



**Arab American University  
Faculty of Graduate Studies**

**The Israeli Military Attack on the Gaza Strip in 2022  
In Light of the International Criminal Court's  
Jurisdiction over Palestine**

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**This thesis was submitted in partial fulfillment of the  
requirements for the Master's degree  
in International Law and Diplomacy.**

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## Thesis Approval

### **The Israeli Military Attack on the Gaza Strip in 2022 In Light of the International Criminal Court's Jurisdiction over Palestine**

By


**Ouf Abdul Rahman Awadallah**

This thesis was defended successfully on February 29th, 2024, and approved by:

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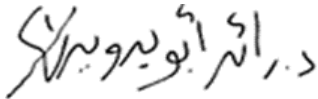
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## **Declaration**

I, the undersigned, declare that I submitted the thesis entitled:

The Israeli Military Attack on the Gaza Strip in 2022

In Light of the International Criminal Court's Jurisdiction over Palestine

I declare that the work provided in this thesis, unless otherwise referenced, is the researcher's own work, and has not been submitted elsewhere for any other degree or qualification.

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## Dedication

To my eternal shelter, the pillar of our journey, the one who turned the impossible into reality—my beloved mother.

To strength and wisdom, my steadfast cornerstone—my father.

To the one whose birth marked a profound change within me, captivating me with an unyielding love—my daughter, Naya.

To my partner and companion on this journey, with pride and gratitude—my wife, Linda.

To my childhood friends and lifelong companions, my siblings: Najah, Sahar, Omar, Samar, and Soha. You are the ones who always make me feel proud. Thank you for the beautiful moments we shared, for your encouragement and support, and for always standing by my side.

To my extended family... To Sidrat Al-Muntaha, my village Asdoud, to the camp (Al Mukhayiam) of my childhood and refuge—Palestine Camp in Syria, and to Gaza, forever a piece of my heart.

## **Acknowledgement**

To the esteemed professors, Dr. Mohammed Al-Mousa, Raed Abu Badawieh, and Dr. Issam Abdeen, you have been my guides and sources of inspiration. Without your efforts and valuable guidance, I would not have achieved this accomplishment—thank you.

## **Abstract**

Since 2007, Israel, the occupying power, has imposed an air, land, and sea blockade on the Gaza Strip, in clear violation of international human rights law, especially the International Covenants on freedom of movement, housing, education, and health. This blockade has had severe consequences for the civilian population in Gaza, leading to significant suffering. The arbitrary Israeli siege has prevented civilians from seeking safety outside Gaza during military attacks, resulting in forced displacement and internal displacement even after hostilities ended. The ongoing harshness of the blockade, coupled with periodic Israeli military assaults ordered by senior Israeli government officials and military leaders, has severely damaged Gaza's infrastructure and eroded the livelihoods of Palestinians.

Despite substantial evidence of Israel's systematic and widespread targeting of civilians in Gaza, particularly during the recent military assault on August 5, 2022, as well as previous assaults in 2008-2009, 2012, 2014, 2018, 2019, and 2021, which resulted in numerous civilian deaths and injuries, including hundreds of children, women, and the elderly, and the widespread destruction of civilian properties, no Israeli civil or military leaders responsible for these violations have been held accountable. These actions constitute war crimes under the Rome Statute of the International Criminal Court (ICC). However, there has been no movement toward holding these individuals accountable, and the international community has failed to ensure justice for the Palestinian people. While global efforts are made to establish international tribunals to prosecute war criminals, Israeli leaders continue to enjoy diplomatic immunity and freedom of movement worldwide.

This study explores the legal mechanisms used to classify war criminals and the tools required to bring Israeli war criminals to justice. It also highlights the challenges in holding Israeli war criminals accountable. Israel's disregard for international law, evidenced by its repeated military attacks on Gaza, including the most recent one in 2022, underscores the double standards in international responses to the Palestinian issue. Israel, as the occupying power, continues to violate international humanitarian law without facing any obligations to protect Palestinian civilians, as mandated by international agreements, particularly the Geneva Conventions and their protocols.

The study delves into Israel's aggressive practices against the Palestinian people, legally classifying them as war crimes, and explores the most effective means to bring Israeli war criminals to international justice through the ICC. It also emphasizes the need to raise awareness about Israeli war crimes, the legality of its military operations in Gaza, and to assess the justification of military necessity and the proportionality of force used. Additionally, it reviews the principles of international criminal accountability for war crimes and explores the application of these rules to the practices carried out in the occupied Palestinian territories, particularly violations of international laws, including the Rome Statute.

The researcher primarily employed the descriptive and analytical research methodology, which aligns with the practical and theoretical aspects of the study. This approach was used to describe the impact of Israeli assaults and their compatibility with international and humanitarian laws. The study analyzed key concepts, such as the principles of distinction and proportionality under international law, the Geneva Conventions, and the

Rome Statute, to develop logical interpretations and evidence that define the problem and classify it as war crimes, emphasizing the importance of bringing the perpetrators to justice.

## Conclusion

The researcher has reached several conclusions and recommendations that are hoped to be considered and implemented in the near future:

1. The International Criminal Court (ICC) has jurisdiction over the Palestinian territories, whether they are occupied or not, regardless of whether Israel is a party to the Rome Statute.
2. The Pre-Trial Chamber's decision regarding jurisdiction in the situation of Palestine is not an advisory opinion but rather a significant judicial decision on jurisdiction, which lays a strong legal foundation for proceeding with trial proceedings.
3. The ICC has jurisdiction over all crimes committed on Palestinian territories, considering that Palestine became a state party to the Rome Statute upon the entry into legal force of the statute regarding its territory.
4. There is a diversity of opinions regarding the dissenting judge's views in the Pre-Trial Chamber decision on the jurisdiction of the Court in the situation of Palestine, especially concerning the elements of statehood in Palestine, its borders, and a violation of established principles of international law.
5. At present, the Palestinian national judiciary is incapable of pursuing Israeli officials for the crimes committed, particularly in the context of the 2022 Israeli attack on Gaza.
6. Israel has not undertaken serious investigations in accordance with the principle of complementarity, even though it has the capacity to do so. Instead, it avoids opening



transparent and comprehensive investigations into the crimes committed by its soldiers and military leaders against the Palestinian people, negating the principle of complementarity and thereby triggering the ICC's jurisdiction.

7. Israel, as the occupying power, does not adhere to the rules of international humanitarian law and human rights law. It does not limit its use of military force, violating principles of proportionality, discrimination, prevention, investigation, and ensuring that civilian protesters are not killed with its military weapons.

8. Israel, the occupying power, has unequivocally committed the crime of genocide in its war on the Gaza Strip in 2023, leaving no room for doubt.

9. The loss of confidence and abandonment by the Palestinian people and supporting nations in the power of international law and its enforceability in the face of political pressures exerted by former colonial powers, especially in the 2023 war.

10. The ICC faces numerous legal and political challenges that hinder its role in applying international criminal justice. Political pressure is the most significant challenge, followed by legal loopholes.

#### Recommendations:

1. It is essential to utilize the Pre-Trial Chamber's decision regarding the ICC's jurisdiction over Palestinian territories as a strong legal basis that can be used if a two-state solution is implemented.

2. Arab and friendly countries must use all available means of pressure to prevent obstruction of ICC investigations. If a verdict of guilt is issued against any official, it will have significant legal and political implications.

3. Immediately collaborate with UN member states to reform the structure of the Security Council and its permanent five-member composition, ensuring that the legal dimension takes precedence over political considerations.
4. The Rome Statute should be amended to address clear legal loopholes, particularly limiting the Security Council's powers to indefinitely defer investigations and prosecutions.
5. It is imperative to unify the current division within the Palestinian Authority, as it would carry numerous political and legal benefits, including the full assertion of judicial authority over Palestinian territories and the possibility of prosecuting Israelis in Palestinian courts.
6. Forming an independent international committee to investigate the scale of explosives and internationally prohibited weapons used by Israel against civilians in the Gaza Strip. Holding those responsible accountable, including those who issued orders, devised plans, and executed them. Taking necessary actions to achieve justice for the Palestinian victims.
7. The ICC should be continuously used for all crimes committed since the entry into force of the Rome Statute, especially those related to the 2022,2023 Israeli attack. This will exert pressure on the international community to hold Israeli leaders accountable for all crimes against the Palestinian people.

## Table of Contents

Thesis Approval .....	I
Declaration .....	II
Dedication .....	III
Acknowledgement.....	IV
Abstract .....	V
Table of Contents .....	X
Chapter One: Introduction.....	1
1.1 The Importance of the Research.....	2
1.2 The Problems of Research.....	3
1.3 Key Determinants of the Research Problem: .....	3
1.4 Research Objectives: .....	4
1.5 Proposed Methodology: .....	5
1.6 Literature Review .....	6
Chapter Two: The Establishment of the International Criminal Court's Jurisdiction Over Palestine .....	10
2.1 Introduction and Division.....	10
2.2 Section 1: The Legal Basis Presented by the Prosecutor to Determine the Jurisdiction of the Court Over Palestine .....	12
2.2.1 Introduction and Division: .....	12
Subsection 1: The Request for Jurisdiction falls under Article 19(3) of the Rome Statute .....	14
Subsection 2: Legal and Practical Aspects of Determining Jurisdiction by the Pre-Trial Chamber before Commencing Trial Proceedings.....	21
2.3 Section 2: The Regional Jurisdiction of the International Criminal Court over Palestine ....	31
1.2.3 Introduction and Division.....	31

Subsection 1: Palestine as a Party to the Rome Statute..... 37

Subsubsection 2: Palestine as a State under Relevant Principles and Rules of International Law  
..... 38

Subsection 3: The Boundaries of the Palestine Territory Subject to the Jurisdiction of the  
International Criminal Court ..... 55

Chapter Three: The Role of the International Criminal Court in Addressing War Crimes in  
Palestine ..... 65

3.1 Introduction and Division..... 65

3.2 Section 1: The Criminal Description of the Israeli Military Attack on Gaza in 2022..... 66

1.3.2 Introduction and Division..... 66

Subsection 2: The Criminal Nature of the Actions Committed during the Attack on Gaza in  
Light of the Rome Statute ..... 72

3.2.2 Facts Indicating the Commission of Acts of Genocide During the Attack on the Gaza  
Strip: ..... 77

3.3.3 The Material Element of the War Crime of Willful Killing as one of the Serious Violations  
of the Geneva Conventions (Article 8/2/a/1) of the Rome Statute..... 85

3.3.4 The Moral Element of these Crimes as Adopted by the Member States in the Rome Statute  
on September 9, 2002:..... 85

3.3.4 The Legal Conditions that Must Be Met for the Application of War Crimes to the Facts of  
the Attack on Gaza: ..... 86

3.3.5Facts Indicating the Commission of War Crimes During the Attack on the Gaza Strip..... 89

3.3.6 The Criminal Nature of Crimes Against Humanity ..... 94

3.3.7 The Material and Moral Elements of the Crime of Deliberate Killing as A Crime Against  
Humanity Under Article 7(1)(A) of the Rome Statute..... 95

3.3.8 Legal Conditions Required for Crimes Against Humanity to Apply to the Events of the  
Attack on Gaza..... 96

3.3.9 The Israeli Aggression on Gaza Strip in 2023 .....	99
3.3.10 Criminal Description of the Israeli Military Attack on Gaza Strip 2023 .....	100
Subsection1: The Events of the Israeli Military Attack on the Gaza Strip in 2023 and Its Consequences.....	100
Subsection2: The Criminal Nature of the Actions Committed During the Attack on Gaza in Light of the Rome Statute. ....	109
3.3.11 Israeli Occupation Crimes during the 2023 Israeli Attack on Gaza under the Rome Statute (Subject-Matter Jurisdiction) .....	112
3.3.12 The Genocide .....	114
3.3.13 The Material and Mental Elements of the Crime of Genocide .....	114
3.4 Section 2: The Legal Mechanisms for Holding Israel Accountable under the Rome Statute .....	120
3.4.1 Introduction and Division.....	120
Subsection 1: National Jurisdiction in the Trial of Israeli Officials According to the Rome Statute.....	124
3.4.2 Responding to the Israeli Perspective Claiming That Palestine Does Not Have Independent Criminal Jurisdiction Capable of Ensuring Fair Trials .....	133
3.4.3 The Extent of the National Judiciary's Ability to Initiate Criminal Proceedings Against Israeli Officials.....	135
Subsection 2: The Trial of Israeli Officials Implicated in Crimes before the International Criminal Court .....	145
Chapter Four: Challenges in the Implementation of Justice before the International Criminal Court.....	153
4.1 Introduction and Division.....	153
4.2 Section 1: Inherent Obstacles in the Rome Statute System of the International Criminal Court.....	154

