

Monetary Gold principle: What is it and what is its connection to the case of Palestine before the International Criminal Court?

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Background:

Determining the jurisdiction of any court in the context of the disputes presented to it is the main pillar on which it will rely as a basis for resolving the existing dispute before it. Without a jurisdiction, the court is not competent whether it is at the level of national or international courts.

In light of the multiplicity and conflict of disputed interests that are before international courts in particular, a judicial principle known as the monetary gold principle was developed. Its aim is to ensure that these courts will not exercise their jurisdiction in the disputes presented to them because of the intertwining of interests between the states party to the dispute with the interests of a state that is not actually a party to the dispute before the court.

So, what is the Monetary Gold Principle? When did it appear and how was it implemented? What is the relationship of this principle to the situation of Palestine before the International Criminal Court, and how has it been used to obstruct the court from exercising its jurisdiction in Palestine? And what did the court respond to that?

What is The Monetary Gold Principle?

The Monetary Gold Principle can be defined as a procedural legal rule that came with the historical practice of the International Court of Justice. It means that international courts are not competent to settle disputes between states unless those states agree to exercise jurisdiction over this dispute by the court. If the decision in the case is related to the interest of a third party who was not involved in the dispute and does not consent to the court exercising its jurisdiction over it, then the court shall refrain from exercising its jurisdiction, even if the conflicting countries accept the court's jurisdiction to settle the dispute.

When did The Monetary Gold Principle appear?

The Monetary Gold Principle first appeared in a [ruling](#) by the International Court of Justice in the case of Italy against France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America in 1954. The origin of the [case](#) is that the Germans had taken a quantity of gold coin/Monetary Gold from Rome, the capital of Italy during World War II, specifically in 1943. This gold was found later in Germany, and it was found that its ownership belongs to Albania.

After World War II, a compensation committee and a committee for the return of the monetary gold emanating from the [compensation agreement from Germany](#) were formed, in which it was agreed that the monetary gold in Germany should be collected for distribution among the affected countries, which are entitled to a share of it.

In light of this agreement, there were [two allegations](#) regarding who is entitled to obtain this gold:

- On the one hand, the UK claimed that the gold should be handed over to it in partial fulfillment of a court ruling in 1949 in the Corfu Channel case. [1]
- On the other hand, Italy claimed that the gold should be handed over to it as partial compensation for the damage it claimed to have suffered as a result of an Albanian law passed on January 13, 1945.

Then, in the Washington Statement of 25 April 1951, the governments of France, the United States and the United Kingdom, which were entrusted with implementing the Compensation Agreement signed in 1946, declared that gold should be delivered to the United Kingdom unless Italy or Albania, within a certain period, submitted a request to the International Court of Justice to adjudicate the rights of each of them. Albania did not take any action as a result, but Italy filed two lawsuits before the International Court of Justice to confirm its eligibility for gold, as France, the United Kingdom and Northern Ireland, and the United States of America fought each other. In the first case, Italy claimed that “three countries should hand over to Italy gold that may be owed to Albania”; Another claim was that “Italy's right to have gold should take precedence over the UK's claim to gold”. However, Italy [raised a question](#) related to a preliminary issue, as to whether the court originally had jurisdiction to adjudicate its case, given that Albania is not a party to the case.

In its ruling of 15 June 1954, the court concluded that it could not, without the consent of Albania (the third party), decide on Italy's claim regarding Albania and the extent of its responsibility for harming Italy, and thus it could not decide whether Italy has the right to receive the Albanian gold. Accordingly, the court held that it would thus not be able to decide the issues presented as a whole.

This is in line with another principle in public international law, known as the consent principle, which states that international courts cannot exercise jurisdiction over a state without its consent.

Accordingly, we find that this principle took its name from this case that was brought before the International Court of Justice. It has been repeatedly used in a number of cases before a group of international courts, and in ones other than the International Court of Justice that established it.

What are the cases that dealt with the monetary gold principle, and what was the position of the court in the cases that were raised in this principle?

The rulings of international courts differed in adopting the monetary gold principle as a legal rule that does not allow the court to continue considering a case because there is an interest of a party outside the case that will be affected if the court continues to consider the case. The principle was applied rarely in some of the cases presented before international courts. However, in most cases, such cases were rejected outright, due to the absence of an applicable case, according to the description of the courts.

