNSC or a state does not provide jurisdiction. By then, the PA had already submitted an application for full membership to the UN but the Security Council had not made a recommendation. Instead, in November 2012, the UN General Assembly upgraded Palestine's status to non-member observer state. It is reported that European countries voted in favor of conferring this status on the condition that Palestine would not immediately seek ICC membership (Schack 2017). Besides, since the main aim of the Statute is "to fight impunity", the role of the ICC corresponds with the Palestinian Declaration of acceptance of jurisdiction. The Court can fill the accountability gap in the region. Otherwise, the international crimes committed in Palestinian territory would be left in the international criminal law vacuum (Azarov and Weill 2012, 261).

Operation Pillar of Defense

In 2012, Israel launched an operation in the Gaza Strip. The Pillar of Defense Operation by the Israeli Air Force lasted eight days from 14 November to 21 November. According to the B'Tselem investigation, 167 Palestinians were killed by the Is-

raeli military including at least 87 who did not take part in the hostilities, 32 of whom were minors. Also, Israel Security Agency (ISA) documented that Palestinians launched rockets from the Gaza Strip and four Israeli civilians and two members of the Israeli security services were killed. Regarding the violations by Israeli Air Force, ISA announcement stated that "during the attacks an effort was made to prevent injury to the innocent, and to minimize as far as possible any injury to uninvolved civilians" (*B'Tselem Report-Human Rights Violations during Operation Pillar of Defense, 14-21 November 2012* 2013, 3-4).

Furthermore, "Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/11" argues that such acts during the operation in 14-21 November 2012 violates the IHL: killing of civilians, destruction of residences and incidental killing of civilians, destruction of civilian property, attacks on media offices and journalists, and destruction of medical facilities (*Report of the Human Rights Council* 2012, 5-11). Therefore, reports of both B'Tselem and UN Human Rights Council show the high number of civilians killed during the operation and several acts that violated the IHL. These falsify Israeli officials' assertion of being abided by international humanitarian law.

Operation Protective Edge

The conflict between Israel and Palestine escalated in the year 2014 because of Israel's military operations to Gaza known as "Operation Protective Edge". United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) Situation Report on Hostilities in Gaza and Israel (2014) listed the violations of human rights with figures. Accordingly, 1.439 Palestinians, including at least 926 civilians were killed by Israeli Defense Forces (IDF) and 66 Israelis were killed by Palestinian armed groups. Two of them were civilians. 280.000 people were displaced during the conflict (*UNOCHA situation report-Hostilities in Gaza and Israel , url = https://www.un.org/unispal/document/auto-insert-203185/, institution = United Nations Office for the Coordination of Humanitarian Affairs, month = aug, year = 2014* N.d.). According to the "Report on Preliminary Examination Activities (2015)" of the ICC, in 2014, IDF attacks were directed against civilian settlements and infrastructure. According to the report, between 19-21 July 2014, the attacks resulted in hundreds of civilian casualties including many women and children. The Israeli government reportedly destroyed 590 Palestinian-owned structures in the West Bank and East Jerusalem, and displaced 1,177 Palestinians in 2014 (*ICC- Report on Preliminary Examination Activities (2015)* 2015, article 67-9, 15).

According to the statistics of (OCHA), which were compiled at the request of Hu-

man Rights Council, in order to investigate violations of International humanitarian law (IHL) and international human rights law (IHRL) that took place between June 13 and August 36, 2014 during the Operation Protective Edge, the total number of Palestinian fatalities in Gaza were 2251 (*UNOCHA-Key figures on the 2014 hostilities* 2015). Beyond these figures, the operation resulted in the largest displacement of people in the Gaza Strip since the war in 1967 and caused damage to infrastructure and services. According to the report by UNOCHA, the Military Advocate General (MAG) the body responsible for investigations within the military was examining IDF misconduct and by 2015 had examined more than 100 incidents and the first indictment was brought in April 2015. According to a 2018 report by IDF, the MAG has allowed "the opening of criminal investigations without the need for prior factual examination with regard to 24 exceptional incidents" and as a result of indictments three soldiers were convicted of looting and aiding and abetting looting. Additionally, 220 incidents were examined by the fact finding assessment mechanism (FFA mechanism) and referred seven of these cases for criminal investigation. With respect to its conduct in Rafah, "after reviewing all the factual findings and the material collated by the FFA Mechanism regarding the fighting overall and the individual incidents that occurred in its course, the MAG did not find that the actions of the IDF forces that were examined raised grounds for a reasonable suspicion of criminal misconduct" (*IDF-Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'* 2018).

During the military operation, Palestine unsuccessfully tried to use activating the ICC's jurisdiction as leverage. For instance, on August 5, 2014 the Palestinian foreign minister travelled to the Hague, suggesting that Palestinian side was using the publicity of the trip to compel Israel to stop the operation but Israel indicated that it planned to continue its operation. Public statements by Palestinian officials did not suffice to use the ICC as a coercive tool (Schack 2017, 335). According to Schack (2017), the reason that the threat of going to the ICC could not deter Israel was because first, this was an on-going operation and Palestinian leadership had made such demands that made it very unlikely for Israel to give any concessions. More significantly, Palestine's threats lacked credibility signalling that it was not actually determined to involve the Court.

According to The Israeli Information Center for Human Rights in the Occupied Territories, an NGO that documents human rights violations committed by Israel as the occupying power, the work of the MAG with respect to the 2014 fighting is a case of whitewashing breaches of the IHL because of lack of transparency about the composition of its members, as well as their capacity to carry out them in terms of

resources and authority. Moreover, B'Tselem states that it is not clear "what the MAG's criteria are for deciding which case will be referred to the FFA Mechanism, which will be referred directly for criminal investigation and what falls under the definition 'exceptional cases'"(*B'Tselem- Whitewash Protocol* 2016). These concerns raise the question as to whether Israel has an effective legal mechanism to investigate and punish crimes committed by its military forces. The PA government and Hamas have not carried out any investigation of alleged war crimes (Bosco 2016).

B'Tselem explains Israeli officials' being in support of investigations as a consequence of their desire to prevent ICC from taking on the issue. Besides the work of the MAG, Foreign Affairs and Defense Committee of the Knesset and State Comptroller have also opened inquiries (*UNOCHA-Key figures on the 2014 hostilities* 2015).