4.2.1 Introduction and Division.....	155
Subsection 1: Legal Challenges in the Rome Statute.....	156
4.3 Section 2: Political Obstacles to the Application of International Criminal Justice .....	174
4.3.1 Introduction and Division.....	174
Subsection 1: Internal Palestinian Challenges.....	175
Subsection 2: External Political Challenges.....	178
Conclusion.....	183
Recommendations: .....	184
References .....	186
الملخص .....	233

## **Chapter One**

### **Introduction**

Israel, the occupying power, has imposed a comprehensive air, land, and sea blockade on the Gaza Strip since 2007, in violation of international human rights laws and principles, particularly the international covenants on freedom of movement, residence, education, health, and, specifically, within the Gaza Strip. The restrictions imposed by Israel, the occupying power, have caused severe suffering and had a profound impact on the civilian population and living conditions in Gaza. The Israeli blockade, characterized by its arbitrary nature, has prevented civilians in Gaza from seeking safety and refuge outside the Gaza Strip during military attacks. It has also resulted in the forced displacement of a significant portion of the population or their internal displacement even after the cessation of hostilities. The ongoing cruelty of the blockade, coupled with periodic Israeli military attacks carried out under direct orders from the highest political echelons of the Israeli government and military leadership, has led to the destruction of Gaza's essential infrastructure.<sup>1</sup>

Despite strong evidence of systematic and widespread targeting by Israel, the occupying power, of civilians in Gaza in its recent military offensive on August 5, 2022, and previous military attacks on the Gaza Strip in the years 2009, 2008, 2012, 2014, 2018, 2019, and 2021, resulting in the deaths and injuries of a large number of civilians, including hundreds of children, women, and the elderly, as well as extensive destruction of civilian objects and property, constituting war crimes according to the Rome Statute establishing the International Criminal Court, no accountability or prosecution of any Israeli civilian or military leaders responsible for these grave violations against the

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<sup>1</sup> The Euro-Mediterranean Human Rights Monitor (Life Almost Impossible After 15 Years of Siege) via the website (<https://euromedmonitor.org/en/gaza>).

Palestinian people has taken place thus far. Palestinians have not received their right to effective recourse, as the world continues to deal selectively with the application of justice, especially concerning war criminals. Furthermore, there is political double standards at the international level despite numerous attempts to establish a fair international criminal justice system to pursue war criminals worldwide.

### **1.1 The Importance of the Research**

**Legal Awareness:** The study contributes to raising awareness about the importance of international criminal law and the role of the International Criminal Court in addressing serious crimes, and supports the trend towards criminal accountability.

**Right to Justice:** The study enhances our understanding of the victims' right to justice, fairness, and accountability. It sheds light on the role of the International Criminal Court in achieving this, including the right to compensation, reparation, and redress.

**Policy and Legislation Development:** The study can provide recommendations and proposals to enhance the role of the International Criminal Court, strengthening its capacity to hold perpetrators of serious crimes accountable. This, in turn, may stimulate the development of national and international policies and legislation.

**Promotion of International Peace and Security:** Achieving justice and accountability for serious crimes is a fundamental element in promoting international peace and security.

By evaluating the jurisdiction of the International Criminal Court in the case of the 2022 Israeli military attack on the Gaza Strip, the study may offer insights and recommendations to enhance this aspect.

**Contribution to Academic Research:** The study represents a valuable contribution to the academic and research field. It analyzes and evaluates the jurisdiction of the



International Criminal Court in cases of military attacks, including the 2022 Israeli military attack on the Gaza Strip. Consequently, it contributes to expanding knowledge and developing legal theories and approaches related to international justice.

### **1.2 The Problems of Research**

The research problem revolves around analyzing the Israeli military attack on the Gaza Strip in 2022 and evaluating the jurisdiction of the International Criminal Court in potentially holding those involved criminally accountable. Despite strong evidence of systematic and widespread targeting by Israel, the occupying power, of civilians in Gaza, constituting war crimes according to the Rome Statute establishing the International Criminal Court, no accountability or prosecution of any Israeli civilian or military leaders responsible for these grave violations against the Palestinian people has taken place thus far. Palestinians have not received their right to effective recourse, as the world continues to deal selectively with the application of justice, especially concerning war criminals. Furthermore, there is political double standards at the international level despite numerous attempts to establish a fair international criminal justice system to pursue war criminals worldwide.

### **1.3 Key Determinants of the Research Problem:**

1. Legal Criteria: Investigating the legal criteria governing the jurisdiction of the International Criminal Court in prosecuting war crimes and crimes against humanity.

2. Determining the Jurisdiction of the International Criminal Court: Studying the extent of its jurisdiction in dealing with this type of crimes and whether it has the legal authority to pursue and prosecute those responsible for these crimes.
3. Analysis of Evidence: Evaluating the available evidence and information regarding the military attack on Gaza and assessing their strength and reliability to support legal actions.
4. Investigation and Accountability: Assessing the available procedures for the International Criminal Court to conduct an independent and effective investigation into the attack, identifying those responsible, and bringing them to trial.
5. Obstacles and Challenges: Identifying the legal, political, and institutional obstacles that may hinder the jurisdiction of the International Criminal Court in dealing with the military attack on Gaza.
6. Potential Outcomes: Evaluating the potential outcomes of the International Criminal Court's intervention in this case, including its impact on legal accountability and justice.

#### **1.4 Research Objectives:**

1. Analyze and clarify the rules and jurisdiction of the International Criminal Court concerning the legal crimes that may occur in the context of the Israeli military attack on the Gaza Strip, and determine the significance of international criminal law in the Palestinian case.
2. Determine the rules of jurisdiction and admissibility in the International Criminal Court, evaluate the Court's ability to investigate the military attack, and hold those

involved accountable according to legal standards. Additionally, understand the role of international criminal law in addressing war crimes.

3. Analyze the obstacles and challenges that the International Criminal Court may face in implementing its jurisdiction in this particular case.
4. Examine the facts and evaluate the available evidence and information regarding the Israeli military attack on the Gaza Strip.
5. Provide recommendations on how to enhance the role of the International Criminal Court and improve its ability to achieve justice in such cases.

### **1.5 Proposed Methodology:**

The proposed methodology involves:

1. Literature Review: Review relevant legal literature and sources related to the jurisdiction of the International Criminal Court and issues of criminal accountability in the presented case.
2. Analysis of Evidence: Analyzing the available evidence and relevant reports regarding the Israeli military attack on the Gaza Strip in 2022.
3. Legal Assessment: Evaluating the legal conditions for establishing the jurisdiction of the International Criminal Court in this case and assessing its capacity for investigation and accountability.
4. Identification of Challenges: Identifying potential obstacles and challenges that the International Criminal Court may encounter in executing its jurisdiction in this case.
5. Conclusion and Recommendations: Drawing final conclusions and providing recommendations to enhance criminal accountability, support victim justice, and achieve fairness.

6. The research aims to contribute to a better understanding of the role of international criminal law and the International Criminal Court in addressing serious crimes and promoting accountability in the context of the Israeli military attack on the Gaza Strip in 2022

## **1.6 Literature Review**

1. International Criminal Law - 3rd Edition in English, 2013 - Revised by Antonio Cassese, Paula Gaeta, Laurence Boisson de Chazournes, Mary Fan, Christopher Gosnell, Alex Whiting. (Translated by Sader Publishers Library) First Edition 2105

The book discusses the fundamental concepts and principles of international criminal law, reviewing its historical development and illustrating how political and social developments impact the evolution of international criminal law. Additionally, it examines the primary sources of international criminal law such as sanctions, international agreements, and general international laws. The book also addresses topics such as crimes against humanity, war crimes, terrorism, and their prevention, as well as the application of international criminal justice. Moreover, it provides a comprehensive analysis of current issues and challenges facing the international criminal law community in the modern era.

2. International Law by Malcolm Shaw - 9th Edition - Cambridge.

Malcolm Shaw's "International Law" is considered an important book for understanding and analyzing modern international law, offering a comprehensive overview of international law concepts and their evolution throughout history. The book explains fundamental concepts such as national sovereignty, human rights, wars, and international dispute settlement. It also reviews the laws and principles governing the

interactions between states in the international arena and their application in various international forums such as the United Nations and international courts. Additionally, the book addresses current issues and challenges facing international law in our contemporary era, such as terrorism, global geopolitical changes, and prominent cases encountered by international law and understanding the nature of resolving international disputes.

3. International Criminal Law, Major International Crimes, International Criminal Courts by Dr. Ali Abdul Qadir Al-Qahwa - Aleppo Legal Publications - Release Date November 1, 2001.

This book provides a comprehensive overview of the fundamental concepts and principles of international criminal law, including defining international crimes and their significance and impact on the international community. It also discusses major international criminal courts such as the International Criminal Court and specialized international criminal courts, explaining their roles and jurisdictions in holding individuals accountable for crimes against humanity, war crimes, genocide, and others. The book offers an in-depth analysis of international laws and treaties related to criminal law, in addition to reviewing key issues under debate in this field such as transitional justice and combating international terrorism. Moreover, the book addresses the challenges of implementing international criminal law and how to enhance it to achieve international criminal justice.

4. Results of Palestine's accession to the International Criminal Court in confronting Israeli crimes - Academic Journal of Legal Research - Volume 6, Issue 2 (December 31, 2015) - Publisher Abdel Rahman Mira University in Bejaia, Faculty of Law and Political Science.

The author examines the impact of Palestine's accession to the International Criminal Court in confronting Israeli crimes, focusing on analyzing the practical and legal implications of this important step. The article evaluates the effect of Palestine's membership in the International Criminal Court on increasing international pressure on Israel to be held accountable for its crimes in the occupied Palestinian territories. It also discusses the challenges facing this step, including Israeli and its allies' resistance, political pressures, legal challenges, expected outcomes of this step, documenting the crimes committed by Israel, and contributing to achieving international justice for victims in Palestine. The author also highlights the importance of international cooperation and support for efforts by the international community in this context. In summary, Shater Abdul Wahab's article in the Academic Journal of Legal Research provides a comprehensive analysis of the results of Palestine's accession to the International Criminal Court in confronting Israeli crimes, focusing on the challenges and opportunities arising from this step.

5. The Palestinian State from the Perspective of International Law - by Abdullah Abdulsalam - University of Algiers Annals - Volume 34, Issue 1, Pages 198-213. March 31, 2020.

The author focuses on the legal aspects related to the establishment of the Palestinian state, its rights, and the challenges it faces. The book begins with a historical and political introduction to the Palestinian-Israeli conflict and its evolution over the decades. Then, it provides an overview of the legal concepts related to self-determination, peoples' right to establish states, and international recognition of states. It subsequently discusses the legal foundations for establishing the Palestinian state and its legal references in international laws and treaties, as well as reviewing

legal and political developments affecting the Palestinian state issue and their impact on Palestinian rights. Additionally, it clarifies the challenges and obstacles facing the Palestinian state's efforts towards international recognition and effective participation in the international community. Finally, the book offers recommendations and analyses to enhance the position of the Palestinian state within the framework of international law and achieve the rights of the Palestinian people.

6. Introduction to the Study of International Criminal Law: Its Nature, Scope, Application, Present, and Future by Mahmoud Sharif Basyouni - Published on January 1, 2007 - Dar El-Shorouk.

The book provides a comprehensive summary of the fundamental concepts and principles of international criminal law and reviews its applications and future prospects. It covers the concept of international criminal law, its importance in holding individuals accountable for their crimes at the international level, and the scope of international criminal law, including crimes such as crimes against humanity, war crimes, and other international crimes. Additionally, it discusses the application of international criminal law in international forums and the role of international criminal courts in holding individuals accountable for international crimes. It provides an analysis of the current status of international criminal law, highlights the challenges and current developments facing it, and discusses the potential future of international criminal law and how to address future challenges and enhance its role in achieving international justice.

## **Chapter Two**

# **The Establishment of the International Criminal Court's Jurisdiction Over Palestine**

### **2.1 Introduction and Division**

The stage of accepting a case before the International Criminal Court (ICC) is one of the most significant phases in the process of international criminal trials for crimes falling under the jurisdiction of the Court. In the case of Palestine, the temporal jurisdiction of the Court did not encounter any obstacles or impediments, primarily based on the provisions of Article 11 of the ICC's Statute (non-retroactivity).

The Statute of the International Criminal Court is grounded on the principle of non-retroactive application of criminal laws. In other words, "the Court has no jurisdiction except with respect to crimes committed after the entry into force of this Statute." Furthermore, the Court is not allowed to exercise its jurisdiction except with regard to crimes committed after the entry into force of this Statute for that state, unless the state has issued a declaration under paragraph 3 of Article 12<sup>2</sup>. This precisely occurred in the case of Palestine.