A breakdown is given below:

In the International Court of Justice (2 acceptance, 3 rejections):

- As we mentioned, this principle began to be applied in the International Court of Justice, which established this principle in [the case of the monetary gold taken from Rome](#) in 1954. The court decided to adopt this principle because there is a stake for Albania (the third party) in this case. Thus, it held that the legal interests of the state of Albania, which is not a party to the conflict, are not limited to measures taken through the decision that would be adopted. Rather, Albania's interests are the subject of the decision itself.
- This principle was also indicated in the court's ruling issued in the [Nicaraguan case](#) v. The United States of America under paragraph 88 of 1984, which was against the background of the dispute regarding responsibility for the US military and paramilitary activities in Nicaragua. Here, the International Court of Justice decided that this principle is not valid for use, as it considered that other countries that it deems that they may be harmed are free to file separate lawsuits, or to use the intervention procedure to protect their interests that are expected to be affected by the decision. In addition, it held that no country referred to in the lawsuit can be considered the same position as Albania in the monetary gold case.

- As well as in the court decision issued in [the case of phosphate lands](#) between the Republic of Nauru and Australia in 1992. In this case, the court found that the principle was not applicable. It held that in the case of the ruling, in 1954, determining the responsibility of Albania, which was absent from the conflict, was a precondition for the issuance of a judgment between the parties present. However, determining the responsibility of New Zealand or the United Kingdom in this dispute between Nauru and Australia is not a precondition for determining the responsibility of Australia. The court also found that the interests of New Zealand and the United Kingdom did not constitute the main subject matter of the case.
- The principle was also referred to in the court's ruling issued in 1995 in the [East Timor case](#), during its consideration of the case on the dispute between Portugal and Australia, regarding the issue of the extension of sovereignty over the territory of East Timor. In this ruling, the court adopted this principle in view of the interest of the residents of East Timor itself, who were not included in the case, in addition to the fact that the court had to rule, as a precondition, on the legality of Indonesia's claim to East Timor, which was not a party to the case.
- The court also addressed this principle in the context of its 1998 ruling in [the case of the land and sea borders between Cameroon and Nigeria](#) - paragraph 79. Where a dispute arose between the two countries after Cameroon lodged a request with the court to institute a lawsuit against Nigeria regarding the issue of sovereignty over the Bakassi Peninsula. Cameroon also asked the court to determine the maritime border between the two countries. Here, the court refused to apply the monetary gold principle as it found that the legal interests of the state of Chad, a third party unrelated to the dispute, did not constitute the same subject matter of the ruling to be issued between Cameroon and Nigeria. Consequently, the Court held that the absence of the State of Chad does not prevent the court from continuing to define the borders between Cameroon and Nigeria in the Bakassi Peninsula.

Permanent Court of Arbitration (1 acceptance, 1 rejection)

The use of this principle was not restricted to the ICJ, but rather extended to other courts, including **the Permanent Court of Arbitration (PCA)**, in two cases:

- The first was when the court considered the [case of Larsen](#) v. Hawaiian Kingdom in 2001, when it referred to him in its judgment in paragraphs 11.1 through 11.24. In this case, a resident of Hawaii sought compensation from the "Kingdom of Hawaii" for failing to protect him from the United States and the state of Hawaii. The two parties, who had agreed to refer their dispute to PCA, expressed their hope that the court would take up the issue of Hawaii's legal status. The two parties argued that the monetary gold principle should be limited to procedures in the International Court of Justice and not in other international courts.

However, the court ruled to apply the principle, and rejected the parties' argument, noting that international arbitration bodies operate within the general limits of public international law. Thus, it cannot exercise jurisdiction over a state that is not a party to its procedures, as the United States, which was absent, was an indispensable party and that their interests will constitute the "very subject" of the court's decision.

- The Permanent Court of Arbitration also addressed this principle in its 2016 ruling on the issue of [arbitration in the South China Sea](#) between the Philippines and China in its judgment paragraphs 640 and 641, Against the background of the dispute between the two parties regarding the legal basis for maritime navigation and rights and entitlements in the South China Sea. Here, the court ruled its jurisdiction in the case and the absence of any justification for working on the monetary gold principal, as it considered that the interests of the (third party), namely Malaysia and Vietnam, would not be harmed. The court said that "to the extent that it examined the demands of China (which are also claimed by Malaysia and Vietnam) for the purposes of assessing the possible situation of China in the areas that Malaysia and Vietnam do not claim, the legal interests of Malaysia and Vietnam do not do so [they do not constitute the subject of the dispute itself]."

