Reexamining the Question of ICC Jurisdiction Regarding the Israel-Hamas War

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<https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/>

On January 1, 2015, the “Government of the State of Palestine” submitted a declaration under Article 12(3) of the Rome Statute, according to which it accepts the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.” On January 2, 2015, the “State of Palestine” joined the Rome Statute by depositing its instrument of accession to the UN Secretary-General.

In February 2021, the ICC [decided](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF) – by majority opinion – that it has the jurisdiction to adjudicate matters arising in territories beyond the 1967 borders: “*For these reasons, the chamber hereby finds… by majority, Judge Kovács dissenting, that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.*”[1](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn1)

Following this decision, in November 2024, the ICC [issued arrest warrants](https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges) against Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant on suspicion of war crimes during the war in Gaza. The decision sent shockwaves through the international community and even [sparked](https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1124&context=faculty-online-pubs) disputes among the various member states of the ICC, with some even refusing to comply with the arrest warrants based on various legal grounds.[2](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn2) The Trump administration sanctioned the court, accusing it of “illegitimate and baseless actions” targeting the U.S. and Israel, ultimately leading to the court’s work [being halted](https://www.ap.org/news-highlights/best-of-the-week/second-winner/2025/ap-exclusive-exposed-how-trump-sanctions-have-halted-the-work-of-the-international-criminal-court/).

Following the decision, the State of Israel has been litigating before the Court to annul the arrest warrants, with the central motif of the argument rooted in the claim that the Court lacks jurisdiction due to Israel’s non-accession to the Rome Statute.

Conversely, those who support the existence of jurisdiction rely on the provision of Article 12(2)(a) of the Statute, according to which the Court has jurisdiction if the State “*in the territory of which the conduct in question occurred*” is a party to the Statute or has agreed to the Court’s jurisdiction. All this in light of the accession of the “State of Palestine” to the Rome Statute in January 2015, as factually determined in the detailed procedural chronology in the Court’s decision.

It should be noted that in light of this factual determination, the State of Israel is trying to argue, as part of its legal arguments, that the Palestinian Authority (PA) should not be recognized as a state at all. Needless to say, this claim is subject to acute political controversy in the international community. In light of this, focusing Israel’s legal arguments on this issue could be a political double-edged sword if it is rejected by the Court.

Against the background of the proceedings sliding into politically divisive channels that undermine trust and support in the Court, I believe there is an alternative legal issue that has been completely overlooked by both the Court and the State of Israel, and may bypass the legal-political discussion. Since the arrest warrants were issued for activities that took place in the Gaza Strip, it is necessary to examine whether the PA has any state authority regarding this territory, even if its statehood is recognized.

The Factual Background

The judicial task involves three sequential functions: determining the facts necessary for the decision (*fact determination*); applying the given legal norm to the specific case (*law application*); and determining the norm itself in light of the specific case circumstances (*law determination*).[3](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn3) Therefore, to understand the basis behind the argument in this paper, one must understand the relevant factual background.

The PA was established under the [Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip](https://www.gov.il/en/pages/the-israeli-palestinian-interim-agreement) with the intent to establish a Palestinian Interim Self-Government Authority during negotiations between Israel and the PLO towards a permanent agreement. The Interim Agreement also established the Palestinian National Council which was intended to serve as the temporary governing body to be elected in general elections; while the PA received the Council’s powers until the Council was established subject to general elections. Given that this agreement was signed with the PLO under Yasser Arafat’s leadership, the Fatah faction took the reins of power in the PA, and in the first general elections also won overwhelming support and a majority in the Council.

In any case, as part of this agreement, IDF forces were redeployed in the Gaza Strip and the West Bank, and control of these areas was partially transferred to the PA while being administratively divided into various districts. But in 2005, the Israeli government decided on a unilateral withdrawal from the Gaza Strip as part of the Disengagement Plan, including the removal of Israeli settlements and settlers. As a result, control of the Gaza Strip was fully transferred to the PA.