On January 1, 2015, the State of Palestine deposited a declaration under the provisions of the third paragraph of Article 12 of the Rome Statute of the International Criminal Court, accepting the Court's jurisdiction starting from June 13, 2014. On January 2, 2015, Palestine submitted its instrument of accession to the Court to the Secretary-General of the United Nations, becoming a party to the Rome Statute. On the same day,

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2. Please refer to the text of Article 11 of the Statute of the International Criminal Court.



the Court's Registrar accepted the declaration deposited by Palestine in accordance with the provisions of Article 12(3) of the Rome Statute<sup>3</sup>.

Based on the above, the State of Palestine has the right to lodge the necessary complaints and lawsuits with the International Criminal Court against the crimes committed by Israel, the occupying power, which has continued to be committed against Palestine and the Palestinian people since June 13, 2014. This date marks the beginning of the entry into force of the Rome Statute of the International Criminal Court with regard to Palestine. Regarding the provisions of temporal jurisdiction<sup>4</sup>, Palestine accepted the jurisdiction of the International Criminal Court to investigate ongoing crimes since that date, which falls under consideration. However, for Israeli crimes committed before that date, before the Rome Statute's entry into force, the International Criminal Court does not have jurisdiction to consider them because the Court does not have jurisdiction over crimes that occurred prior to a state's accession.

Therefore, when considering that the jurisdiction of this Court is essentially complementary to national jurisdiction, this basis necessitates the presence of specific criteria and conditions established by the Court's system for accepting a case.

This matter was examined through the decision of the Prosecutor of the International Criminal Court issued on December 20, 2019, directing the request to the Pre-Trial Chamber to determine the availability of the Court's territorial jurisdiction over the situation in Palestine. Subsequently, the decision of Pre-Trial Chamber I of the International Criminal Court issued on Friday, February 5, 2021, stated: "The

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3. Find it at the following link: [https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22\\_ref-palestine.pdf](https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22_ref-palestine.pdf) (Cited on 5/6/2023).

<sup>4</sup> Article 12(3) of the Statute, regarding the prerequisites for the exercise of jurisdiction, states: "3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

International Criminal Court, by majority, considers that the Court's territorial jurisdiction includes the occupied Palestinian territory, namely the West Bank, including East Jerusalem, and Gaza Strip." This means that the study of this chapter will be within the framework of the request made by the Prosecutor of the International Criminal Court to the Pre-Trial Chamber to determine the territorial jurisdiction, as well as within the framework of the rules of customary international law, in addition to the Pre-Trial Chamber's decision, considering the legal considerations and foundations in these two decisions.

Thus, within this introduction, this chapter will be studied in the context of the provisions of the Rome Statute of the International Criminal Court through two main chapters:

1. The legal basis presented by the Prosecutor to determine the Court's jurisdiction over Palestine.
2. The scope of the Court's regional jurisdiction over Palestine.

## **2.2 Section 1: The Legal Basis Presented by the Prosecutor to Determine the Jurisdiction of the Court Over Palestine**

### **2.2.1 Introduction and Division:**

According to Article 1 of the Rome Statute, an International Criminal Court ("the Court") is established as a permanent body with the authority to exercise its jurisdiction over individuals for the most serious crimes of international concern, as specified in this Statute. The Court is complementary to national criminal jurisdictions, and its jurisdiction and procedures are subject to the provisions of this Statute.

In light of this jurisdiction, on May 22, 2018, the International Criminal Court received a referral from the then Prosecutor (Fatou Bensouda), originating from the State of Palestine, in accordance with the provisions of Articles 13(a) and 14 of the Rome Statute. Palestine has been a party to the Rome Statute since June 13, 2014. This referral requested that the Prosecutor initiate investigations into Israeli crimes within the territory of Palestine, including issues related to prisoners, the escalating settlements, and the aggression on the Gaza Strip<sup>5</sup>.

Subsequently, on December 20, 2019, the Prosecutor announced her intention to proceed with the situation in Palestine by opening an investigation into alleged crimes on Palestinian territory. After fulfilling all the legal criteria outlined in Article 53(1) of the Statute concerning jurisdiction and the interests of justice, the Prosecutor determined that there was a reasonable basis to initiate official investigation proceedings. However, she postponed the investigation pending a determination by the Pre-Trial Chamber of the Court regarding the confirmation of the Court's territorial jurisdiction over Palestinian territory<sup>6</sup>.

Therefore, it is essential to examine the legal basis for the Court's jurisdiction over Palestine in light of the legal considerations upon which the Palestinian government's request was based. Additionally, it is important to understand how the Prosecutor addressed this matter and the process of delineating the boundaries and scope of regional jurisdiction over Palestinian territory.

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<sup>5</sup> International court criminal: Policy Paper on Preliminary Examinations, The Office of the Prosecutor, November 2013, P, 9. (Jurisdiction).

<sup>6</sup> Please refer to the full statement on the International Criminal Court's website: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20191220-otp-statement-palestine-ara.pdf> (Cited on 5/6/2023).

**Therefore, it is Necessary to Examine the Legal Basis for the Jurisdiction of the International Criminal Court Over Palestine in Light of the Legal Considerations Established by the Palestinian Government's Request, as Well as How the Prosecutor Deals with this Matter, and the Situation Regarding the Determination of the Boundaries and Scope of Territorial Jurisdiction in Palestinian Territories.**

**In Light of this Introduction, this Chapter Will be Divided into Two Main Demands:**

**Subsection 1: The Request for Jurisdiction falls under Article 19(3) of the Rome Statute**

**Subsection 2: Legal and Practical Aspects of Determining Jurisdiction by the Pre-Trial Chamber before Commencing Trial Proceedings.**

**Subsection 1: The Request for Jurisdiction falls under Article 19(3) of the Rome Statute**

The Office of the Prosecutor initiated this action based on the text of Article 19(3) of the Rome Statute, which states: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility<sup>7</sup> " In addition to text of the first paragraph of the same article, states: "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17."

According to the text of this article, it is evident that it is broad in scope, as it grants the Prosecutor the right, in principle, to request the Court to decide on the issue of judicial jurisdiction before commencing an investigation. There is no time limit imposed on the

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<sup>7</sup> Please review the texts of the articles of the Rome Statute of the International Criminal Court on the following website: <https://www.ohchr.org/ar/instruments-mechanisms/instruments/rome-statute-international-criminal-court> (Cited on 5/6/2023).

Prosecutor's ability to exercise this right, nor any limitation on the Court's ability to decide on such a request. This is clearly reflected in the text of the aforementioned provision of the Rome Statute, which affirms the Office of the Prosecutor's right to seek a judicial decision even before the existence of a case arising from the situation in question. This is because Article 19 (3), which allows the Prosecutor to request a decision from the Court regarding jurisdiction or admissibility, is a matter that supports the request itself. This provision enables the presentation of the jurisdiction issue to the Pre-Trial Chamber, which is obliged to resolve this issue. It is necessary to issue a judicial ruling at this stage to facilitate and expedite the Prosecutor's investigation in an effective and expeditious manner, on a sound legal basis, ensuring the cooperation of states at this stage, which can only be achieved with a clear and public judgment on the basis of jurisdiction upon which the Prosecutor can conduct the investigation in this case.<sup>8</sup>

In the same context, the Office of the Prosecutor acknowledges the legal opinions and concerns expressed by judges of this Chamber regarding the decision on judicial jurisdiction in the cases of "Bangladesh and Myanmar." However, the Prosecutor emphasizes that the situation of Palestine is significantly different from the mentioned cases, especially since Palestine submitted a referral request under Article 14 of the Statute and not just Article 13(a). The Prosecutor conducted a preliminary examination on January 16, 2015, and is prepared to proceed with the investigation once the scope of the Court's jurisdiction over the situation in Palestine is confirmed.

Therefore, due to the referral from the State of Palestine, there is no requirement for the Pre-Trial Chamber's authorization before commencing an investigation. However, given

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<sup>8</sup> International Criminal Court: Situation in The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P, 10.

the legal issues and facts related to the situation in Palestine, which is a unique and highly contentious situation, specifically the dispute regarding the territory where the investigation is being conducted, the Prosecutor has requested that this matter be decided upon before initiating the investigation.

It is worth noting that Palestine has approached the International Criminal Court (ICC) on multiple occasions. The first of these occasions was in 2009, following the Israeli military aggression known as "Operation Cast Lead" in Gaza. Palestine submitted a declaration to the ICC accepting the Court's jurisdiction to investigate crimes committed by Israeli forces, based on its status as a UN-recognized entity. Following Palestine's submission of this declaration, the then Prosecutor, Luis Moreno-Ocampo, initiated a preliminary examination of the situation in Palestine. However, a decision was only issued three years later, on April 3, 2012, stating that he could not proceed to the investigation stage due to the unresolved issue of Palestine's legal status under international law. Nonetheless, he expressed his readiness to investigate allegations of crimes in Palestine once its legal status was clarified before relevant UN bodies.<sup>9</sup>

Subsequently, after the United Nations General Assembly adopted Resolution 67/19 in November 2012, recognizing Palestine as a "non-member observer state" at the United Nations, this paved the way for Palestine's accession to other international institutions. Palestine submitted its second declaration under the Rome Statute and its instrument of accession to the ICC to the UN Secretary-General on January 1, 2015, joining the Court's statute. This took effect in Palestine on April 1, 2015. On January 7, 2015, the Registrar of the Court informed the Palestinian government of the acceptance of its

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<sup>9</sup> International criminal court: Situation in Palestine, the office of the Prosecutor: <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (Cited on 5/7/2023)

declaration under Article 12 (3) for further consideration, and this situation remained under preliminary examination in Palestine since January 16, 2015.<sup>10</sup>

Following these developments, the Office of the Prosecutor received a referral request from the government of the State of Palestine regarding the situation in Palestine from June 13, 2014, onward, on May 22, 2018. Palestine requested the Prosecutor, in accordance with Articles 13(a) and 14 of the Rome Statute, to investigate crimes within the Court's temporal jurisdiction, encompassing past, ongoing, and future crimes that fall within the Court's jurisdiction, and that occurred throughout the territory of Palestine.

In this recent case, Palestine presented a foundational referral request as a state party to the Rome Statute, pursuant to Article 13 of the Rome Statute, which states: "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A State Party refers the situation to the Prosecutor, especially when it appears that one or more of the crimes referred to in Article 14 have been committed."

Also, based on the text of Article 14 of the Rome Statute, as a State Party to the Court after the Statute came into effect, it is stated that: "A situation in which one or more crimes within the jurisdiction of the Court appear to have been committed may be referred to the Prosecutor by a State Party in accordance with Article 13: (1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed and request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. (2) The referral of a

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<sup>10</sup> The report issued by the Office of the Prosecutor on December 14, 2020, page 55. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-pal-ara.pdf> (Cited on 10/6/2023).

situation to the Prosecutor shall be accompanied by such information as the State referring the situation considers appropriate."

Accordingly, the Office of the Prosecutor conducted a preliminary examination since January 16, 2015, whereby the first Pre-Trial Chamber was seized of the Palestinian situation. This readiness to open an investigation is contingent upon the confirmation of the Court's jurisdiction. The preliminary examination is not a legal investigation in the strict sense but rather a preliminary procedure undertaken by the Office of the Prosecutor to ensure that the legal criteria required by the Rome Statute are met. Based on its results, the Prosecutor can either announce the opening of an investigation or close the file. In this case, the Prosecutor relied on the text of Article 19(3) of the Rome Statute, as previously mentioned, to support the request, interpreting it in good faith and considering both its apparent meaning and its purpose.

Therefore, the preliminary examination is not a legal investigation because, except for the text of Article 19(3) of the Rome Statute, there is no other procedural means available to the Prosecutor for judicial intervention under the Rome Statute. Additionally, the absence of a requirement for the Pre-Trial Chamber's authorization before commencing an investigation in the case of a referral from a State does not imply that it is prohibited. Even with the State's referral of the case, there is no guarantee that jurisdictional issues will not arise in subsequent proceedings. Therefore, jurisdictional issues are determined at the outset, even if not legally required, under Article 15(4), which states: "If the Pre-Trial Chamber, after the study of the request and the supporting materials, considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by



the Court regarding jurisdiction and admissibility." Consequently, the investigation will be conducted thereafter on solid and legally tested judicial grounds.<sup>11</sup>

In this regard, it is evident that Article 19(3) and Article 14 do not bind or restrict the authority of the Prosecutor to request a decision at a specific stage or regarding a specific part of the proceedings.