The International Tribunal for the Law of the Sea (0 acceptance, 1 rejection)

The International Tribunal for the Law of the Sea has also addressed this principle in its 2016 judgment in the [case of the ship M V Norstar](#), in light of the dispute between Panama and Italy. It came against the background of the Italian arrest and detention of the oil tanker M V Norstar, which is an oil tanker registered under the Panama flag. In paragraphs 156 and 172 of its ruling, the court rejected the applicability of the principle of the monetary gold, which Italy had referred to in support of its argument. Italy said that the order issued to seize the ship was issued by Italy to Spain, not from Spain, as Italy was the one who had asked Spain to seize the ship registered under the name Panama. Italy argued that Spain is an indispensable party to prevent the court from exercising its jurisdiction, but the court asserted that it has jurisdiction as long as the decision does not require determining the legality of Spain's behavior.

The WTO Dispute Settlement Committee (0 acceptance, 1 refusal):

This principle was also mentioned before the Dispute Settlement Committee of the World Trade Organization in its consideration of [the issue of restrictions on the import of textiles and clothing - Turkey](#). As it deals with it under Paragraph 10.9 of its 1999 ruling, regarding Turkey imposing a set of restrictions on a wide range of textile and clothing products imported from India.

The Dispute Settlement Committee said that European societies (the third party) were not a primary party in this dispute before the committee; therefore, the activation of this principle cannot be accepted before the court.

When did the monetary gold principle emerge within the framework of the International Criminal Court - the case of Palestine?

The first reference to the monetary gold principle appeared in the International Criminal Court in the "case of Palestine" before the court specifically in the context of the Prosecutor's request under Article 19 (3) of the Rome Statute for the Pre-Trial Chamber to issue a ruling on the court's territorial jurisdiction in Palestine. Then it was mentioned in the exhibition of entries and notes submitted before the Pre-Trial Chamber in light of the response to the request submitted by the Department's Office of the Prosecutor.

It was then taken up by the Pre-Trial Chamber in its final decision, issued on 5 February 2021, regarding the Court's territorial jurisdiction over the situation in Palestine.

The reason for the emergence of this principle in the Palestine case before the court is that if the court exercises its jurisdiction over the occupied Palestinian territories, it will be exposed to issues and crimes related to Israel, which is not a party to the court and does not agree to the court's jurisdiction in this matter. Thus, an argument has been raised before the court that the issue of the court's territorial jurisdiction in the case in Palestine may not be examined by the court, because this examination will take place without the participation of one of the main stakeholders - Israel - and it directly affects its territorial sovereignty.

The following is a detailed breakdown of this issue and how it came within the scope of the court's work on the question of Palestine in its entirety:

1. In the application submitted by the Public Prosecutor: The first reference to the principle was in the [application](#) submitted by **(the Prosecutor)** to the First Pre-Trial Chamber on 22-January-2020, within the framework of the margin No. 60 (on paragraph 35), which was submitted by the Prosecutor under Article 19 (3) From the Rome Statute, in order to issue a ruling on the territorial jurisdiction of the court in Palestine. In this regard, the public prosecutor said to the court that she believes that there is no possibility of applying the monetary gold principle before the International Criminal Court for a number of reasons, namely:

First: The International Criminal Court does not settle disputes between states, but rather examines the criminal responsibility of individuals.

Second: The court is not responsible for resolving a territorial dispute or determining the owner of a legal basis (sovereignty) valid in the Occupied Palestinian Territory.

Third: The application of the monetary gold principle prevents the court from exercising jurisdiction over non-member state nationals who may commit crimes on the territory of a member state. Adding that this issue was discussed by the states at the Rome Conference, which explicitly rejected such an approach (the application of the monetary gold principle) to the Rome Statute because it prevents the court from investigating crimes committed on the territory of a state party.

“The International Criminal Court does not adjudicate disputes between states, but rather examines the criminal responsibility of individuals.”