Parallel to these processes, political tension developed within the PA between the Fatah movement and the Hamas movement. In the general elections held in January 2006, Hamas won an overwhelming majority of votes, resulting in 74 seats out of 132 in the Council. As a result – and due to the complex constitutional structure of the PA – a political stalemate developed and tensions between the two political factions increased. These tensions led to a series of violent confrontations between the two political factions.

In February 2007, under Saudi mediation, the [Mecca Agreement](https://ecf.org.il/media_items/1197) was signed between the factions, leading to the establishment of a Palestinian national unity government in March 2007 headed by Ismail Haniyeh, but it struggled to deal with the problems of the PA and violent incidents continued, albeit at lower intensity.

During May 2007, clashes between the factions resumed and escalated until they reached their peak in mid-June in what later became known as the “Battle of Gaza.” During these confrontations, Hamas took control of the Gaza Strip while arresting and even executing Fatah activists; while in the West Bank, where Fatah still had the upper hand, security mechanisms loyal to Fatah arrested Hamas activists.

On June 14, 2007, PA President Mahmoud Abbas – a.k.a. Abu Mazen – [announced](https://www.reuters.com/article/world/middle-east/abbas-dismisses-government-declares-emergency-idUSL14756576/) the dissolution of the Palestinian unity government and the [dismissal](https://web.archive.org/web/20071012102508/http:/jmcc.org/goodgovern/07/eng/presidentdecrees07.htm#dec14junc) of Haniyeh as prime minister, while [declaring](https://web.archive.org/web/20071012102508/http:/jmcc.org/goodgovern/07/eng/presidentdecrees07.htm#dec14junb) a general state of emergency. In Haniyeh’s place, Abbas appointed Salam Fayyad, former finance minister in the unity government, and on June 17 the government under his leadership was sworn in, even though it did not receive recognition in the Palestinian Council. This swearing-in was done by [virtue](https://web.archive.org/web/20071012102508/http:/jmcc.org/goodgovern/07/eng/presidentdecrees07.htm#dec17jun) of the special emergency order which allowed the establishment of an emergency government without the approval of the Palestinian parliament. At the same time, the military wing of Hamas was [outlawed](https://web.archive.org/web/20071012102508/http:/jmcc.org/goodgovern/07/eng/presidentdecrees07.htm#dec16jun) as part of the special emergency order. Following this, Hamas rejected these decisions and claimed they were invalid or lacked authority.

In any case, Hamas’s takeover of the Gaza Strip and the dissolution of the Palestinian unity government led to a *de facto division of the Palestinian territories into two entities: the West Bank controlled by the PA and the Gaza Strip controlled by Hamas*.

In the years following the takeover, reconciliation attempts were made between the rival factions to reunite the West Bank and Gaza Strip under a single governing unit. But these attempts encountered difficulties due to the heavy suspicion between the parties and the conflicting interests that emerged after the split between the Gaza Strip and the West Bank.

In April 2014, a new reconciliation agreement was signed between Fatah and Hamas which announced the establishment of a unity government within a few weeks and the holding of general elections within six months. In June, the new government was sworn in on the [basis](https://www.files.ethz.ch/isn/180881/No.%20559%20-%20Shlomo%20and%20Yoram%20for%20web.pdf) of a presidential decree, and contrary to the provisions of the Palestinian amended Basic Law of 2003 (articles 66-67), it was not approved by the Legislative Council, which [led](https://www.al-monitor.com/originals/2014/11/hamas-no-confidence-vote-abbas-government.html) to challenges to its legitimacy.