Therefore, the application of Article 19(3) to the Palestinian situation aligns with the subject and purpose of the Rome Statute, which fundamentally seeks "to end impunity" and ensure the activation of the Court's jurisdiction in a legal and flexible manner.<sup>12</sup>

This is clearly reflected in the statement of the Prosecutor, where she asserted: "that there is a reasonable basis to proceed with an investigation in the situation in Palestine, pursuant to Article 53(1) of the Statute. In sum, I am satisfied that (1) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip."<sup>13</sup>

The current question arises: Why did the statement focus only on war crimes? It is evident that the Prosecutor was able to determine that there is a reasonable basis to believe that crimes falling within the jurisdiction of the Court (specifically, war crimes) may have been committed by members of the Israeli occupying forces in at least three incidents that were emphasized during the preliminary examination. However, this does

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<sup>11</sup> Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, issued on February 5, 2021, *Journal of Legal and Political Sciences*, University of Wadi, Volume: 13, Number: 1, 2022, page 317.

<sup>12</sup> Dr. Issam Barra, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, *Journal of Judicial Deduction - Mohamed Khider University in Biskra*, Volume: 13, Number: 28, 2021, page 71.

<sup>13</sup> In a press release from the Office of the Prosecutor, it was stated: "I am convinced that there is a reasonable basis to proceed with an investigation into the situation in Palestine, pursuant to Article 53(1) of the Statute. In summary, I am satisfied that: (1) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (2) the potential cases arising from the situation would be admissible; (3) there are no substantial reasons to believe that an investigation would not serve the interests of justice. However, given the unique and highly contested legal and factual issues pertaining to this situation – the question of the territory within which the investigation may be conducted – I have sought a ruling by the Pre-Trial Chamber I today on the Court's territorial jurisdiction under Article 12(2)(a) of the Rome Statute in Palestine."

not mean that the Prosecutor is required to specify all the allegations at this stage. The crimes specified above serve illustrative purposes, and once the Prosecutor commences her work under Article 53(1), the investigation will not be limited to these specific crimes. The Prosecutor will be able to expand or amend the investigation concerning the specified acts or other acts, incidents, groups, or individuals alleged, as long as the matters specified for prosecution are sufficiently linked to the situation, particularly considering that the situation in Palestine is one where it is alleged that crimes continue to be committed.<sup>14</sup>

Regarding the legal basis upon which the Prosecutor built her request, the Prosecutor founded her request on the information available to her, specifically, that there is a reasonable basis to believe that individuals of the Israeli occupying forces committed war crimes, characterized by disproportionate attacks in at least three incidents as emphasized by the Office, constituting crimes under Article 8(2)(a)(i) of the Statute. These are crimes involving willful killing, willfully causing serious injury to body or health, under Articles 8(2)(a)(i) and 8(2)(a)(iii) respectively, and crimes involving intentionally directing attacks against objects or persons using distinctive emblems of the Geneva Conventions, under Articles 8(2)(b)(xxiv) or 8(2)(e)(ii).

The prosecution believes that there is a reasonable basis to believe that due to the ongoing Israeli occupation of the West Bank, including East Jerusalem, individuals from the Israeli occupying forces have committed war crimes under Article 8(2)(b)(viii),<sup>15</sup> particularly regarding the transfer of Israeli civilians to the West Bank

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<sup>14</sup> International criminal court: Situation in The State of Palestine, 22 January 2020, Pre- Trial Chamber 1 Op. Cit, P, 53.

<sup>15</sup> This article states: "b) Other serious violations of the laws and customs applicable in armed conflicts within the established framework of international law, namely, any of the following acts: 8 (b) The transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the

since June 13, 2014. The prosecution also concludes that the potential cases arising from the investigation into these alleged crimes would be admissible under Article 17(1)(a) of the Statute.<sup>16</sup>

Regarding the prosecution's reference to Gaza, it noted that the scope of the situation in Palestine could extend to include an investigation into crimes allegedly committed concerning the use of non-lethal means and lethal means by members of the Israeli occupying forces against individuals participating in protests that began in March 2018 near the border fence in Gaza. This resulted, according to reports, in the death of more than 200 people, including over 40 children, and the injury of thousands of others.<sup>17</sup>

### **Subsection 2: Legal and Practical Aspects of Determining Jurisdiction by the Pre-Trial Chamber before Commencing Trial Proceedings.**

There is no doubt that determining the jurisdiction of the Court in the case of Palestine is of utmost importance in the progress of the conflict in accordance with legal and international principles consistent with the Statute and its objectives. Thus, establishing the regional, temporal, and personal jurisdiction of the Court in a specific and defined case is a prerequisite for initiating an investigation, in accordance with Article 53(1)(a) of the Statute, which requires the prosecution to prove that the Court has jurisdiction, including the territorial jurisdiction over each situation under investigation. To achieve this goal, pursuant to Article 12(2)(a), the prosecution must determine whether the

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territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."

<sup>16</sup> This article states: "1. Subject to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible in accordance with this article where: (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court."

<sup>17</sup> International criminal court: Situation in The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P,54.

criminal conduct or at least one element thereof occurred within the territory of a State party to the Statute, which is Palestine in this case

In a similar context to the situation in Palestine, a dispute arose in the case of "Myanmar and Bangladesh." In this case, the Prosecutor sought a ruling on jurisdiction under Article 12(2)(a) of the Rome Statute, particularly in situations where a part of the crime occurred on the territory of a State Party to the Statute. This request was made to enable the Prosecutor to proceed with the investigation into crimes alleged to have occurred between October 9, 2016, and 2017, during the waves of violence in the Rakhine State of Myanmar, as well as any other crimes sufficiently linked to these events. The request was based on the occurrence of one or more elements of these crimes within the territory of Bangladesh. The Office of the Prosecutor at the International Criminal Court sought a ruling from the Pre-Trial Chamber to clarify whether the Court had jurisdiction to investigate the alleged forced deportation of over 725,000 Rohingya men, women, and children from Myanmar to Bangladesh since August 25, 2017.<sup>18</sup>

Since Myanmar is not a State Party to the Rome Statute of the International Criminal Court, serious violations occurring within its borders do not typically fall within the Court's territorial jurisdiction, prohibiting Myanmar authorities from exercising the Court's jurisdiction.

As a result, a dispute arose regarding the establishment of the Court's jurisdiction, based on crimes of forced deportation of civilians on the border between Myanmar and Bangladesh, i.e., the crossing of victims into Bangladesh. Therefore, the Pre-Trial Chamber was asked to determine whether Article 12(2)(a) of the Rome Statute required

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<sup>18</sup> International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, No. ICC-01/19, 14 November 2019, P,4.5.

that the entire criminal conduct occur within the territory of one State Party for the Court's jurisdiction to be accepted, or if it could apply to only a part of that conduct<sup>19</sup>

The Pre-Trial Chamber observed that the wording of Article 12(2)(a) generally refers to the principle of territoriality. Therefore, it should first consider what territorial jurisdiction means under customary international law because this would help understand the legal framework that the drafters had in mind when formulating these provisions.

The Pre-Trial Chamber noted that customary international law does not prohibit states from asserting their jurisdiction over acts that occurred outside their territory based on the principle of territoriality. A brief survey of state practices reveals that many states have developed various concepts for a range of situations that allow local judicial authorities to assert territorial jurisdiction in transnational crimes<sup>20</sup> These concepts include:

1. Objective territoriality: A state can assert territorial jurisdiction if the crime began outside its territory but was completed within its territory.
2. Subjective territoriality: A state can assert territorial jurisdiction if the crime began within its territory but was completed outside it.
3. Presence everywhere: A state can assert territorial jurisdiction if the crime occurred wholly or partially within its territory, regardless of whether the part that occurred within its territory constitutes an element of the crime or not.
4. Theory of constitutive element: A state can assert territorial jurisdiction if at least one element of the crime occurs within its territory.

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<sup>19</sup> International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, Op. Cit, P,4.

<sup>20</sup> Ibid, P,24, Para, 54.

5. Effects principle: A state can assert territorial jurisdiction if the crime occurred outside its territory but had effects within its territory.

From the review of these various legislative provisions in different countries concerning territorial jurisdiction over transboundary conduct, it is evident that these legislations, on territorial jurisdiction over cross-border criminal conduct, are consistent with customary international law (*opinio juris*), leading to two crucial conclusions:

1<sup>st</sup>: Under customary international law, states have the freedom to assert territorial criminal jurisdiction, even if part of the conduct constituting the crime occurs outside their territory.

2<sup>nd</sup>: states have a relatively broad margin of discretion in determining the nature of this connection.

In light of the provisions of Article 12(2)(a) of the Rome Statute, it becomes apparent that they do not define the conditions under which the Court may exercise its jurisdiction over transboundary crimes based on the principle of territoriality. At the same time, it would be incorrect to infer that states intend to limit the Court's territorial jurisdiction only to crimes that occur exclusively within the territory of one or more State Parties. Additionally, such an interpretation would contradict the principle of good faith.

Therefore, when states delegate authority to an international organization, they transfer all necessary powers to achieve the organization's objectives, and in this regard, it is worth noting that the Rome Statute contains numerous war crimes that occur during international armed conflicts.<sup>21</sup> If the Court cannot exercise its jurisdiction over crimes that were partially committed in the territory of a non-party state, this would mean that

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<sup>21</sup> Ibid, P,27, Para, 60.

the Court cannot consider cases involving war crimes committed in international armed conflicts involving non-party states.<sup>22</sup>

Furthermore, there is no indication anywhere in the Rome Statute that the drafters intended to impose such a limitation. It should be assumed that State Parties conveyed to the Court their territorial jurisdiction but within the framework of the rules of international law.

Therefore, the only clear restriction arising from the formulation of Article 12(2)(a) of the Rome Statute is that at least part of the conduct constituting the crime must occur within the territory of a State Party. Consequently, the Court can exercise territorial jurisdiction within the boundaries defined by customary international law.<sup>23</sup>

Applying these rules to the situation in Palestine, the International Criminal Court (ICC) has jurisdiction to consider all crimes that have occurred on the territory of Palestine, whether these crimes took place within the occupied territories or elsewhere. This is in line with the same principle mentioned above, which has been followed in similar cases. The Court's jurisdiction extends to crimes that occurred throughout the Palestinian territories, regardless of whether Israel, the occupying power, is a State Party to the Rome Statute or whether the criminal conduct occurred in part or in full within the territory of the State Party. The only limitation, as consistently emphasized in the Pre-Trial Chamber's decisions, is that at least part of the conduct constituting the international crime must have occurred within the territory of a State Party. This condition has indeed been met in the crimes referred to in the Prosecutor's request.

As a result, the Prosecutor in her request pointed out that it is essential to confirm the geographic scope of her investigative activities. Her future investigation will not be

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<sup>22</sup> Ibid, P,27, Para, 60

<sup>23</sup> Ibid, P,27, Para 61

limited to a particular group of individuals or crimes, as indicated at this stage, but could extend to other individuals and crimes falling within the Palestinian situation. This is in accordance with her duty to seek the truth under Article 54(1)(a) of the Rome Statute.<sup>24</sup>

Determining the territorial jurisdiction of the International Criminal Court over the entire Palestinian territories is crucial in the case of Palestine due to the disputed nature of these territories. Palestine does not exercise full control over the occupied Palestinian territories. Additionally, the internationally recognized Palestinian Authority does not govern the Gaza Strip, which is under the control of Hamas. Despite these complexities, the Prosecutor argued that the Court can exercise jurisdiction despite these circumstances.<sup>25</sup> Therefore, a decision from the Pre-Trial Chamber confirming the Court's territorial jurisdiction would be beneficial for several reasons<sup>26</sup>

1. It ensures judicial certainty that there will be no other issues arising later in the proceedings, as the Prosecutor needs complete confidence in the legal basis for her actions and the Court's jurisdiction over the Palestinian situation.
2. Such a decision would assist in ensuring an effective investigation, as it would be illogical to later demand cooperation from states to determine the legality of these requests.

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<sup>24</sup> Article 54 of the Rome Statute states: "Duties and powers of the Prosecutor with respect to investigations: 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In investigating, the Prosecutor shall, as appropriate, gather and examine evidence, from a variety of sources, including the information provided by the States, the information gathered by the preliminary examination process, and the evidence collected pursuant to article 56. He or she shall seek the cooperation of the State Party concerned in the collection of such evidence."

<sup>25</sup> Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, issued on February 5, 2021, in the same source, page 318

<sup>26</sup> ICC Pre-Trial Chamber I 2020, pp. 16-19, pars. 34-39. Review the reports of the International Criminal Court in the case of Palestine on the website: [https://www.icc-pi.int/sites/default/files/CourtRecords/CR2020\\_01033.PDF](https://www.icc-pi.int/sites/default/files/CourtRecords/CR2020_01033.PDF) (Cited on 15/6/2023)



3. Moreover, any judicial decision at this early stage would strengthen and support the judicial process and its efficiency by ensuring the most effective use of the Court's limited resources.
4. Finally, during this stage, the Pre-Trial Chamber may, if it deems appropriate, allow referred entities and victims to submit briefs in their defense. This would enable the Chamber to hear all perspectives to help it make an organized determination of jurisdiction and thus legitimize its subsequent decisions correctly.