Fourth: Even assuming the applicability of this principle before the International Criminal Court, there is an exception mentioned by the Permanent Court of Arbitration in the context of its handling of the case of Larsen against the Kingdom of The Hague. The monetary gold principle may not be adopted, even with the presence of an unrepresented third party, if the legal situation related to it could have been extracted (for example, through an official decision of the Security Council). While the aforementioned court did not find that this exception applies to the Larsen case, the Prosecutor of the International Criminal Court held that this exception applies to Palestine. As the United Nations General Assembly and the Security Council have repeatedly emphasized that the situation resulting from Israel's violations of international law is not recognized in the occupied Palestinian territories and demanded Israel to withdraw from the occupied Palestinian territories.

2. In the notes (entries of The Friends of the Court):

- This principle was referred to in the [entry](#) submitted on March 15th - 2020 by (William Schabas) under Paragraph 27, in response to the claim that the ICC is not at all competent to handle border issues. Schabas said that national criminal courts, including the courts of Israel, may be required to determine the extent of states' territories, for the purposes of determining the territorial jurisdiction of those courts, and when they do, they do not adjudicate a territorial dispute, but simply draw the boundaries, so far as that is practicable.

Accordingly, Schabas said: This measure does not prevent the National Criminal Court from determining the extent of the region over which it will exercise its jurisdiction, so why should it be different in the International Criminal Court?

- This principle was also mentioned in the [entry](#) submitted on March 15-2020 by (the Palestinian Bar Association - Dr. Moataz Qafisha) under Paragraph 48, where she expressed in her memorandum, "Israel is wrong in that the International Criminal Court will not be able to look into the situation of the territories." According to the monetary gold principle, based on the fact that the issue of borders was left to the permanent status negotiations under the Oslo Accords." She added that this claim is incorrect because the International Criminal Court will not determine the borders of Palestine on its own, but will separate the territories of a state [which is Palestine] with pre-defined borders.
- This principle was also relied on in the [entry](#) submitted on March 16 - 2020 by a group of academics (Laurie Blanc, Mattis de Blois, Geoffrey Korn, Daphne Richmond Barack, Gregory Rose, Robbie Sabel, Jill Troy, and Andrew Tucker) in paragraphs from 30 – 32. As it was considered that "the interests of Israel will be dynamically affected by determining the territorial boundaries." Consequently, the court cannot take any such decision in the absence of Israel as a third party directly affected by this measure taken before the court. The aforementioned academics relied on the monetary gold principle to say that the International Criminal Court, therefore, cannot exercise jurisdiction to determine the issues in which the interests of third parties constitute "the subject of the decision itself." Noting that the International Criminal Court is not a forum for disputes between states and is not required to resolve a regional dispute. The academics explained that the pre-trial chamber of the court, in order to define (the Palestinian territories), must determine that Palestine is sovereign over the West Bank, including East Jerusalem, which requires a clear recognition of this by Israel, which means that the sovereign territorial rights of Israel will inevitably constitute "a subject". The decision itself.
- The principle was also discussed in the [entry](#) submitted on March 16-2020 to Robert Hensch and Julia Benzotti, in paragraph 3, where they saw that the arguments referring to the "monetary gold principle" contribute to preventing the court from exercising its jurisdiction; thus, it is not appropriate to be applied.

Especially since this rule applies in the context of the procedures taken between states, while the procedures brought before the International Criminal Court are related to the criminal responsibility of individuals.

“Arguments referring to the monetary gold principle contribute to preventing the court from exercising its jurisdiction.”

- Finally, this principle was relied on in the [entry](#) submitted on March 20, 2020, by the (Israel Forever Foundation) in Paragraph 65. B (That the courts should not decide on the cases brought before them that greatly affect the legal interests of a country not participating in the procedures before it, in compliance with the rules of international law, especially those approved by the International Court of Justice).

How did the Prosecutor deal with this principle and how did she respond to the entries / notes?