As the UN established a committee under the Human Rights Council to investigate crimes, Netanyahu and the Ministry of Foreign Affairs of Israel criticized UN's "obsessive hostility" toward Israel and "one-sided mandate". After the head of committee Schabas called for Israeli Prime Minister Benjamin Netanyahu to stand trial at the ICC for war crimes, Netanyahu announced that Israel would not cooperate with the UN probe (Newman 2014). Amnesty International documented the crimes perpetrated by Israeli soldiers, and that Israel conducted acts of violence indiscriminately. Israel's Foreign Ministry rejected the finding in the report, saying Amnesty "ignores documented war crimes perpetrated by Hamas" and had produced no evidence to back up its claims (*The Guardian-Israel accused of war crimes during campaign in Gaza* 2014).

Even though Hamas as another side of the violence welcomed the Palestinian membership to the ICC, Israeli officials on the other hand denounced the ICC move, with Prime Minister Benjamin Netanyahu calling it "a dark day for truth and justice." Netanyahu argued that the ICC "has no authority to adjudicate the matter. It has jurisdiction only in lawsuits presented by sovereign states, but there has never been a Palestinian state. We will not accept or acquiesce to this injustice. We will continue to fight it with all the tools at our disposal." It was also condemned by US Secretary of State Mike Pompeo, who said the inquiry "unfairly targets" the Jewish state(*Times of Israel- Hamas hails ICC for readying probe of alleged war crimes by Israel and itself* 2019).

Against the overwhelming force of Israel, Palestinian side claims that it was unable to defend itself and turned to other tactics. President Abbas said that "Israel has left us no other option" by signaling the threat of going to the ICC if the violent activities by Israeli forces continue (Schack 2017, 333). However, considering that the Court only provides prospective jurisdiction, preventing the crimes during the Operation

Protective Edge could not be possible. On the other hand, a general deterrence effect might happen for the future relations, now that Palestine has formally acceded to Rome Statute (335).

Despite the fact that Israeli officials deny the existence of war crimes repeatedly, the Israeli state has shown some improvements that can be evaluated as a deterrence effect because of the fear of possible jurisdiction in the Court.

A current report on the conflict between Israel and Palestinian armed groups, World Report 2020 by Human Rights Watch (HRW) demonstrates that as of October 31 2019, Israeli forces have violated laws of war. According to Palestinian resources, IDF has killed 34 Palestinians and injured 1,884 with live ammunition. During a short-lived fighting in early May 2019, Israeli airstrikes killed 25 Palestinians and 13 of them were civilians and according to the report, serving no military objective and disproportionately killing civilians, these constituted war crimes (*Human Rights Watch- World Report 2020* 2020, 302)[9]. According to the information compiled by the OCHA as reported by HRW, as of 11 November 2019, in Gaza, Israeli security forces have violated international human rights law, killing 71 Palestinians and injuring 11.453 of them (304). In the West Bank, Israeli security forces killed 23 Palestinians and wounded at least 3,221 (307). Potentially these violations could also be grounds for ICC investigation for war crimes and crimes against humanity. However, since Operation Protective Edge there has not been another major Israeli military operation in Palestinian territories.

Settlements

Furthermore, not only war crimes committed by Israel, but also illegal settlements restrict the living zone of Palestinians, adding to their grievances. According to a report submitted on 15 March 2000 by the Special Rapporteur of the Commission on Human Rights, "Israel had confiscated since 1967 an estimated 60 per cent of the West Bank, 33 per cent of the Gaza Strip and approximately 33 per cent of the Palestinian land in Jerusalem for public, semi-public and private use in order to create Israeli military zones, settlements, industrial areas, elaborate 'bypass' roads and quarries, as well as to hold 'State land' for exclusive Israeli use" (Akasaka 2008, 109). Currently, more than 500.000 Israeli settlers live in the West Bank which is under the occupation of Israel. Adding approximately 200.000 settlers in East Jerusalem, the ratio of settlers in the total Israeli population is almost 1/6 (Kılınç 2018, 180).

[9]The report also covers violations committed by the Palestinian armed groups. As a result of the rockets fired to Israeli side from Gaza, 4 Israeli and 2 Palestinian civilians were killed.

Prime Minister Rami Hamdallah had said that Palestinian Authority was planning to refer the Israel's illegal settlement activities and all its crimes against the Palestinians to the International Criminal Court (*Asia News Monitor-Israeli Settlements, Crimes to Be Submitted to ICC Next Week* 2018). By "continuing these war crimes of settlement activities on our lands and stealing our money, Israel is pushing and forcing us to go to the ICC", said a senior aide to President Abbas (Kalman 2012). Aljazeera also confirms that Israel's settlement activity violates Article 8 of the Rome Statute which constitutes as war crimes: "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" (*Rome Statute of International Criminal Court* 2011, Article 8 (2-b)). Besides UN General Assembly (*(UNGA)*) adopted several resolutions regarding the illegal settlement activity of Israel in Palestinian territories based on pre-1967 borders (*UNGA-Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories* 2019). U.S. Secretary of State Mike Pompeo announced that "The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law." Such announcements on illegal settlements and the ongoing process of investigating the crimes committed in Palestinian territories by the Prosecutor of the ICC have economic repercussions for Israel. European and Canadian consumers may begin to discredit the relations with Israel based on ethical grounds (Kattan 2019). As a reaction by Israel to Palestine's accession to the ICC, Israel announced it will release part of the taxes. This move is seen as an attempt to make Palestinians refrain from referring cases against Israel (Zahriyeh 2015).

The UN General Assembly, in its resolution 61/118[10], reaffirmed its long-held stance that "Israeli settlements in the Palestinian territory, including East Jerusalem, and in the occupied Syrian Golan are illegal and an obstacle to peace and economic and social development", and calling on Israel "to comply strictly with its obligations under international law, including international humanitarian law, with respect to the alteration of the character and status of the occupied Palestinian territory, including East Jerusalem" (Akasaka 2008, 109-110).