Based on the information provided, the Pre-Trial Chamber issued a decision on February 5, 2021, confirming the Court's jurisdiction over the situation in Palestine. What concerns us here is the purpose of resorting to the Pre-Trial Chamber to determine the issue of jurisdiction in light of the arguments presented by the Prosecutor and the legal basis on which the Pre-Trial Chamber based its decision that the International Criminal Court (ICC) has jurisdiction over Palestine.

In this context, the decision referenced in your text mentions that the first sentence of Article 19(3) of the Rome Statute allows the Prosecutor to request a ruling from the Court regarding "a jurisdictional issue." This provision defines the subject matter of the ruling as a "jurisdictional issue" in general terms without imposing further restrictions. Moreover, it does not specify any time limits for making such a request.<sup>27</sup>

The Pre-Trial Chamber's interpretation of this provision aligns with the ordinary meaning of the text. To apply this provision, certain conditions must be met, as outlined in Article 19(3). First and foremost, the structure of Article 19 of the Rome Statute distinguishes between three distinct procedural mechanisms. The title of this article concerns challenges to the Court's jurisdiction or admissibility of "the case." As a result,

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<sup>27</sup> international criminal court: PRE-TRIAL CHAMBER I, situation in the state of Palestine, 5 February 2021, pre- trial chamber 1, icc-01/18 no. Icc-01/18, P,32, Para 69.

the scope of application of the third paragraph of Article 19 does not refer to the term "challenge" or "the case," which appears throughout the article. Therefore, Article 19(3) of the Rome Statute grants a specific and exclusive right to the Prosecutor, differing from what is provided in paragraphs 19(1) and 19(2), and as such, it can be inferred that this provision regulates three distinct mechanisms applicable to different situations. Therefore, these mechanisms have independent functions, and they do not restrict one another.

Furthermore, the absence of references of this kind in Article 19(3) of the Rome Statute indicates that this mechanism goes beyond merely challenging the Court's jurisdiction or admissibility of "the case." It is broader in scope and does not limit itself to such challenges.<sup>28</sup>

Additionally, the Pre-Trial Chamber expressed its disagreement with the argument that "challenges related to territorial jurisdiction<sup>29</sup> necessarily undermine the right of the (suspect/accused) to challenge jurisdiction under Article 19(2)(a) of the Statute." It emphasized that the Chamber had previously ruled that the accused always has the right to challenge under Article 19(2) of the Statute, whether the Chamber exercises its authority under Article 19(1) or not. Similarly, a decision under Article 19(3) of the Statute does not diminish the right of the suspect or accused (or concerned states) to later challenge the Court's jurisdiction under Article 19(2) of the Statute.

In summary, the Pre-Trial Chamber's decision confirmed that the Prosecutor has the right to request a ruling from the Court regarding "a jurisdictional issue" under Article

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<sup>28</sup> international criminal court: PRE-TRIAL CHAMBER I, situation in the state of Palestine, 5 february 2021, Op, Cit, P,32, Para72.

<sup>29</sup> This is because this chamber had previously concluded on the former Prosecutor's request for a ruling on jurisdiction regarding the forced deportation of the Rohingya people from Myanmar to Bangladesh. The Prosecutor's reliance on the mechanism provided for in Article 19(3) to address the issue of jurisdiction had sparked controversy.

19(3) of the Rome Statute, and this provision covers a broader scope than challenges related to the Court's jurisdiction or admissibility of "the case." Additionally, it emphasized that this does not affect the right of the suspect or accused to later challenge the Court's jurisdiction under Article 19(2) of the Statute.

On the other hand, the logical basis stated in Article 15 of the Basic System, which requires ensuring that the investigation is conducted on a sound judicial basis as early as possible, is similarly applied in relation to the issue of investigation resulting from a referral by a State Party under Articles 13(a) and 14 of the Basic System.<sup>30</sup>

Because, according to Article 53(1) of the Basic System, the Prosecutor must consider the same factors, including whether there is a "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed," when deciding whether to initiate an investigation on its own or one resulting from a State Party referral. If the Prosecutor initiates an investigation on its own, its jurisdiction will be reviewed by the Pre-Trial Chamber under Article 15(4) of the Basic System.

If Article 19(3) of the Basic System is interpreted to go beyond the absence of the term "complaint" within the text, in this case, the Prosecutor can, when necessary, request a judicial review of the jurisdiction issue concerning an investigation resulting from a State Party referral.

This is because a restrictive interpretation of Article 19(3) of the Basic System would create an indefensible distinction. On one hand, the Prosecutor would initiate an investigation on a sound judicial basis from the beginning. On the other hand, investigating resulting from a referral by a State Party on an uncertain basis would raise doubts about the Court's jurisdiction from the outset. Ultimately, the Pre-Trial Chamber

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<sup>30</sup> Ibid, P, 35, Para, 78.

would need to assess these questions regarding the request as a whole under Article 58 of the Basic System, which could lead to the dismissal of the case after a lengthy and costly investigation.

Third and finally, the Pre-Trial Chamber is responsible for addressing jurisdictional issues in the context of the case based on several legal provisions, namely Articles 19(1), 19(2), and 58(1)(a) of the Basic System. In light of these provisions, Article 19(3) of the Basic System would have no practical effect if it were to apply only within the context of a case brought before the Court. On the contrary, Article 19(3) of the Basic System would have a clear effect if it were understood to apply outside the scope of the pending case.<sup>31</sup> Specifically, it would allow the Prosecutor to request a decision on the jurisdiction issue for the purpose of determining the scope of the investigation in the relevant case resulting from a State Party referral, instead of unnecessary delays in reaching the judicial review stage of jurisdictional matters under Article 58 of the Basic System.<sup>32</sup>

Based on these arguments, the Pre-Trial Chamber is convinced that the Prosecutor has the right to request the determination of jurisdiction at this stage, and this request holds significant value throughout the proceedings. Therefore, the decision of the Chamber will not be merely advisory but will be a decision regarding jurisdiction, which will push the legal process forward in a tangible and effective manner. Accordingly, the Pre-Trial Chamber ruled that the International Criminal Court has jurisdiction over Palestine, as will be clarified in the upcoming section.

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<sup>31</sup> Ibid, P, 36, Para, 81.

<sup>32</sup> Article 58 of the Rome Statute states: "1. The Pre-Trial Chamber shall issue a warrant of arrest at any time after the initiation of the investigation and on the basis of a request by the Prosecutor if it is satisfied, after the examination of the request and the evidence or information submitted, that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court..."

## **2.3 Section 2: The Regional Jurisdiction of the International Criminal Court over Palestine**

### **1.2.3 Introduction and Division**

The temporal jurisdiction did not cause any notable issues in the case of Palestine, in accordance with what is stipulated in the Statute in Article 11, which it specified this jurisdiction based on crimes committed after the entry into force of this Statute. Therefore, the Court does not exercise its functions and jurisdiction concerning a state that becomes a party to the Statute until this Statute has entered into force with regard to crimes committed before its entry into force. However, there is an exception to this general rule, which is the extension of the Court's jurisdiction to crimes committed before the Statute's entry into force for that state if it had previously issued a declaration allowing the Court to exercise its jurisdiction over the crime under investigation. Before delving into the details of this section, it is necessary to explain the issue of temporal jurisdiction in more detail.<sup>33</sup>

#### **A. Temporal Jurisdiction of the International Criminal Court over Palestine:**

The International Criminal Court adheres to specific procedural and substantive conditions before considering the subject of any crime. One of the most important of these requirements is the temporal jurisdiction condition, which was adopted by the Rome Statute as an implementation of the general principle established in the national legal systems of different countries, which prohibits the retroactive application of criminal laws. This condition was included in the Statute for purely political reasons,

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<sup>33</sup> Look regarding temporal jurisdiction in the book authored by Dr. Ali Abdul Qader Al-Qahouji, "International Criminal Law - Key Crimes, International Criminal Courts," published by Halabi Legal Publications, Beirut, 2001, page 329.

aiming to gain the acceptance of a larger number of states for the Court's jurisdiction.<sup>34</sup> This clearly contradicts international agreements related to war crimes and crimes against humanity.<sup>35</sup>

In this regard, the text of this condition is included in the Statute in Article 11, which states that the Court only has jurisdiction to consider crimes committed after the entry into force of this Statute in respect of the state. Therefore, the Court is not allowed to exercise its jurisdiction with regard to crimes committed before the entry into force of this Statute for that state unless the state has issued a declaration in accordance with the provisions of paragraph 3 of Article 12.

As a result, the International Criminal Court is not authorized to consider Israeli crimes committed prior to the entry into force of the Statute, despite the absence of a statute of limitations according to international customary law and relevant international agreements, such as the 1967 Convention on the Non-Applicability of Statutory

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<sup>34</sup> Dr. Chiter Abdelwahab, "The Consequences of Palestine's Accession to the International Criminal Court in the Face of Israeli Crimes," *The Academic Journal of Legal Research, Faculty of Law and Political Science, University of Abdelrahman Mira, Bejaia, Algeria*, Volume: 12, Number: 2, 2015, page (102)

<sup>35</sup> The principle of non-applicability of statutes of limitations to war crimes and crimes against humanity is established in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Article 4 of this convention states: "The States Parties to this Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the crimes mentioned in articles I and II of this Convention, and to provide effective penalties for persons guilty of such crimes wherever they are found. "As a result, Article I of the convention refers to:

(a) War crimes defined in the Charter of the International Military Tribunal (Nuremberg Trials) as "grave breaches of the Geneva Conventions of 12 August 1949, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

(b) Crimes against humanity, whether committed in time of war or in time of peace, as defined in the Charter of the International Military Tribunal (Nuremberg Trials).

In essence, this convention ensures that there are no statutory limitations that prevent the prosecution or punishment of individuals for war crimes and crimes against humanity, regardless of when and where these crimes occurred.

Limitations to War Crimes.<sup>36</sup> For example, based on current information, the International Criminal Court will not be able to investigate Israeli crimes that occurred during the Israeli aggression on the Gaza Strip in 2009.

This is especially evident in the Goldstone Report on the Israeli aggression issued on September 15, 2009, in which the United Nations Fact-Finding Mission found strong evidence of serious human rights violations and violations of international humanitarian law committed by Israel, the occupying power, in the Gaza Strip. Israel committed acts that may amount to war crimes and possibly crimes against humanity.<sup>37</sup> This prompted the Palestinian Minister of Justice to submit an official declaration to the Office of the Prosecutor of the Court, requesting an investigation into the crimes committed during Operation "Cast Lead" in the Gaza Strip. However, the Office of the Prosecutor rejected the Palestinian request on the grounds that Palestine is not a state according to international law.

Therefore, the International Criminal Court, in accordance with its Statute, has jurisdiction to consider crimes committed after April 5, 2015, which is the date when the legal framework of the Statute entered into force for Palestine. It should be noted that the Palestinian case before the International Criminal Court is related to Palestine's submission of a new declaration to the Court through the Ministry of Foreign Affairs, based on Article 13, paragraph 3, in which Palestine accepted the Court's jurisdiction retroactively to June 13, 2014. This retroactive jurisdiction allows the Court to investigate crimes committed during the military aggression on Gaza in 2014.

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<sup>36</sup> Dr. Chiter Abdelwahab, "The Consequences of Palestine's Accession to the International Criminal Court in the Face of Israeli Crimes," in the same source, page 242

<sup>37</sup> Refer to the details of this report on the website:"

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK EwiLn66A\\_f\\_AhVUUaQEhd3kCcEQFnoECA4QAQ&url=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FHRCBodies%2FHRCouncil%2FSpecialSession%2FSession9%2FPressReleaseArabic.doc&usq=AOvVaw1rH8A64di8pcOwoMl4j\\_Yg&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK EwiLn66A_f_AhVUUaQEhd3kCcEQFnoECA4QAQ&url=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FHRCBodies%2FHRCouncil%2FSpecialSession%2FSession9%2FPressReleaseArabic.doc&usq=AOvVaw1rH8A64di8pcOwoMl4j_Yg&opi=89978449) ((Cited on 7/5/2023)

The issue of retroactive jurisdiction arises from the rejection by the Prosecutor's Office on July 25, 2014, during the Israeli aggression on Gaza, of the request from the Palestinian Minister of Justice in the Palestinian government and the Attorney General to initiate an investigation based on a complaint from 2009. The Prosecutor's Office responded that "the head of state, the head of government, and the minister of foreign affairs alone are authorized to make a declaration of acceptance of the jurisdiction of the International Criminal Court."<sup>38</sup>

In light of this background, the Statute of the International Criminal Court highlights the mechanism of exercising its jurisdiction through Article 13. According to this text, there are three categories of entities that can trigger the jurisdiction of the International Criminal Court: States Parties to the Statute, the Security Council, and the Prosecutor.