On November 30, Hamas [announced](https://www.jpost.com/Arab-Israeli-Conflict/Hamas-rejects-Abbas-claim-that-it-colluded-with-Israel-and-says-unity-government-is-over-383264) that the unity government term had ended after the six-month period specified in the agreement. This argument was based on the provision of [Article 3 of the reconciliation agreement](https://content.ecf.org.il/files/M00859_FatahHamasAgreementApr2014English.pdf) that stated: “*To emphasize that legislative, presidential and National Council elections will be held simultaneously, and the president is authorized to set a date for elections, in consultation with the national forces and actors, and the elections shall be held within six months of the formation of the government.*”

Meanwhile, Fatah [denied](https://www.timesofisrael.com/fatah-official-denies-unity-government-mandate-has-ended/) that the mandate for the unity government had ended and claimed that the reconciliation agreement was still valid. In any case, an acute dispute arose between the parties regarding the expiration of the reconciliation agreement. In June 2015, the unity government [resigned](https://www.aljazeera.com/news/2015/6/17/palestinian-unity-government-resigns) after Abbas announced that it was unable to function in the Gaza Strip.

From December 2015, the parties renewed talks between them in an attempt to complete the 2014 agreement. In October 2017, a new reconciliation agreement was [signed](https://www.theguardian.com/world/2017/oct/12/hamas-claims-deal-agreed-fatah-control-gaza-strip) under which Hamas was supposed to hand over control of Gaza by December 1, 2017. But as of January 2018, the parties had [failed](https://www.jpost.com/Arab-Israeli-Conflict/Hamas-leader-Group-still-seeking-reconciliation-with-Fatah-539633) to implement the agreement, with disputes over the interpretation of its details and missed deadlines.

In September 2020, another reconciliation agreement was [signed](https://www.timesofisrael.com/fatah-hamas-say-theyve-agreed-to-hold-palestinian-elections-in-coming-months/) to establish a unity government and hold general elections, but this agreement too was not implemented and its non-implementation led to a new round of negotiations between the parties.

In October 2022, another reconciliation agreement was [signed](https://www.aljazeera.com/news/2022/10/13/palestinian-factions-sign-reconciliation-agreement-in-algeria) between the parties, which was intended to hold general elections for the presidency and the legislature. But the provisions of this agreement were also not implemented, and all reconciliation attempts were suspended following the outbreak of war between Hamas and Israel in October 2023.

The Legal Framework

The source most often cited as containing the conditions for the establishment of a state is Article 1 of the [1933 Montevideo Convention](https://avalon.law.yale.edu/20th_century/intam03.asp). According to Article 1, a state as a person of international law should possess: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states.

As Raic notes in his book,[4](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn4) unlike the national legal system, the international legal order does not have a central body authorized to attribute and enforce rights and obligations. Therefore, factual situations have received greater importance for assessing legal positions within international law. It should be noted that in this context, the principle of effectiveness serves to some extent as evidence of the ability to hold legal rights to fulfill legal obligations under international law.

In the context of state formation, the principle of effectiveness receives great importance in assessing the preconditions. As Crawford notes in his book, “international law defines ‘territory’ not by adopting private law analogies of real property but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population. Territorial sovereignty is not ownership of but governmental power with respect to territory.”[5](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn5)

Indeed, accordingly, it was emphasized in the [arbitration award](https://legal.un.org/riaa/cases/vol_xxii/209-332.pdf) between Eritrea and Yemen that “the modern international law of acquisition (or attribution) of territory generally requires: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.”[6](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn6)

In the case set before us, there is no dispute that the temporary Palestinian unity government established under the April 2014 reconciliation agreement lacked the ability to exercise governmental power with respect to the Gaza Strip, as evidenced by the fact that it even disbanded in June 2015 after President Abbas unequivocally announced that it was unable to function in the Gaza Strip. Support for this can also be found in Abbas’s early public criticism in September 2014, in a key address to the Arab League, when he accused Hamas of leading a “shadow government” in the Gaza Strip.

[In his words](https://www.aljazeera.com/news/2014/9/7/abbas-threatens-to-end-hamas-unity-deal): “We won’t accept a partnership with them if the situation continues like this in Gaza, where there is a shadow government… running the territory…”. And note, that in his address, Abbas emphasized unequivocally with regard to the Gaza Strip that “*The national consensus government cannot do anything on the ground…*”.