It is not possible to confidently argue that the ICC has deterred Israeli actions in Palestinian territories. In fact, Israel continued to announce new settlements. Although Prime Minister Netanyahu cancelled some settlement activity in Jerusalem in September 2014, this seems to have been the result of American pressure, rather

[10]For full text of resolution, see *UNGA Resolution 61/118* (2007)

than the threat of Palestine's accession to the ICC (Schack 2017, 330). In fact, plans to annex Israel's settlements although it raises the possibility of prosecution by the ICC have been taken after PA acceded to the Rome Statute (*Los Angeles Times-Israel undeterred by international opposition to annexation* 2020). Unlike Israel's operations in Gaza where the domestic mechanisms may help prevent the exercise of ICC jurisdiction, with respect to settlements there is no similar established procedure. However, the High Court of Justice's decision in 2018 signaled to ICC that Israeli local court system does respect international law. Yet, the court's decision to annul the 2017 legislation that would have allowed retroactively legal settlements built on occupied territories in land that is privately owned by Palestinians, have pushed the Israeli government to annex West Bank territory (Bob 2020).

5.2.2 Israel's Reactions to Accusations of International Crimes

Before the accession to the ICC, Palestine's bid to the UN and the upgraded status to the non-member observer state got a coercive reaction by the Israeli state. Israeli politicians announced renewed settlement activity. In fact, on the day after the vote they announced 'preliminary zoning and planning preparations'. They planned to expand the settlements to the most contentious areas in the West Bank (Schack 2017, 329-330).

As Mahmoud Abbas gave the signals of going to the Court for the crimes committed by IDF against Palestinians, Israel and the United States warned the PA against joining the ICC. The Military Advocate General of the Israeli Defense Forces, Avichai Mandelblit, "PA pursuit of Israel through the ICC would be viewed as war" by the Government of Israel. U.S. Ambassador to the UN Samantha Power had argued that Palestine's accession to the ICC "will be anything other than devastating to the peace process". Besides, the PA had reported that it has also been pressured by other Western governments—including Australia, Canada, France, Germany, Italy, and the U.K.—to refrain from applying to join the ICC (Kittrie 2016, 208-9).

Despite the reported war crimes, Israel legitimizes its acts of violence with varied arguments. The occupation of Palestine is seen as a defense against the security threat made by the Palestinian armed groups. So, crimes are believed "as legitimate, just, or as the only means to defend or advance the interests of the group or the individual's situation or status, making the crimes necessary, if they are even viewed as 'crimes'" (Rothe and Collins 2013, 196).

Importantly, Israel both rejects the committed crimes in Palestinian territories by Israeli soldiers and denies the existence of Palestinian state. Netanyahu stated in the 2015 Israeli election that there would be no Palestinian state while he is in power (Beaumont 2015). Also, after Palestinian membership and the possible war investigation for Israel were announced, Netanyahu said that it is a strategic threat for Israeli military and political leaders and that such probe will be the top priorities of Israel's agenda. Israeli officials do not accept the ICC jurisdiction because there is no sovereign Palestinian state that could access and delegate to the court criminal jurisdiction over its territory and nationals (Ahren 2020).

On the other hand, the threat of prosecution or the 'shadow effect' of the prosecutor somehow has affected Israel's domestic judicial system and military justice system. As one of the roles of ICC's possible jurisdiction, national judicial reforms have been initiated in the Israeli side regarding the reforms in the IDF as demonstrated above. In line with the recommendation made by the Turkel Commission Report[11]. The IDF Chief of General Staff established a mechanism for fact-finding assessments (FFA Mechanism) to look into "Exceptional Incidents" during the 2014 hostilities. The investigations made by FFA Mechanism were referred to the MAG (Military Advocate General), which is a central component of the IDF military justice system. In cooperation with FFA Mechanism, the MAG initiated inquiries on 2014 hostilities (*UN- Human Rights Council Resolution S-21/1* 2015, 160-2).

However, according to the UN Human Rights Council Resolution S-21/1, independence and impartiality of these inquiries are problematic (*UN- Human Rights Council Resolution S-21/1* 2015, 165). Therefore, Israel did not conduct sufficient and impartial investigations on Israeli soldiers' alleged war crimes in the Palestinian territories because it denies the documented reports. To illustrate, B'Tselem and Yesh Din, the two leading Israeli human rights organizations in monitoring the investigations of crimes committed by the IDF against Palestinians, find that the military law enforcement system is a complete failure. "Existing investigation mechanism precludes serious investigations and is marred by severe structural flaws that render it incapable of conducting professional investigations" (*B'Tselem- Israel is unwilling to investigate harm caused to Palestinians* 2014). Turkel Commission Report also concludes that "there are grounds for amending the examination and investigation mechanisms and that in several areas there are grounds for changing the accepted policy" (*The Turkel Commission Report- The Public Commission to Examine the Maritime Incident of 31 May 2010* 2010, 49). Thus, denying the documented re-

[11] The Turkel Commission was established in 2010 by the Government of Israel of the Public Commission to examine the Maritime Incident of 31 May 2010, known as "Mavi Marmara Incident". Report: *The Turkel Commission Report- The Public Commission to Examine the Maritime Incident of 31 May 2010* (2010).

ports on war crimes, not conducting proper investigations, and being unwilling to prosecute the perpetrators opened the floor for the ICC jurisdiction based on the complementarity principle.

5.2.3 The Need for International Jurisdiction: Involving the ICC

The deadlock at the UN Security Council in responding to the Gaza Strip during December 2008 and January 2009 showed the deficiency in international law mechanisms to Israel's reported violations of international humanitarian law. The Palestinian-to-Israeli casualty ratio was validated as 100:1 by several channels: the testimony of IDF soldiers, diaries of persons living in Gaza at the time, by the Norwegian film *Tears of Gaza*, and informal reports by UN staff stationed at the time of the attacks in Gaza (Falk 2011, 84). Besides, a number of international organizations[12] and governments called the need for investigation on possible violations of international criminal law. Thus, with respect to Israel's alleged crimes on the Gaza Strip, the role of the ICC carried great hopes for justice (Azarov and Weill 2012, 259). The very object and purpose of the Rome Statute – to put an end to impunity – demonstrates the critical role of the ICC in forcing commitment to the international law and reducing the intensity and the number of violations (Schabas 2011, vi).

Reports overwhelmingly stress on the number of casualties, rockets, injuries, and displacement by both sides of the conflict. On the other hand, Paust (2015, 58) enlists the other types of violations of the Laws of War that could be investigated and judged by the Court. The collective penalties, deportation of civilians, infusion of one's own nationals into occupied territory, and annexation of occupied territory are four specific types of Israeli conduct. On the other hand, unlawful confinement, hostage-taking, and murder, armed attacks on civilians and civilian objects, and use of indiscriminate methods and means of attack are included as Palestinian violation types of Laws of War. Since such relevant offenses are included in the Rome Statute, the ICC can address them and imply jurisdiction.