When it is foreseen, a State Party to this Statute can refer a situation in which one or more crimes falling under the jurisdiction of the Court appear to have been committed, for the purpose of determining whether to prosecute individuals for those crimes, as per Article 13(1) of the Statute.<sup>39</sup>

If that is the case, Article 14 of the Statute states that "1- A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed and request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2- As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is

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<sup>38</sup> "Look at the timeline of this matter in: the report issued by the Office of the Prosecutor on December 14, 2020, in the previous source, page 55."

<sup>39</sup> Article 13(a) of the Rome Statute of the International Criminal Court states: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A State Party refers a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed to the Prosecutor pursuant to article 14."



available to the referring State" to establish the territorial jurisdiction of the Court over the concerned situation.

Before delving into the details of the boundaries and scope of the Court's regional jurisdiction over Palestine, it is necessary to clarify the nature of this regional or territorial jurisdiction of the International Criminal Court, which can be defined through the Statute itself in Article 12(2)(3): "2- The Court may exercise jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national. 3- If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question."<sup>40</sup>

Therefore, the International Criminal Court has jurisdiction over crimes that occur within the territory of a State Party or a State that has accepted the Court's jurisdiction,<sup>41</sup> as well as the State of registration of a vessel or aircraft if the crime occurred on board. Additionally, there are two exceptional cases in which the Court exercises its jurisdiction even if the state is not a party to the Statute: when such a state accepts the Court's jurisdiction, or when the Security Council refers the situation to the Court, and it is found that one or more international crimes have been committed.

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<sup>40</sup> Dr. Ali Abdul Qader Al-Qahouji, *International Criminal Law*, in the previous source, pages 329-331.

<sup>41</sup> This is what happened on the part of Palestine when the documents of accession to the Rome Statute were deposited with the Secretary-General of the United Nations. On January 1, 2016, the State of Palestine joined the Rome Statute establishing the International Criminal Court, and the treaty came into force for Palestine after three months, on April 1, 2016. Citation: Dr. Riham Salah Khalid Al-Husari, "The Jurisdiction of the International Criminal Court over the Occupation Crimes Committed in Gaza Strip from 2014 to 2018 in Light of Law and Islamic Sharia," Master's Thesis, Faculty of Sharia and Law, Islamic University, Gaza, 2021, page 29.

Applying this principle to the situation in Palestine, it becomes evident that the International Criminal Court has jurisdiction over all crimes that have occurred within the Palestinian territories, considering Palestine as a State Party to the Statute. This is in accordance with the referral provided for in Article 12(2)(a) of the Statute, as based on the judgment issued by the Pre-Trial Chamber and in accordance with the legal precedents, whether customary or based on previous cases like the "Myanmar and Bangladesh" case.<sup>42</sup> For the establishment of territorial jurisdiction, it is sufficient that the conduct constituting the crime occurs within the territory of a State Party to the Statute, regardless of whether this conduct occurs in whole or in part.

Indeed, the only clear limitation stated in the wording of Article 12(2)(a) of the Statute is that at least part of the conduct constituting the crimes must have occurred in the territory of a State Party. Based on this, the International Criminal Court is permitted to exercise territorial jurisdiction within the boundaries defined by customary international law and national laws.<sup>43</sup>

In light of the aforementioned background, and for the legal framework of the International Criminal Court to establish its regional jurisdiction over Palestine, the Prosecutor's Office needed to specify the legal principles of international law on which the determination of the elements of this jurisdiction is based. These elements include the boundaries and scope of the court's regional jurisdiction. This comes after the Prosecutor had stated the legal basis relied upon in their initial request to the Pre-Trial Chamber to establish the court's jurisdiction over Palestine.

It's important to note that there were several obstacles to issuing the jurisdiction decision by the Pre-Trial Chamber, whether these pressures were purely political or

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<sup>42</sup> Please refer to the legal sources in detail in the first section.

<sup>43</sup> International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic Of The Union Of Myanmar, Op. Cit, 26, Para, 60.

legal and practical obstacles posed by the dissenting judge (Judge Peter Kovács). These obstacles included issues related to the scope of jurisdiction and jurisdictional boundaries.

Therefore, it is necessary to study this issue based on the decision issued on February 5, 2021, by the Pre-Trial Chamber of the International Criminal Court, which was based on three main requests:

**Subsection 1: Palestine as a Party to the Rome Statute**

**Subsubsection 2: Palestine as a State under Relevant Principles and Rules of International Law**

**Subsection 3: The Boundaries of the Palestine Territory Subject to the Jurisdiction of the International Criminal Court**

**Subsection 4: The Contradiction of the Dissenting Opinion with Established Principles in International Law**

**Subsection 1: Palestine as a Party to the Rome Statute**

**Introduction and Division**

The prosecution argues that the territorial jurisdiction of the court in the case of Palestine extends to the occupied Palestinian territories,<sup>44</sup> relating to the right of the Palestinian people to self-determination and the views of the international community as expressed by the United Nations General Assembly and other international bodies that have linked these rights to the occupied Palestinian territory. Therefore, it is necessary to clarify the scope of the court's jurisdiction over Palestine, as well as to discuss and

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<sup>44</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 22 January 2020, Pre-Trial Chamber 1, ICC-01/18 1/112 22 January 2020, No. ICC-01/18 , P, 55. To access all the decisions issued by the Pre-Trial Chamber and related documents regarding the request of the Prosecutor, please visit the following website: <https://legal-tools.org/doc> (Cited on 9/7/2023)

elucidate opposing views from the court's friendly states and the arguments they relied upon, in order to provide a detailed response.

There has been significant legal controversy regarding the issue of the court's territorial jurisdiction over Palestine, and the main reason for this is the recurring question raised during preliminary sessions: does the description of a state apply to the situation in Palestine? Because the availability of this description is the initial way to establish the court's jurisdiction over Palestine, the prosecution has put forth primary and alternative justifications to prove and confirm the applicability of the state description to Palestine.<sup>45</sup>

The prosecution views the situation in Palestine as a state based on two primary legal grounds: first, Palestine is a state according to Articles 125(3) and 12(2) of the Rome Statute. Second, the alternative argument is that Palestine is a state in accordance with the relevant principles and rules of international law. However, this matter did not end here, as many friendly states of the court opposed these legal justifications with numerous arguments. Therefore, it is necessary to present these arguments and respond to them to demonstrate their lack of validity and seriousness. As a result, this demand will be divided into two branches:

## **Subsubsection 2: Palestine as a State under Relevant Principles and Rules of International Law**

The prosecution has based its legal justifications regarding the conditions of the International Criminal Court's jurisdiction in the case of Palestine<sup>46</sup> on the presence of the concept of statehood in Palestine in accordance with the provisions of Article 12(1)

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<sup>45</sup> Dr. Mariam Lukal, Commentary on the International Criminal Court's Decision Regarding its Territorial Jurisdiction in Palestine, in the previous source, page 318.

<sup>46</sup> State on the territory of which the conduct in question occurred”.

and Article 125(3) of the Rome Statute. More precisely, Palestine's recourse to the court was based on its correct status as a state party to the Rome Statute of the International Criminal Court. The prosecution believes that Palestine's accession to the Rome Statute was done correctly, and on this basis, Palestine was classified as a state party where crimes within its territory, war crimes, and crimes against humanity occurred, in accordance with Articles 12(2) and 125(3). Palestine must be considered a "state" in accordance with Article 12(2) of the Rome Statute after depositing its instrument of accession to the United Nations Secretary-General in accordance with Article 125(3). Consequently, after the Rome Statute's entry into force concerning Palestine, it must be considered a "state where the conduct in question occurred" in accordance with Article 12(2)(a) of the Rome Statute, and there is no need for or evaluation to be conducted when a state submits a declaration to the court accepting its jurisdiction, according to Article 12(2)(a).<sup>47</sup>

This matter was a subject of controversy during the consideration of the territorial jurisdiction over the crimes of forced deportation that occurred to more than 725,000 Rohingya men, women, and children from Myanmar to Bangladesh, with the latter being a party to the Rome Statute, while Myanmar is a non-party state. When the request to initiate judicial jurisdiction was made by the Office of the Prosecutor, a debate arose over this point. The Pre-Trial Chamber of the Court concluded that customary international law does not prohibit states from exercising their jurisdiction over acts or conduct constituting crimes that occurred outside their territory, based on the principle of territoriality. Many countries have established different mechanisms for various cases, giving national judicial authorities jurisdiction over transboundary

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<sup>47</sup> International criminal court: Situation In The State of Palestine, 22 January 2020, Pre- Trial Chamber 1 Op. Cit, P,75.

crimes. Considering the provisions of Article 12(2)(a) of the Rome Statute, it becomes clear that it does not include specific conditions under which the Court may exercise its jurisdiction over transboundary crimes based on the principle of territoriality. At the same time, it would be erroneous to infer that state parties intend to limit the Court's territorial jurisdiction exclusively to crimes that occur within the territory of one or more-party states.<sup>48</sup>

It is of utmost importance to note that the current situation of Palestine, particularly regarding the recent declaration (January 2015) submitted by the International Criminal Court, differs significantly from the previous declaration made in 2009.<sup>49</sup> Palestine's request was initially rejected by the Office of the Prosecutor, arguing that Palestine is not a state in the legal sense or concept of international law. The researcher believes that this argument is inaccurate and has political implications, as despite Palestine having been recognized as a state on multiple occasions, one notable example being United Nations General Assembly Resolution 43/177 dated December 15, 1988, which acknowledged Palestine's declaration issued by the Palestinian National Council on November 15, 1988. The resolution decided to use the name 'Palestine' instead of the 'Palestine Liberation Organization' in the United Nations system while not affecting the status of the observer of the Palestine Liberation Organization and its functions within the United Nations system.<sup>50</sup>

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<sup>48</sup> International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, Op. Cit, 24, Para, 54.

<sup>49</sup> The Office of the Prosecutor: Situation in Palestine, Op. Cit, Para, 1. <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> ((Cited on 15/7/2023

<sup>50</sup> Refer to the United Nations resolutions regarding Palestine." <https://www.un.org/ar/ga/67/resolutions.shtml> ((Cited on 10/7/2023)

Furthermore, what happened in the Oslo Accords on September 9, 1993, through the mutual recognition between Israel and the Palestine Liberation Organization as representing the State of Palestine, resulted in the signing of the agreement with Palestine considered a represented state by the Organization. However, all these arguments and others were not sufficient in the view of the Prosecutor to accept Palestine's request.

After the decision issued by the United Nations General Assembly Resolution 67/19 on November 26, 2012, granting Palestine the status of a non-member state with observer status in the United Nations, which led to Palestine submitting a special declaration on January 1, 2015, in accordance with the provisions of paragraph 3 of Article 12 of the Rome Statute of the International Criminal Court. This declaration was accepted, granting the Court jurisdiction starting from June 13, 2014. On January 2, 2015, Palestine deposited its instrument of accession with the Secretary-General of the United Nations, joining the Rome Statute's system. Consequently, Palestine became a party to the Rome Statute and had the right to declare its acceptance of the jurisdiction of the International Criminal Court, which happened on January 7, 2015, with the Registrar of the International Criminal Court accepting the declaration made by Palestine in accordance with the provisions of Article 12(3) of the Rome Statute.<sup>51</sup>

This means that once a state becomes a party to the Rome Statute, the International Criminal Court automatically has jurisdiction over crimes committed within its territory under Article 5, without the need for additional approval or separate evaluation. This

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<sup>51</sup> International court criminal: The Office of the Prosecutor, 14,December, P,55. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-pal-ara.pdf> (Cited on 10/7/2023)

was the fundamental argument presented by the Prosecutor to establish the Court's jurisdiction over the situation in Palestine.<sup>52</sup>

In response to this question, the Pre-Trial Chamber relied on Article 31(1) of the Vienna Convention on the Law of Treaties to interpret Article 12(2)(a) in good faith and in accordance with the ordinary meaning of the text, placing its terms in their context and in light of the object and purpose of the Rome Statute. The Chamber noted that the Rome Statute, its procedural rules, evidence rules, and regulations do not provide a specific definition of a state. However, the Chamber observed that the preamble of Article 12(2) of the Rome Statute states in the relevant part that: "The Court may exercise jurisdiction if one or more of the following States is a Party to this Statute."