[In her memorandum](#), which came within the framework of her response to the entries and notes of the court's friends and legal representatives of victims and states on April 30, 2020, the Prosecutor of the International Criminal Court, Fatou Bensouda, addressed the issue of the monetary gold principle in paragraphs 31-39. She confirmed her previous position that the principle cannot be applied to the International Criminal Court, because international or legal responsibility for the conduct of a non-party state can never constitute (the same subject matter) in the court's proceedings. The General Prosecutor of the Court confirmed the following:

First: The existence of this rule lies at the core of the mandate of the International Court of Justice to settle disputes between states to determine their international responsibility for their behavior on the condition that states agree to the court as a ruling between them. However, this differs from the role played by the International Criminal Court, which is charged with adjudicating individual criminal responsibility of individuals without affecting the responsibility of states under international law.

Second: The Prosecutor emphasized that the case-law of the International Court of Justice confirms that this principle was applied only when the court was asked to rule on international responsibility for the conduct of a third-party state that was not a party to the procedures related to the settlement of the dispute.

She indicated that this principle does not apply unless the legal interests of the third country will not only be affected by a decision but will be a subject of conflict in the decision itself.

Third: If the principle is applied, this will make the wording in the Rome Statute, which allows the court to investigate and prosecute citizens of non-party countries, regardless of their official status, on the territory of a state party, meaningless.

Fourth: The court's decision regarding the public prosecutor's request to determine the regional jurisdiction of the court will only specify the region in which the public prosecutor and her team may conduct the investigation of the alleged crimes. Thus, it is nothing more than a mediator for the ultimate purpose of the court, which is the future adjudication of the criminal responsibility of one or more persons once the prosecution is filed and the charges against them are confirmed.

Fifth: The Public Prosecutor clarified that the judicial practice of the International Court of Justice itself in similar circumstances confirms that the International Criminal Court can rule on matters arising from the situation in the Occupied Palestinian Territories without defining the disputed borders between Palestine and Israel. As the advisory opinion presented by International Court of Justice on the issue of the wall. As well as the decisions taken by the Security Council and the General Assembly of the United Nations, according to which the Israeli settlements on Palestinian lands, including "East Jerusalem," were established in contravention of international law.

How did the Pre-Trial Chamber deal with this principle when ruling on the court's territorial jurisdiction in Palestine?

The Pre-Trial Chamber of the International Criminal Court discussed the principle of the monetary gold in [its decision](#) issued on February 5-2021, specifically in paragraphs 58 to 60, regarding the application submitted by the Office of the Prosecutor pursuant to Article (19/3) to issue a ruling on the court's territorial jurisdiction in Palestine. The ruling of the Pre-Trial Chamber included that there was no possibility of this principle being applicable to the situation in Palestine.

The Pre-Trial Chamber based its decision not to activate the principle of the monetary gold on the fact that the International Criminal Court cannot rule in disputes between states, because it does not have jurisdiction over states, but it exercises its jurisdiction over natural persons only. The Chamber also noted that Israel was invited to present a memorandum regarding the measures taken by the court, but it chose not to take advantage of this opportunity.

The Pre-Trial Chamber added that its current decision regarding the court's jurisdiction is strictly limited to the issue of jurisdiction stipulated in the Prosecutor's request. Additionally,

it does not include any decision regarding border disputes between Palestine and Israel. Consequently, the current decision may not be interpreted as determining, bias, influencing in any other way any other legal issue arising from the events in the situation in Palestine, whether under the Basic Law or any other field of international law.

Conclusion:

From all of the foregoing, we find that the scope of application of the principle of monetary gold has arisen in the circumstances of existing disputes between countries, and that the courts have tended to adopt it only in the event that the interests of third parties, absent from the dispute, which will constitute "the subject of the court's decision itself. ", not as an effect.

Accordingly, we find that the International Criminal Court and its Public Prosecution Office, in their view of the case of Palestine, have completely refused to apply this principle by asserting that the nature of the responsibility before the court is the responsibility of individuals not states. In addition to stressing that its decision is concerned with examining the crimes committed against the territory of a State Party, without deciding on border disputes between Palestine and Israel, and its decisions may not be interpreted further.

[1] Corfu Channel Case: It is the first international legal case brought before the International Court of Justice in 1947 between the United Kingdom and the People's Republic of Albania, which was brought by the United Kingdom to demand compensation for damages caused by the series of accidents caused by Albania in the Corfu Channel, which did not receive compensation of which. It was decided in the Washington agreement that if Italy was judged in favor of Albania with the monetary gold principle, the United Kingdom would take its right to compensation from what Albania obtained.

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