According to Kontorovich (2014), "The International Criminal Court has become perhaps the most important weapon in the lawfare campaign against Israel". Overestimating the impact of the ICC threat on Israel is difficult to measure. However,

[12] Human Rights Watch: *Human Rights Watch- Palestine: ICC Should Open Formal Probe* (2016); Amnesty International: *Amnesty International- Israel/Occupied Territories: Call for international investigation of Gaza strikes* (2006).

possible ICC jurisdiction affected the strategic decision-making of Israeli state. For example, in 2012, for the accused of having illegal property and violating the Geneva Convention, Jewish residents in Hebron were forcibly removed from their houses by the Israeli government. Besides, Prime Minister Netanyahu and Palestinians negotiated on the price of releasing the terrorist killers in the Palestinian side. "The deal was that at least as long as Israel makes concessions, the Palestinians would put off seeking action at the ICC" (Kontorovich 2014).

On a much larger scale, considering Israel's policy based on the proclaimed right to protect its security, Israel is unlikely to deter. Also, Israel sees illegal settlements as key to its continued existence. Israel would not change those settled policies overnight upon legal challenges from the Court which Israel does not recognize (Mills 2015). ICC Report also notes the continuation of crimes in the Israeli side rather than deterrence. "Since the opening of the preliminary examination of the Situation in Palestine, Israel has continued unabated to commit crimes within the jurisdiction of the Court. It has done so brazenly in order to advance its settlement regime to an unprecedented level with the aim of pursuing its policy of displacement and replacement of the Palestinian people" (*ICC- Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute* 2018).

In sum, the interstate level explanation of Palestine's accession to the ICC refers to the possible prosecution of Israeli conduct. Considering the judicial improvements in the Israeli system after the accession to the ICC, the decrease in the number of Palestinian fatalities by IDF, and the releasing a part of Palestinian taxes, the deterrent effect of Palestine's ICC bid remains open to discussion. The theoretical basis for this hypothesis is derived from the prosecutorial deterrence theory of Jo and Simmons (2016) with respect to the complementarity principle of the ICC. However, the continuation of armed attacks, reported war crimes committed by Israel and Israel's unwillingness to investigate the perpetrator of war crimes in national courts may lead to the Court to exert jurisdiction in the future.These also show that the prosecutorial deterrence theory does not completely explain the explanation at the interstate level. Moving forward, as the third level of explanation, what is the reason behind the PA's decision to accede to the ICC in terms of domestic conjuncture?

5.3 Domestic Level- ICC Jurisdiction over Hamas' Conduct

In the domestic arena of Palestine, there are two major actors that are both representatives of Palestinian people and ruling over different territories: Hamas in Gaza and Fatah/PA in the West Bank. Such duality in the administration generates mostly tension and competition among the authorities. PA's commitment to the Court may bring another consequence with respect to this duality approaching PA's decision to commit from a domestic level of analysis can provide an explanation for why Palestine joined the court . The credible commitment theory may help explain the domestic level interaction because Hamas is the violent actor among Palestinian authorities and as such, more likely to be subject to the jurisdiction of the ICC. Therefore, by becoming a member of the ICC, Fatah may be looking to use the court to prosecute its members or alternatively tie its own hands and convince Hamas to also alter its violent behavior .

As previously emphasized, according to credible commitment theory, the states' decision to commit to the ICC are derived from two assumptions: first; because of low committal to international crimes, states infer that they will not be subject to the jurisdiction of the ICC, second; states see the ICC as a rational tool to tie their own by credibly committing to the court and creating incentives for other players/rebels to abandon their behavior (Simmons and Danner 2010, 231).

Furthermore, Hashimoto (2012)'s expected-utility model of decision is also applicable to the domestic level explanation. Leaders are torn between threats of the ICC prosecution and political turnover. Similar to Simmons and Danner (2010)'s argument, he argues that the threat of ICC prosecution is a cost that leaders may be willing to take. Accordingly, Hashimoto (2012) argues that leaders make cost and benefit calculations based on the expected-utility model. Commitment to the ICC is costly but incumbents may seek to marginalize their domestic enemies with the threat of prosecutions by the ICC. When the cost of anti-regime violence by the rival is higher than the probability of being prosecuted by the Court, national leaders accept the ICC's jurisdiction. Considering the Palestinian case, the benefit of being a member of the ICC should be greater than the cost so that PA has a rational ground to join the ICC. The necessary condition is to have the higher probability that Hamas leaders would be prosecuted by the Court as a result of their more frequent use of violence relative to the Fatah.

To be able to analyze the domestic level of analysis and the applicability of theoretical expectations, this section briefly points out the relations between Hamas and

Fatah which have appeared as a domestic opponent in the 1980s. Then, the documented reports revealing the acts of international criminal law violations by Hamas and news and speeches setting out the possible jurisdiction of Hamas by ICC are analyzed in this sub-chapter.

5.3.1 Relations between Hamas and Fatah/PA

Hamas, born out of the consequence of the First Intifada, was a source of concern and threat not only for Israel but also for PLO equally (Kılınç 2018, 177). Fatah was the sole expression of Palestinian resistance until the rise of Hamas in 1987. The increasing popular support and participation to Hamas especially among Islamists led to the decline in popularity of Fatah (Hroub 2000, 5).

The main differences between Fatah and Hamas are mainly over their attitude toward Israel and their contemporary approach to the use of violence. Fatah adopted a less violent stance especially under the rule of Mahmoud Abbas who was a believer in negotiations and signed Oslo Accords with Israel. However, Hamas was opposed to a peaceful two-state solution. The implementation of the Oslo Accords had altered Hamas-PLO relations too. "No longer a competition among ostensible equals, their relationship became one of a ruling authority versus an opposition group" (Klein 1996, 111). Yet, despite Fatah's moderate attitude, Israel did not ease life in occupied territories, so the credibility of Fatah was shaken.