This means that Article 12(2)(a) of the Rome Statute should be interpreted in light of the Pre-Trial Chamber's decision in accordance with Article 12(1) and Article 125(3). Therefore, the Pre-Trial Chamber finds it logical that once a state becomes a party to the Rome Statute, the Court may exercise its jurisdiction over its territory or nationals under Article 12(2) of the Rome Statute, provided that the requirements set out in Article 53(1) for initiating investigation proceedings are met.

On the other hand, concerning the Rome Statute, Article 125(3) states that "this Statute shall be open to accession by all States." Therefore, it is evident from this provision and all other legal texts in the Statute that no additional criteria or conditions are imposed for states to accede to the Rome Statute.

In light of this article, the Pre-Trial Chamber, in its judgment, found that Palestine acceded to the Rome Statute in accordance with the procedure specified in Article

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<sup>52</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, ICC-01/18 No. ICC-01/18 P,38



125(3) of the Rome Statute on January 2, 2015.<sup>53</sup> Subsequently, Palestine submitted its instrument of accession, and it became a party to the International Criminal Court on April 1, 2015, after the Rome Statute had entered into force in Palestine. Furthermore, the Secretary-General of the United Nations distributed Palestine's instrument of accession to the States Parties before its acceptance, and no State Party, except Canada, expressed any opposition at that time.<sup>54</sup>

The Pre-Trial Chamber also notes that in the context of the current proceedings, seven State Parties submitted observations on the Prosecutor's request, arguing that Palestine cannot be considered a state for the purposes of Article 12(2)(a) of the Rome Statute. These states include the Czech Republic<sup>55</sup>, Austria<sup>56</sup>, Australia<sup>57</sup>, Hungary<sup>58</sup>, Germany<sup>59</sup>, Brazil<sup>60</sup>, and Uganda<sup>61</sup>.

Regarding these states' arguments, it is evident that they revolve around a fundamental assertion that Palestine does not meet the four criteria outlined in the 1933 Montevideo Convention on the Rights and Duties of States in Article (1) These four criteria include a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. The Czech Republic, for example, believes that the question of the Palestinian state is of paramount importance for applying the conditions of jurisdiction under Article 12, meaning that the conditions of statehood according to customary international law require the fulfillment of specific basic requirements found

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<sup>53</sup> Article 125(3) of the Rome Statute states: "Signature, ratification, acceptance, approval or accession: 3. Accession to this Statute shall be open to all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."

<sup>54</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, Op.Cit, 44.

<sup>55</sup> <https://www.legal-tools.org/doc/7qm3y8/> (Cited on 10/7/2023)

<sup>56</sup> <https://www.legal-tools.org/doc/i3unoe/> (Cited on 10/7/2023)

<sup>57</sup> <https://www.legal-tools.org/doc/sz7bcl/> (Cited on 10/7/2023)

<sup>58</sup> <https://www.legal-tools.org/doc/g74etu/> (Cited on 10/7/2023)

<sup>59</sup> <https://www.legal-tools.org/doc/8bwxco/> (Cited on 10/7/2023)

<sup>60</sup> <https://legal-tools.org/doc/u96u9u> (Cited on 10/7/2023)

<sup>61</sup> <https://legal-tools.org/doc/rvaogc> (Cited on 10/7/2023)

in the first article of the Montevideo Convention, which include a permanent population, a defined territory, a government that exercises control, and the capacity to enter into relations with other states<sup>62</sup>. Germany, similarly, relied on the same provisions of the Convention, arguing that the four criteria that a state must meet to be recognized internationally as a legal entity are a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.<sup>63</sup>

However, these arguments are not accurate, legal, and devoid of substance. The Czech Republic and Germany, in presenting these arguments, do not rely on the Montevideo Convention and its various provisions but on the Badinter Committee<sup>64</sup> - which clarifies that a state is considered: "a community composed of a territory and a population subject to organized political authority and possessing the attribute of sovereignty."<sup>65</sup>

As for Hungary, it provided more detailed arguments than Germany and the Czech Republic on this matter. Hungary believes that the four criteria mentioned in the Montevideo Convention refer at the same time to the necessity of the concept that the Badinter Committee emphasizes, which is the attribute of sovereignty. In addition, the existence of a state according to customary international law is a matter related to the de facto situation on the ground, which requires recognition. However, recognition is not an essential and central element in the constituent elements of statehood<sup>66</sup>

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<sup>62</sup> Czech Republic, Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020, PP, 4- 10

<sup>63</sup> Federal Republic of German, Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020, P, 12, Para. 23.

<sup>64</sup> The Badinter Commission, originally established by the European Community (EC), was created as a body of members of the European Commission during the conference held by the European Commission through the announcement on August 27, 1991. This was done in the context of the EC's involvement in the disintegration of the former Socialist Federal Republic of Yugoslavia (SFRY, or Yugoslavia). The Badinter Commission was formed in this context.

<sup>65</sup> Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," Al-Haq Foundation, Ramallah, West Bank, Palestine, 2020, page 20

<sup>66</sup> Hungary , Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 , PP5, Para, 5

This can be responded to by noting that if the assessments and evaluations related to the legal status of a state were among the main functions of international law, this diversity would raise questions. On the one hand, it is clear that the distinction and difference between one government and another in terms of exercising control over the territory and organized political authority - is a minor and insignificant distinction.<sup>67</sup> The most surprising aspect is apparent through Brazil's arguments in this matter. It is known that Brazil previously recognized Palestine as a state before undergoing political shifts under President Bolsonaro's rule. Through its submission to the International Criminal Court as a friend of the court, Brazil argues that "each state must make its decisions regarding the recognition of statehood based on its own analysis and criteria for statehood."<sup>68</sup> This argument is also reflected in Uganda's position due to its previous recognition of the State of Palestine.<sup>69</sup>

It is needless to explain that the positions of both Brazil and Uganda are characterized by confusion and contradiction due to their previous stance on recognizing the State of Palestine. This contradiction and inconsistency are evident in that they refer to the texts of the Montevideo Convention, while at the same time, they violate Article 6 of this Convention, which states that countries must adhere to the idea that recognition of a state is irrevocable. Furthermore, their positions are in conflict with the judgments of the International Court of Justice regarding the binding nature of state representation on

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<sup>67</sup> Dr. Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," in the previous source, page 21

<sup>68</sup> Uganda , Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 , P, 12, Para

<sup>69</sup> Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 01/18-69, PP

one side, which is in line with the ruling of the International Court of Justice in the First Nuclear Tests case in 1974.<sup>70</sup>

In addition to the above, both Brazil and Uganda have argued that the issue of the legal status of the Palestinian state should be resolved through negotiations with Israel. However, this condition, added by these countries based on the Montevideo Convention, has no basis in the Convention or any other international agreement. It simply reflects the political positions taken by these governments against the State of Palestine. Furthermore, those countries that favor Israel argue for a settlement through negotiations with Israel while simultaneously rejecting any deviation from the objective criteria presumed to be met according to the Montevideo Convention.<sup>71</sup> Consequently, what these observers are calling for must be framed to raise the qualifications required for statehood, tailored in a way that is only applicable to Palestine, due to the reality of Israeli colonial domination.

Furthermore, considering that Israel acts as the occupying military power, it is highly challenging to reach a just and balanced negotiation between the two states. This has been affirmed by the International Court of Justice in its judgment in the Chagos Archipelago case, stating that "one cannot speak of a treaty if one of its parties is subject to the authority of a colonial power"<sup>72</sup>

Nevertheless, it should be noted that these countries remained silent during Palestine's accession process, and none of them objected to Palestine's accession before the

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<sup>70</sup> The term "individual act of the State" refers to a unilateral declaration made by a state with the intention of producing specific legal effects under international law

<sup>71</sup> Dr. Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," in the previous source, page 22.

<sup>72</sup> ICJ, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) (25 February 2019) para 172, <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf> (Cited on 20/7/2023) This judgment is referred to in the book authored by Dr. Pierce Cansie, in the previous source, on page 24

Assembly of States Parties at that time or later. It should also be noted that many States Parties to the Statute are also members of the Arab League and the Organization of Islamic Cooperation, which intervened to support Palestine's full participation as a State Party, arguing for the principle of the single state. Furthermore, the purpose of determining the territorial jurisdiction of the Court is to legally transfer Palestine, allowing it to exercise its judicial authority over the entire occupied Palestinian territory (i.e., the West Bank, including East Jerusalem, and the Gaza Strip).<sup>73</sup> Therefore, regardless of Palestine's status under public international law, its accession to the Statute was carried out in accordance with the proper and normal procedures, as specified in Article 125(3) of the Statute<sup>74</sup>. In this regard, the Pre-Trial Chamber<sup>74</sup> sees that once the conditions for accession are met in accordance with Article 125 of the Statute, the combined effect of Articles 12(1), 125(3), and 126(2) of the Statute is that the Statute automatically enters into force for a new State Party. This means that a State, in this case, Palestine, has agreed to submit itself to the provisions of the Statute, and as such, all the provisions of the Statute apply to it in the same way they apply to any other State Party.

Based on all the aforementioned legal arguments, the Rome Statute does not require additional conditions or standards for a State Party for the Court to exercise its jurisdiction over the territory or citizens of the State Parties. It does not require a separate assessment of the status of a State Party before it can exercise its jurisdiction under Article 12 of the Statute. Any limitation imposed on States after their acceptance

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<sup>73</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, Op.Cit, P,45, Para, 101

<sup>74</sup> Article 126(2) of the Statute provides that: "Entry into force: 2. For each State that ratifies, accepts, approves or accedes to this Statute after the deposit of the sixtieth instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the sixtieth day following the deposit of its instrument of ratification, acceptance, approval or accession

as parties to the Statute contradicts the principles of effectiveness and good faith. It is illogical and unacceptable to allow an entity to join the International Criminal Court and then subsequently deny its rights and obligations, effectively denying the Court's exercise of jurisdiction.<sup>75</sup>

Therefore, the researcher believes that this interpretation by the Pre-Trial Chamber regarding the provisions related to territorial jurisdiction is a response that aligns with the provisions of the Rome Statute and the rules of international law. If the Court's jurisdiction over the situation in Palestine were hindered by additional criteria and conditions, it would have effectively emptied Palestine's accession to the Rome Statute of its content, not to mention undermining future confidence in the Court.

Hence, the most objective and logical interpretation resulting from the interaction between Articles 125 and 12 of the Rome Statute is that the Court has the right to exercise its jurisdiction over the territory of any State Party once the conditions specified in Article 35(1) are met, without any prior additional conditions. This aligns with the Rome Statute itself, as the overwhelming majority of states during the preparatory work for the Rome Statute agreed to the concept of automatic jurisdiction for the Court. In other words, once a state becomes a party to the treaty, the consent to accept and exercise jurisdiction is integrated simultaneously.<sup>76</sup>

In conclusion, based on the customary understanding that should be given to the conditions of the Rome Statute in their context and the intended purpose of this provision, the term "State" mentioned in Article 12(2)(a) should be interpreted to refer

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<sup>75</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, Op.Cit, P,44

<sup>76</sup> Dr. Maryam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the aforementioned source, p. 320

to a State Party to the Rome Statute. Therefore, jurisdiction was properly conferred upon Palestine as a State that committed the relevant conduct.<sup>77</sup>

### **A. Palestine is a State under the Relevant Principles and Rules of International Law**

This is the second alternative argument presented by the Office of the Prosecutor. Although the Pre-Trial Chamber does not require a separate assessment of Palestine's status under international law, if deemed necessary, the Office of the Prosecutor has also argued that Palestine is a State based on these principles.

The Prosecutor contends that the establishment of a state, in general, relies on meeting the four criteria mentioned earlier, as outlined in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933. These four criteria revolve around permanent population, defined territory, government, and the capacity to enter into relations with other states, or what is commonly referred to as the Montevideo criteria. It is worth noting that this convention has not yet entered into force, but its texts recognized by international organizations serve as reflective mirrors of customary international law.<sup>78</sup>

Applying these criteria to the Palestinian situation, Palestine fulfills the territorial criterion as it has clear territorial boundaries. This has been the case since the British Mandate period and even more so after the issuance of the United Nations General Assembly Resolution 181 in 1947, which divided Palestine into two independent Arab and Jewish states with international governance for Jerusalem.<sup>79</sup>

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<sup>77</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, Op. Cit, 45

<sup>78</sup> International criminal court: Situation In The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P,76

<sup>79</sup> Maryam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the aforementioned source, p. 328

In the same context, United Nations Security Council Resolution 242, adopted on November 22, 1967, emphasized the inadmissibility of acquiring territory by war and the necessity of working towards a just and lasting peace, allowing countries in the region to live in peace.