In Conclusion

As mentioned, already on November 30, 2014, an acute dispute arose between Hamas and Fatah regarding the expiration date of the national unity government’s mandate under the reconciliation agreement between the parties.

Under these circumstances, when dealing with two rival political factions each disputing the governing authority of the other, a genuine doubt arises regarding the legal authority of the temporary unity government to join the Rome Statute; and at the very least, a genuine doubt regarding the application of this accession to the Gaza Strip under Hamas control, while the latter disputes the authority of the unity government.

Furthermore, the swearing-in of the unity government was done in violation of the provisions of the Palestinian amended Basic Law of 2003, which [serves](https://www.elections.ps/tabid/210/language/en-US/Default.aspx) as the legal and constitutional framework for the PA ‘s governing system, defining the nature and structure of the government. As stated above, this issue was at the heart of the Hamas movement’s claims regarding the legitimacy of the temporary government, and was even [emphasized](https://www.al-monitor.com/originals/2014/11/hamas-no-confidence-vote-abbas-government.html) by one of the movement’s representatives (Mohammed al-Ghoul) when raising claims regarding the government’s expiration: “The government failed to carry out its duties and functions… *Moreover, it is illegal as it has yet to get the vote of confidence of the parliament, knowing that it was formed five months ago.*”

Indeed, [Article 66 of the Basic Law](https://www.elections.ps/Portals/0/pdf/The_Amended_Basic_Law_2003_EN.pdf) states that:

*(1.) Once the Prime Minister selects the members of the government, the Prime Minister shall submit a request to the Legislative Council to hold a special session for a vote of confidence. The vote of confidence shall take place after hearing and discussing the written ministerial declaration which specifies the program and policy of the government. The session shall be held no later than one week from the date of submission of the request. (2.) The vote of confidence shall be cast for the Prime Minister and the members of the government together, unless the absolute majority of the members of the Legislative Council decides otherwise. (3.) Confidence shall be granted to the government if it obtains the affirmative vote of the absolute majority of the Members of the Palestinian Legislative Council.*

Hence, not only a political dispute regarding the expiration date of the reconciliation agreement clouds the legal authorization, but also a significant deviation from Palestinian constitutional law itself. A legal issue that also requires factual and legal review.

To illustrate the significance of this constitutional violation, imagine a situation in which a presidential candidate decides to swear himself into office *while skipping the Electoral College vote count* as required by [Article II, Section 1, Clause 3 of the U.S. Constitution](https://constitution.congress.gov/browse/article-2/section-1/clause-3/). Would such a president be considered legitimate and have any legal authority in the eyes of the nation and the world? Would he be considered legally competent to conduct international relations on behalf of the United States?

To all of the above, one must also add the question of the legality of the presidential decrees issued by Abbas and by virtue of which the temporary unity government was sworn in. [Article 43 of the amended Basic Law of 2003](https://www.elections.ps/Portals/0/pdf/The_Amended_Basic_Law_2003_EN.pdf) does grant the PA president the power to issue presidential decrees, but their validity is conditional on their presentation and approval by the Legislative Council:

*The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise, they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.*

Given the deviation – which is not factually disputed – from the parliamentary affirmation process as noted above, it is doubtful whether the presumption of regularity can be applied from a factual perspective; and accordingly, it cannot be assumed as a starting point that the presidential decree was indeed properly submitted for review and approval by the Legislative Council.

Therefore, given that the very recognition of the PA as a state is disputed among the member states, I believe that before the discussion spills over into judicial activism with controversial political characteristics, it is appropriate that the factual and legal doubt that has arisen be properly clarified. As is known, “the devil is in the details” and therefore clarification of this doubt may render unnecessary many disputes which even undermine the foundations of the Court itself among its member states.