In 2005, support for Hamas, that advocated the Palestinian national struggle in religious terms gained momentum in Gaza[13]. Fatah had been ruling the West Bank since the 1990s and Gaza from 1968. In the 2006 legislative elections, Hamas received more votes than Fatah. Its unexpected electoral victory and a subsequent military ousting of the Fatah-led Palestinian Authority from Gaza, Hamas became Gaza's ruling party (Adem 2019, 24). This victory further complicated their relations (Bunton 2013, 101-3) because Hamas gained the control of Gaza and became an unofficial distinct authority representing Palestinian people. Before that, Fatah-led Palestinian Authority was the sole representative authority of Palestinians.

Since PLO was recognized as the main representative of Palestinian people by Israel, Hamas and Fatah as the main factions within the PLO were not equal in status. However, both are political parties and as such Hamas was not subordinated to

[13]In 2004, Ariel Sharon, the former Prime Minister of Israel proposed a disengagement plan including the withdrawal of the Israeli army and settlers from Gaza.

Fatah's authority. After the 2006 elections, a new government was formed under the prime ministry of Hamas leader but it had not been recognized as the legitimate government by the international community.

Jaouni (2015) resembles the Palestinian state of affairs to a case of schizophrenia. On one hand, Palestinian leadership internationalizes the Palestinian cause by acquiring membership of international organizations and seeking the recognition of the State of Palestine by international community. Internally, on the other hand, Palestinians are fragmented and dependent. Following the principles of Oslo Accords, they have little control over their land and resources and are highly dependent on Israel. Besides the misery of dependence on Israeli inclinations, Hamas-led coup in Gaza in 2007 divided the Palestinian authority politically and geographically and led to the creation of two separate governments in Gaza and West Bank, each claiming to be the real representatives of Palestinians. The Palestinian Authority led by Fatah was recognized by a considerable number of states unlike the Hamas government (42).

The PA's attempt to accept the ICC's jurisdiction in 2009 followed the violent conflict between Israel and Hamas in late 2008 and early 2009. Three-week non-stop ground invasion and airstrikes (Operation Cast Lead), led to approximately 1.400 Palestinian casualties[14] and 4 Israeli casualties[15] (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, 90-92). The PA's ad hoc declaration accepting the exercise of the jurisdiction of the Court mostly targeted Israel because of the disproportionate use of violence and high number of casualties (Worster 2010, 1154-5). On the other hand, Mahmoud Abbas accused Hamas of having "taken risks with the blood of Palestinians, with their fate, and dreams and aspirations for an independent Palestinian state". Besides, he said that it is impossible to negotiate with anyone who rejects the supremacy of the PLO – referring to Hamas (*BBC- ICC seeks West Bank and Gaza 'war crimes' inquiry* 2019).

Gordon and Sengupta (2014) reported in New York Times that "intense domestic political pressure" on Abbas led to "regain credibility among an increasingly critical" Palestinian public. During the Operation Protective Edge, while Hamas was seen as combatant against Israel and gained public audience among Palestinians, Abbas and the PA's conduct was peaceful toward Israel (Kittrie 2016, 209-210). Since Hamas reportedly violated the IHL and is likely to be subject to the jurisdiction of the Court, the PA may actually expect to get utility from its decision to commit,

[14]Data is provided from three different sources each gives different numbers: The Central Commission for Documentation and Pursuit of Israeli Criminals (1.444 casualties), Al Mezan (1.409 casualties), and B'Tselem (1.387 casualties).

[15]Data is from the Israeli Ministry of Foreign Affairs.

as framed by Hashimoto (2012).

5.3.2 Reports on Hamas' Violation of International Crimes

According to reports published by the 2009 UN Fact Finding Mission[16], Amnesty International[17], Human Rights Watch[18],Israel has violated the laws of war and Israeli officials could potentially be prosecuted by the court in case ICC finds grounds to exert its jurisdiction. It was not only Israel but also Hamas militants that have allegedly violated IHL. In the light of these reports, a possible investigation by the ICC may hold both Hamas and Israeli leaders liable for international crimes (Worster 2010, 1156).

The Goldstone Report, in its examination of the alleged crimes by Israel and Palestinian armed groups, revealed that since 2001, Palestinian armed groups have fired about 8.000 rockets and mortars into southern Israel. Between 18 June 2008 and 18 January 2009, during the Operation Cast Lead, rockets launched by Palestinian armed groups in Gaza have killed three civilians inside Israel and two civilians in Gaza. Over 1000 Israeli civilians were injured by these rockets. The great majority of them (918/1000) were injured during Israel's military operations in Gaza. Besides, the rockets and mortars fired by Palestinian side damaged houses, schools, and cars in Southern Israel (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, 31). According to the report by Human Rights Watch in August 2009, Palestinian armed groups, particularly Hamas, used "Qassam" rockets deliberately and indiscriminately to destroy Israeli civilians. Palestinian armed groups have fired "more than 4,000 rockets at Israeli territory since 2001, including nearly 2,700 rockets from September 2005 through May 2007, and more than 1750 rockets in 2008 alone" (*Human Rights Watch- Rockets from Gaza: harm to civilians from Palestinian armed groups' rocket attacks* 2009, 10). Besides, Jerusalem Center for Public Affairs argues that the rockets fired by Hamas also demolished Palestinian houses in Gaza in which the IDF had taken up positions (212).

Comparing the magnitude of violence carried out by Israel and Hamas, IDF (Israeli

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[16] *Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (2009).

[17] *Amnesty International- UN must urge Israel and Palestinians to carry out Gaza investigations* (2009).

[18] *Human Rights Watch- Rockets from Gaza: harm to civilians from Palestinian armed groups' rocket attacks* (2009).

Defense Forces) military operations caused far greater total harm to civilian lives and property than operations by Palestinian armed groups. During the conflict in Gaza in 2009, the number of killings by IDF was more than 1,350 Palestinians, including a large number of civilians; Hamas and other Palestinian groups killed six Israeli soldiers and three civilians (*Human Rights Watch- Rockets from Gaza: harm to civilians from Palestinian armed groups' rocket attacks* 2009, 4). To justify the violent activities, leaders of Hamas announced that their intention to target Israeli civilians was as lawful "reprisal for the civilian fatalities in Gaza as a result of Israeli military operations" (32). One of the prominent leaders of Hamas, Mahmoud Zahar publicly expressed that "The Israeli enemy . . . shelled everyone in Gaza. They shelled children and hospitals and mosques, and in doing so, they gave us legitimacy to strike them in the same way" (53). Even so, both UN Fact Finding Mission in the Goldstone Report and Human Rights Watch report indicates that the activities of Hamas are still unlawful according to the IHL because the rocket attacks have been carried out civilians (*Goldstone Report-Report of the United Nations Fact-Finding Mission on the Gaza Conflict* 2009, 32); (*Human Rights Watch- Rockets from Gaza: harm to civilians from Palestinian armed groups' rocket attacks* 2009, 3-4).

The Pillar of Defense Operation carried out by the IDF from 14 to 21 November 2012 led to the casualties in both Israeli and Palestinian side. Hamas and other Palestinian armed groups fired over 1500 rockets at Israel during this operation. Six Israelis, including four civilians were killed and 239 Israelis were injured (*UN Human Rights Council resolutions S-9/1 and S-12/1* 2013, 12). B'Tselem report argues that the rocket attacks by Palestinians violated the IHL because "it targeted civilians and civilian sites. Furthermore, the rockets used are too imprecise a weapon to distinguish military from civilian targets. Therefore, even had any attempt been made to do so, the use of rockets in civilian areas is illegal in and of itself" ((*B'Tselem Report-Human Rights Violations during Operation Pillar of Defense, 14-21 November 2012* 2013, 28).

During the Operation Protective Edge undertaken by Israel in 2014, war crimes committed by Hamas and other Palestinian armed groups also escalated. According to the "Report on Preliminary Examination Activities (2015)" by the ICC, according to UNDSS, Palestinian armed groups allegedly indiscriminately fired 4,881 rockets and 1,753 mortars towards Israel. Six civilians were killed as a result of the rocket attacks and many more Israelis injured (*ICC- Report on Preliminary Examination Activities (2015)* 2015, 14-15).

Unlawful attacks and civilian casualties on both Israeli and Palestinian side have been on going. According to the information provided by the Meir Amit Intelligence

and Terrorism Information Center, Palestinian armed groups in Gaza fired 1,378 rockets towards Israel as of November 2019. Those rockets fired from Gaza have killed four Israeli civilians and injured more than 123 Israelis (*Human Rights Watch-World Report 2020* 2020, 305). Also, the statistics of killings by Palestinian side, especially by Hamas, from September 2000 to May 2020 are outlined in the website of Israel Ministry of Foreign Affairs. Accordingly, 1.359 people have been killed by Palestinian violence and terrorism since September 2000. According to the statistics published by the Meir Amit Intelligence and Terrorism Information Center (ITIC), 12.352 rockets fired to on towns and settlements in southern Israel from January 2005 to August 2019. The number of rockets fired by Palestinian side peaked to 3.852 in the Operation Protective Edge (*Israel Ministry of Foreign Affairs- Victims of Palestinian Violence and Terrorism since September 2000* N.d.).

2020 report submitted to the ICC regarding the court's territorial jurisdiction in Palestine, there is credible basis to argue that Hamas and other armed groups have committed war crimes (*ICC- Situation in the Case of Palestine* 2020, 53). The crimes allegedly committed by Hamas and other Palestinian armed groups can be investigated pursuant to the article 17(1)(a)-(d) of the Statute (58).

5.3.3 Evidence in Support of the Explanation on Possible Jurisdiction over Hamas

As one of the hot conflicts in the international arena, news on the possible jurisdiction of Hamas is not scarce. Trahan and Cooper (2012) claims that the ICC membership of Palestine hurts Hamas more than Israel. Since Israel has conducted domestic investigations and the fear of ICC involvement has even encouraged Israel to expand its mechanisms of accountability. . Besides, since the Palestinian Authority pledged to cooperate with the Court, the ICC may call the PLO to collect evidence against Hamas leaders and even surrender them. Hamas' indiscriminate attacks on Israeli settlements could potentially lead to prosecution of its leaders by the ICC (*BBC- Will ICC membership help or hinder the Palestinians' cause?* 2015).

Despite of the existing reports and news confirming the Hamas' engagement with war crimes that may cause to the jurisdiction and even prosecution by the ICC, Hamas welcomes the Palestinian membership in the Court. Hazem Qassem, the spokesman of Hamas, told that "The Hamas movement welcomes the decision of the prosecutor of the International Criminal Court to open an investigation into war crimes committed by the occupation against Palestinian people" (*Times of*

Israel- Hamas hails ICC for readying probe of alleged war crimes by Israel and itself 2019). The Hamas's approach can be seen as an effort to seek self-legitimization for war crimes facilitated by them. Izzat Rishq, a senior Hamas official said the group isn't concerned about becoming a target of a war crimes probe: "We are under occupation ... our fighters are defending their people. These rockets are meant to stop Israeli attacks and it is well known that Israel initiated this war and previous wars" (*Hareetz- Hamas pledges to back Palestinian bid to join ICC* 2018).

After the meeting between the Palestinian chief negotiator Saeb Erekat and Khaled Meshaal, the leader of Hamas, Hamas's deputy chairman and chief negotiator in Cairo, Moussa Abu Marzouk has been instructed to sign the document supporting the State of Palestine as a member of the ICC in The Hague. According to the *Middle East Eye*, such decision is due to the aim of ending Israel's impunity as vital to the Palestinian cause. The movement decided "it would not allow itself to be used as an obstacle to a prosecution against Israel for war crimes". Besides, Hamas was confident that it would not be subject to the prosecution in the ICC(Hearst 2015).

Besides, before the accession to the ICC, Hamas had supported PA's UN bid for statehood. However, the relations between PA and Israel had been criticized among the circles in Hamas. Especially, senior officials of Hamas stated that Palestinians must not "sacrifice or compromise any inch of Palestinian land from the [Mediterranean] sea to the [Jordan] river" (Naylor 2012). Nevertheless, Abbas said that he will not make any decision on a bid without taking the consent of all Palestinian factions (*The Guardian- Hamas declares support for Palestinian bid to join international criminal court* 2014). Hamas' support for both the UN and ICC bid reflects that there is agreement among different Palestinian factions that involving the ICC and internationalizing the conflict is considered a viable approach.