Furthermore, this clarification is also consistent with the Court’s duty as stated in article 19(1) of the statute: “*The court shall satisfy itself that it has jurisdiction in any case brought before it.*” As emphasized in the [Jean-Pierre Bemba confirmation decision](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF): “The Chamber considers that the phrase ‘satisfy itself that it has jurisdiction’ also ‘implies’ that the Court must ‘attain the degree of certainty’ that the jurisdictional parameters set out in the Statute have been met.”[7](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn7)

It should be noted that a significant part of the relevant factual infrastructure is in the hands of the PA. Given that the PA seeks to join the Rome Statute, it bears the burden of proving that it has the legal authority to do so. This is especially true in light of the apparent evidence – including public admissions of fact – presented above that contradicts this assumption.

In conclusion, the Court’s decision on jurisdiction regarding the State of Israel is flawed and has caused a ripple effect that is now eating away at the Court’s effectivity and legitimacy.

Jurisdiction is a threshold criterion for exercising the ICC’s authority. If the Court ignores the law so can member states. To quote Shylock: “If you deny it, let the danger light upon your charter and your city’s freedom.”[8](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn8)

Due to the contentious nature of the debate surrounding the Israeli-Palestinian conflict, I would like to emphasize: I’m a realist and so is my argument. There is considerable legal doubt surrounding the PA’s legal authority to join the Rome statute due to the internal civil war between Hamas and Fatah.

To illustrate this doubt, let’s ask ourselves: Can South Korea speak for North Korea or vice versa? Can China speak for Taiwan or vice versa? Can Morocco speak for the Western Sahara?

A long time ago, in there dissenting opinions, Justices Harlan and Frankfurter warned about the weaknesses of the judiciary and the pitfalls it faces: “The Court’s authority – possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”[9](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn9)

These remarks that were made about the judicial authority at the national level are even more fitting when we are dealing with a voluntary international judicial institution like the ICC. Indeed, only recently did Hungary – a founding member of the ICC – [announce](https://www.bbc.com/news/articles/c807lm2003zo) its withdrawal from the Rome Statute due to its refusal to comply with the arrest warrant against Netanyahu.

Therefore, the court should review the doubt that arose and clarify the PA’s legal authority. Addressing this issue will only bolster confidence in the Court and ease cooperation with swinging member states.

And note, that the opportunity to do so was emphasized in the Pre-Trial Chamber’s [recent decision](https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180c1587a.pdf), which stated that “*It does not prejudge the question of Israel’s standing to challenge the Court’s jurisdiction and, even less so, the merits of Israel’s arguments relating to the Court’s jurisdiction over Israeli nationals. These issues will be addressed by the Chamber when it rules, as directed by the Appeals Chamber, on the substance of Israel’s Jurisdiction Challenge*.”[10](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fn10)

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Notes

1. Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine. 5 February, 2021, No. ICC-01/18-143.[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref1)
2. Rebecca Ingber “Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant” (2025) *Faculty Online Publications* 124.[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref2)
3. Aharon Barak ”The Role of a Supreme Court in a Democracy” 53 *Hastings L.J.* 1205 (2002).[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref3)
4. David Raic *Statehood and the Law of Self-Determination* (2022) pp. 50-51.[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref4)
5. James Crawford *The Creation of States in International Law* (2nd edition, 2006) p. 56.[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref5)
6. *Eritrea v Yemen, Award on Territorial Sovereignty and Scope of the Dispute*, (1998) XXII RIAA 211, 268 (1999) (section 239 of the award).[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref6)
7. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo. 15 June 2009, No.: ICC-01/05-01/08 (section 24 of the decision).[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref7)
8. The Merchant of Venice, Act IV, Scene I.[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref8)
9. *Baker v. Carr*, 369 U.S. 186, 267 (1962).[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref9)
10. Decision on the State of Israel’s request to have arrest warrants withdrawn, vacated, or declared of no force or effect and to suspend the Prosecutor’s investigation. 16 July 2025, No. ICC-01/18-457 (section 16 of the decision).[↩︎](https://jcpa.org/reexamining-the-question-of-icc-jurisdiction-regarding-the-israel-hamas-war/#fnref10)