How can we explain the fact that the leaders of Hamas welcomed the ICC bid? In this regard, the *hand tying theory* as argued by Simmons and Danner (2010) provides us an explanation. Rather than marginalizing Hamas a domestic rival of the PA who may possibly oust Fatah leadership (*expected utility model*), the hand tying theory proposes that by making a credible commitment, in other words, by acceding to the Rome Statue, Fatah-led PA is tying its own hand and making it difficult or costly to break that promise and commit violence. In return, the other player- Hamas is expected to alter its own behavior and give up violent acts.

Also known as the Palestinian civil war, the 2006-2007 conflict in Gaza was fought between Fatah and Hamas. Although Hamas still controls Gaza, the 2014 reconciliation talks between the two actors resulted in an unity government (Bobb 2014).

Although the reconciliation efforts broke down later, there has not been a repeat of the violent engagement between Hamas and Fatah such as the one experienced during the Gaza conflict, suggesting that Fatah's commitment has been received as a credible one by Hamas.

In sum, why Palestine acceded to the ICC and what possible implications may appear as a result of this accession can be analyzed in three levels of analysis. An explanation based on one level of analysis and single explanation is not adequate for understanding Palestine's ICC bid. Besides, these explanations are interlinked and interwoven that need to be examined in a holistic way. At the international level of analysis, the bid is a step in the recognition ladder as demonstrated by the previous attempts of international commitments and the proof of the PA's commitment to the rules of international criminal law. Besides, as Kittrie (2016, 1-2) argues, the ICC accession is a way tot internationalize the Palestinian cause as a legal matter and increase the support of international community.

In the interstate level of analysis, Palestine's other rationale appears: ICC's jurisdiction over Israeli conduct. Taking into account the documented war crimes by IDF and illegal settlement activities, the likelihood of Israeli soldiers' subject to the prosecution by the Court is very high. Also, Israel's unwillingness to carry out impartial national investigations and the absence of a just judicial system in examining the war crimes in Palestinian territories call for ICC involvement in light of its complementarity principle. On the other hand, confirming the prosecutorial and social deterrence theory of Jo and Simmons (2016), Israel has shown some improvements in its judicial system and the number of killings has been reduced, suggesting that ICC's deterrent effect is at work. Not willing to damage its image in the international community and fearing a potential prosecution, Israel since PA's 2014 application to ICC has not carried out another military operation .

At the domestic level of analysis, the dynamics between Hamas and Fatah/PA offer a different set of explanations for the question on Palestine's decision to join the ICC. On the one hand, it is likely ICC could prosecute Hamas leaders. Since Fatah/PA is the less violent actor and has less probability to be subject to ICC prosecution, the PA calculates that the court's jurisdiction over Hamas over the cost of being prosecuted by the Court is more valuable (Hashimoto (2012)'s expected-utility model). In fact, in its December 2019 announced, ICC Prosecutor Bensouda said there is reasonable basis to believe that Hamas and other militant groups has committed war crimes[19] (Beaumont 2019).

[19]Prosecutor's statement said "there is a reasonable basis to believe that members of Hamas and Palestinian armed groups committed the war crimes [including] intentionally directing attacks against civilians and civilian objects and using protected persons as shields; wilfully depriving protected persons of the rights

Also, PA by acceding to the court, Fatah may be tying its own hands in order to create incentives for Hamas to give up its violent activities against Fatah as theorized by Simmons and Danner (2010). The reconciliation between Fatah and Hamas suggests that ICC involvement has changed the dynamics between the two actors. Although the leaders of Hamas announced that they accept the jurisdiction of the ICC because of their desire to self-legitimize their own conduct against Israelis, considering the high involvement of indiscriminate attacks, the perpetrators of crimes in Hamas are likely to be subject to the prosecution by the Court. However, the high likelihood of Hamas' jurisdiction by the Court does not confirm that the jurisdiction of Hamas was a motive for PA in acceding to the Rome Statute nor the claim that it was motivated to force Hamas to respect international criminal law Therefore, the explanation at the domestic level of analysis necessitates further research.

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of fair and regular trial and wilful killing or torture and/or inhuman treatment and/or outrages upon personal dignity" (Beaumont 2019).

6. CONCLUSION

This thesis aimed to analyze the motives of the Palestinian Authority in acceding to the Rome Statute. Within the theoretical framework of a three-levels of analysis and careful overview of the evidence that involves three main actors, Fatah/PA, Israel and Hamas it has offered mutually supportive motives that explain why Palestine committed to the ICC. The study is based on the assumption that the Palestinian Authority commits to the International Criminal Court due to the possible implications of the ICC accession. That is why, the analysis concerns both the motives of PA's accession and the possible implications of the ICC bid. Even though some previous studies (Adem 2019; Benoliel and Perry 2010; Kontorovich 2013; Najafian Razavi 2016; Quigley 2013; Ronen 2010; Worster 2010) did similarly examine this development that added a new dimension to Israeli-Palestinian conflict, the existing scholarship is mostly from the international law discipline and concerns the questions over Palestinian statehood. This study is grounded on international relations scholarship by offering three interlinked explanations operating in three levels of analysis, and provides a comprehensive survey of PA's commitment to the ICC.

In the international level of analysis, international recognition appears the most apparent and foremost motive for the PA's decision to be a state party to the ICC. The sovereignty cost associated with commitment to an international organization is not applicable in the case of Palestine. As the second explanation, operating on the interstate level of analysis, the Palestinian Authority accedes to the ICC for accountability for war crimes committed against Palestinians and/or deter Israel. Even if not Israel is not a member state to the ICC, due to the territoriality principle of the ICC, any crime committed in the territories of a member state can be investigated and prosecuted by the Court. Moreover, based on the same principle, Hamas, the more violent authority controlling the Gaza Strip, may be subject to the jurisdiction of the ICC. This explanation rests on the domestic level of analysis. All these three explanations are discussed in detail with the support of evidence and the theoretical framework in the "Strategic Tools of the Accession to the Rome

Statute" chapter.

For analyzing these explanations based on three levels of analysis, a qualitative case study method has been used. Palestinian case is special as indicated in the Introduction chapter, so the case study method is useful for this particular analysis. Due to the non-comparability of Palestinian case with the other state parties of the ICC, this study paid attention to historical sequence in the conflict and applies process tracing method in the analysis part.

To provide substance to the analysis of the Palestinian case study, this study besides secondary sources have relied on official reports and statements from sources. Because of time and language limitations, it has not been possible to conduct a systematic evaluation. Instead this thesis has traced the historical developments with support from first and secondary sources with attention to comprehensiveness and relevance. In future studies, for example, a Ph.D. thesis on this subject matter can conduct a systematic analysis of news based on the LexisNexis database.

While Palestine's decision to commit may have happened couple of years ago, ICC's involvement in Israeli-Palestinian conflict is ongoing and evluations on the possible outcomes are only hypothetical. Simmons and Danner (2010) in their analysis on why states join the ICC (this thesis also borrows this theoretical explanation) argue that "evidence on governments' motive for joining the ICC is hard to come by" and in cases where these may be available, those statements "give very little insight (236). Because of the difficulty in predicting the motives of the Palestinian Authority for accessing to the ICC, the analysis of this thesis is informed by official statements and reports. However, especially regarding the part of the jurisdiction over the conduct of Hamas, making interviews with the leaders may strengthen the validity of this explanation. In this regard, the main limitation in this thesis is that despite offering three interlinked explanations, the emphasis has been on recognition and deterrence. Because the the thesis has not produced strong evidence at the domestic level and because two theories offer contradictory predictictions regarding an expected utility and making a credible commitment by joining the ICC, these explanations demand further research to confirm or deny how Fatah-led PLO's dynamic with Hamas may have informed its decision to join the court. In that sense, explanations at the third level of analysis need further investigation. On the other hand, this limitation may be an inspiration for further research that may expand the scope of sources and apply additional techniques such as archival research, discourse analysis, content analysis, and interviews.

To sum up the analysis elaborated in "Strategic Tools of the Accession to the Rome Statute" chapter, the three levels of analysis, international, interstate, and domestic

level, offer interlinked explanations for PA's accession to the Rome Statute. Each can be evaluated as mutually supportive explanations with varying degrees of explanatory power.

In the international level of analysis, the main motivation for the PA is international recognition. The accession to the Rome Statute is a step in the recognition ladder that the PA has been climbing. Through the membership in the ICC, Palestine gets both diplomatic recognition in the international community and strengthens its international legal sovereignty by adding another treaty/organization to the lists. Also, acceding to the Rome Statute internationalizes the Israeli-Palestinian conflict and increase the international support for the Palestinian cause. In return, this boosts PA's 'recognition as a legitimate actor' in the international arena. Moreover, committing to the rules of the Rome Statute and accepting ICC jurisdiction may increase PA's credibility via its respect to international law. Existing reports and news confirm the validity of this explanation.

From an interstate level of analysis, the ICC jurisdiction over Israeli conduct provides the second explanation of this study's theoretical framework. Even though Israel is not a state party to the Rome Statute, the membership of the PA may lead to the investigation and prosecution of crimes committed by Israeli forces in Palestinian territories because of the territoriality principle of the Rome Statute. As indicated in the previous chapter, Israel reportedly violated IHL several times and killed numbers of Palestinians including civilians. The evidence including official reports and news show that Israel is likely to be subject to the Court's jurisdiction. With respect to the future of Isreaeli-Palestinain conflict, prosecutorial deterrence theory (Jo and Simmons 2016) provides that states that wish to deter violence, may commit to the ICC. In the Palestinian decision to commit, the expectation that Israel may be deterred because of the likelihood of ICC exerting its jurisdiction and the shadow effect of the prosecutor. Besides, the prosecutorial deterrence can indirectly affect the actors' improvement of national court systems based on the complementarity principle of the Rome Statute. On the Israeli side, the deterrent effect of the ICC can be seen in the reforms within IDF, the improvements in the judicial and legislative system. Although this explanation about motives does not predict the eventual outcome and Israel may not be deterred because so far Israel neither accepts the alleged violations of IHL nor the possible jurisdiction of the ICC. According to the provided reports, Israel's investigation system is not designed for giving accountability to violations of IHL, so ICC offers an alternative mechanism of accountability. In short, Israel's conduct against Palestinians provides grounds for the ICC to exert jurisdiction over Israel and may deter such conduct in the future.

Domestic level of analysis addresses the dynamics between Fatah and Hamas -the two main representative authorities of Palestinian people. Since Hamas is the more violent actor, committing war crimes against Israelis, its likelihood of being subject to the jurisdiction of the ICC is high. Both Simmons and Danner (2010)'s credible commitment theory and Hashimoto (2012)'s expected-utility model theorizes that leaders make cost-benefit calculations in accepting the jurisdiction of the ICC. If the benefit of marginalizing the enemy is more than the cost of the possibility to be prosecuted by the Court, leaders choose to accept its jurisdiction. Alternatively, according to Simmons and Danner (2010)'s credible commitment theory by making a legal/credible commitment in acceding to the Court, states tie their hands. Although on the surface, joining ICC may seem to involve a concern for international audiences, in fact for that government's political opponents (including the rebels) it signals the government's genuity about de-escalating the conflict.

Taking into consideration that Hamas supported the PA's decision to accede to the Rome Statute and welcomed the jurisdiction of the ICC, we can argue that PA by tying its own hand, may have given incentives to Hamas to alter its violent behaviour. In fact, Fatah and Hamas, which had fought a violent war in 2007, have signed a reconciliation agreement in 2017. In light of this, the PA may not intend to put Hamas into a risky position before the Court. However, intentionally or unintentionally accession to the ICC may lead to the jurisdiction of Hamas considering the reported war crimes by the leaders and followers of Hamas.

The ICC factor has brought new dimensions to the Israeli-Palestinian conflict and opened new discussions. Will the annulment of the annexation law by Israel affect the investigation of Israel? (*Middle East Monitor- Why Trump is targeting the ICC* 2020; *TRT World- Israel's annexation plans to ruin Middle East peace hopes – Turkish FM* 2020) Will ICC bring justice for Palestine? How will the US' disdain for the court affect the Court's investigation? (*Middle East Monitor- Fresh complaint submitted to ICC over US-Israel war crimes in Palestine* 2020) Will a possible prosecution of Hamas' leaders alter the domestic relations of Palestinian actors? Will a possible jurisdiction over Israeli conduct hinder the peace negotiations? Since the process of investigation has not ended yet and the implications of the investigation are uncertain, the discussions on possible consequences of the ICC involvement in the conflict continue and diversify. All these questions may be the starting point of new studies on this field.

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