Therefore, it can be argued that Palestine meets the criteria for statehood under international law, including the territorial criterion. The decisions and resolutions of international bodies, as well as historical developments, support this assertion, indicating that Palestine has fulfilled the necessary criteria to be considered a state under international law.<sup>80</sup>

Therefore, Resolution 242 indicates a very important legal implication, namely that the current Israeli occupation is a fact and not a legal status. This is in addition to considering the Fourth Geneva Convention of 1949, which states that the theory of military occupation is based on two principles<sup>81</sup>:

- Occupation does not transfer sovereignty, which means that legal sovereignty and its associated powers remain with the state that has sovereignty over the territory.
- Therefore, international law only recognizes the authority of the occupying power to take necessary measures to administer the occupied territories, without affecting regional sovereignty and another legal jurisdiction.

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<sup>80</sup> Please provide more context: [https://info.wafa.ps/ar\\_page.aspx?id=4963](https://info.wafa.ps/ar_page.aspx?id=4963)(Cited on 20/7/2023)

<sup>81</sup> Article 4 - Legal Status of Parties to the Conflict: "The application of agreements and this Protocol, as well as the conclusion of agreements provided for in these texts, shall not affect the legal status of the parties to the conflict. The occupation of a territory or the application of agreements and this Protocol shall not affect the legal status of that territory. "Article 5(5) - Appointment and Acceptance of Protecting Powers and Their Substitutes: "The appointment and acceptance of protecting powers for the purposes of applying agreements and this Protocol shall not affect the legal status of the parties to the conflict or the legal status of any territory, including occupied territory, in accordance with Article 4." These articles emphasize that the application of agreements and protocols, as well as the appointment of protecting powers, should not alter the legal status of parties involved in a conflict or the territories, even in cases of occupation



Therefore, even though Palestine is under Israeli occupation, it is still the territorial component of the state and fulfills all the conditions applicable to the Palestinian situation. This is in accordance with the resolutions of the Security Council and relevant international agreements.

1. The Permanent Population Element:

The criterion of a permanent population is one of the criteria that have been debated by countries opposing the jurisdiction of the International Criminal Court over Palestine. It is clear that Palestine meets the criterion of a permanent population, as there is no dispute that the Palestinian people have been present in the territory before 1947, i.e., before the partition resolution.

2. The Elected Government Element:

On the other hand, the Palestinian Authority exercises its authority over the permanent population within its territory, through the powers delegated by Israel as the occupying power. This began to appear from the early days of the Oslo Accords negotiations, which concluded with the signing between the government of Israel and a team from the Palestinian Liberation Organization. The aim of this agreement is to reach a permanent settlement based on Security Council Resolution 242, which guarantees Israel's withdrawal from the occupied territories in 1967, and Security Council Resolution 338, which calls for a ceasefire between the Arab states and Israel. This agreement contained several agreed-upon provisions, including the withdrawal from the Gaza Strip and the Jericho area, as well as the transfer of authority from the Israeli military government to Palestinians authorized for this task.

In addition to this, United Nations resolutions have recognized the Palestine Liberation Organization as the representative of the Palestinian people since October 14, 1974. The

United Nations General Assembly recognized the Palestine Liberation Organization and granted it the right to participate in General Assembly debates on Palestinian matters, as well as granting it the status of non-member observer state. This allowed it to participate in all sessions of the General Assembly, as of November 22, 1987.<sup>82</sup>

### 3. The Ability to Enter into Relations with Other States:

Starting with the declaration of the State of Palestine on November 15, 1988, by the Palestinian Liberation Organization in Algeria, many countries quickly established diplomatic relations with Palestine. Since that declaration, Palestine has enjoyed extensive diplomatic relations with many countries around the world.

The recent decision by the United Nations to officially commemorate the Palestinian Nakba on May 15, 2023, for the first time since 1948, is significant. This decision was made based on a resolution issued by the United Nations General Assembly on November 30, 2022, recognizing Palestine as a "non-member observer state" in the United Nations. This resolution paved the way for Palestine to join other international institutions. Palestine then submitted its second declaration under the Rome Statute (its accession to the International Criminal Court) to the United Nations Secretary-General on January 1, 2015.<sup>83</sup>

Recently, for the first time since 1948, the United Nations decided to commemorate the Palestinian people's Nakba (catastrophe) with an official event on May 15, 2023. This decision was based on the authorization granted by the United Nations General Assembly through a resolution issued on November 30, 2022. This resolution aimed to

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<sup>82</sup> Dr. Abdulsalam Abdullah and Dr. Benaamer Tunisian, "The State of Palestine from the Perspective of International Law," Yearbook of the University of Algeria, Volume 34, Issue 1, 2020, Page 90

<sup>83</sup> United nation: A/RES/67/19. [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_67\\_19.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_67_19.pdf) (Cited on 10/7/2023)

commemorate the 75th anniversary of the Nakba, during which more than half of the Palestinian population was displaced, turning them into refugees.

The General Assembly voted in favor of the Palestinians to commemorate the Nakba at the United Nations, with a majority of 90 votes in favor, opposed by 30 votes against, while 47 countries abstained from voting on the initiative<sup>84</sup>. As a result of this decision, the United Nations Committee responsible for exercising the rights of the Palestinian people that are not subject to disposal, in collaboration with the Division for Palestinian Rights in the Department of Political and Peacebuilding Affairs, organized two events at the United Nations headquarters in New York<sup>85</sup> to mark the seventy-fifth anniversary of the Nakba. The Committee and the Permanent Observer Mission of Palestine to the United Nations participated in organizing these events.

Therefore, this commemoration represents a significant political achievement with potential future implications. All these actions taken by the Palestinian Authority on the international stage signify one crucial reality: Palestine has the capacity to engage in international relations with both states and various international organizations. Consequently, Palestine meets all the criteria for statehood according to customary international law and internationally agreed-upon standards, especially those outlined in the Montevideo Convention.

Furthermore, up to this point, Palestine has acceded without reservations to seven out of nine international agreements related to human rights, which has led to Palestine submitting reports to the committees on human rights associated with these agreements.

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<sup>84</sup> The United Nations General Assembly Resolution No. 23/77 A/RES, dated November 30, 2022, includes a request from the Palestinian Rights Division within the Secretariat, in accordance with paragraph six of the resolution, to dedicate its activities in 2023 to commemorate the seventy-fifth anniversary of the Nakba, including by organizing a high-level event in the General Assembly Hall on May 15, 2023, and by disseminating relevant records and certificates. For more details on this resolution, please refer to the following website:

<https://documentsddsny.un.org/doc/UNDOC/GEN/N22/717/67/PDF/N2271767.pdf?OpenElement>

<sup>85</sup> <https://news.un.org/ar/story/2023/05/1120367>

These committees include the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Committee on the Rights of the Child, in addition to the committee that conducts a special investigation into its jurisdiction over Palestine in the context of the inter-state complaint initiated by Palestine against Israel under the Convention on the Elimination of All Forms of Racial Discrimination.

In its analysis, the committee adopted a functional approach to the legal status of the State of Palestine. It concluded that it was neither important nor necessary to conduct an analysis to measure the functional capacity of Palestine to act as a state party to the Convention. Despite differences in the eligibility criteria required to meet the conditions for joining the Convention against Racism compared to those in the Rome Statute, they are limited to states and do not extend beyond them.<sup>86</sup>

On the other hand, the committee observes that the Palestinian right to self-determination within the occupied Palestinian territories has been explicitly recognized by various bodies. For instance, the International Court of Justice noted that the "legitimate rights" of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement "include the right to self-determination." Furthermore, the General Assembly, on numerous occasions, linked the Palestinian people's right to self-determination to the Palestinian territories delineated by the Green Line, emphasizing the need to respect and preserve the territorial integrity of the occupied Palestinian territory.<sup>87</sup>

Therefore, the committee believes that the right to self-determination rises to the level of a "human right recognized internationally" within the meaning of Article 21(6) of the

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<sup>86</sup> Dr. Pierce Clancy, "Responding to the Arguments Raised in the Submissions of the Friends of the Court in the Case of the State of Palestine before the International Criminal Court," the source mentioned above, page 31

<sup>87</sup> See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, para. 49

Rome Statute, and the committee affirms that both the United Nations General Assembly and the International Court of Justice have confirmed the applicability of this right.

Therefore, in light of its interpretation of Article 12(2)(a) of the Rome Statute, in conjunction with Articles 125(3) and 126(2), and in accordance with internationally recognized human rights, and in a more specific manner, the committee believes that the regional criteria mentioned above for the Prosecutor's jurisdiction, as set out in Articles 13(a), 14, and 53(1) of the Rome Statute, encompass the right to self-determination. Consequently, the committee holds that the aforementioned conclusion - that the ICC's regional jurisdiction in the situation in Palestine extends to the territories occupied by Israel since 1967 based on relevant indicators arising from Palestine's accession to the Rome Statute - aligns with the right to self-determination.<sup>88</sup>

### **Subsection 3: The Boundaries of the Palestine Territory Subject to the Jurisdiction of the International Criminal Court**

The committee determined that the second request resulting from the Prosecutor's application, which is the determination of the boundaries of Palestinian territory for the sole purpose of establishing the Court's jurisdiction, is closely related to the first issue arising from the Prosecutor's request. The act of accession is what provides the relevant criteria regarding the Court's regional jurisdiction in the case before the judiciary.

**A.** the committee wishes to reaffirm that disputed boundaries have never prevented a state from becoming a party to the Rome Statute, and therefore, a state cannot prevent the Court from exercising its jurisdiction.

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<sup>88</sup> International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber 1, Op.Cit ,PP, 53-55

To emphasize this point, William Schabas argues that it is possible for a specific entity to be considered a party to the Rome Statute, even if it does not meet the technical definition of a state under customary international law. He supports this argument by citing the example of the Cook Islands, which applied for accession in 2008 and was accepted by the United Nations Secretary-General at the time, despite questions about its status as a state from the outset.<sup>89</sup>

**B.** with regard to the Palestinian territories for the sole purpose of determining the Court's jurisdiction, the committee notes that the granting of non-member observer state status to Palestine by the United Nations General Assembly in Resolution 67/19 reaffirms the right of the Palestinian people to their independent state of Palestine on the Palestinian territory occupied since 1967.

1. The United Nations General Assembly, in similar resolutions with the same wording, has specifically emphasized on such occasions the following:
2. The need to enable the Palestinian people to exercise sovereignty over their territories occupied since 1967<sup>90</sup>. The continued military occupation of Palestinian territory since 1967, including East Jerusalem, and the right of the Palestinian people to self-determination and sovereignty over their lands.<sup>91</sup>
3. The importance of respecting regional unity, communication, and the territorial integrity of the entire occupied Palestinian territory, including East Jerusalem.<sup>92</sup>

The preliminary chamber's decision is in line with international law and resolutions issued by the United Nations Security Council regarding the situation in Palestine. In

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<sup>89</sup> Dr. Wafa Dridi and Dr. Wisalaa Marzouki, "The Situation of Palestine before the International Criminal Court: A Reading of the Decision of Pre-Trial Chamber I," *Journal of Humanities Sciences*, University of Batna, Algeria, Volume 9, Issue 2, 2022, page 744

<sup>90</sup> United Nations, General Assembly, Question of Palestine, 15 December 1988, A/RES/43/177, para. 2.

<sup>91</sup> United Nations, General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, 6 May 2004, A/RES/58/292, para

<sup>92</sup> United Nations, General Assembly, The right of the Palestinian people to self-determination, 19 December 2011, A/RES/66/146, preamble

terms of international law, it recognizes the boundaries of the Palestinian state as occupied territory through the International Court of Justice's advisory opinion on meeting the request of the United Nations General Assembly dated December 3, 2003.

The International Court of Justice issued an advisory opinion against the separation barrier on July 9, 2004, which affirmed that the State of Palestine includes the territories occupied since 1967. Paragraph 77 of the advisory opinion states that, according to customary international law, territories are considered occupied when effectively placed under the control of an enemy army and its authorities. This occupation extends to all areas where such authority is established, including East Jerusalem.

Israel occupied territories in 1967, including areas between the Green Line and the previous eastern borders of Palestine under the mandate. According to customary international law, these territories are considered occupied by Israel, as the occupying power. Subsequent events in these areas, as described in paragraphs 75 to 77, have not changed this status. All territories, including East Jerusalem, remain occupied, and Israel retains the status of the occupying power.<sup>93</sup>

Furthermore, various resolutions issued by the United Nations Security Council concur that Israel's policy and practices of establishing settlements on Palestinian and Arab territories occupied since 1967 have no legal basis and pose a significant obstacle to achieving a comprehensive, just, and lasting peace in the Middle East. Resolution 446, dated March 22, 1979, states that Israel's policies and practices in this regard have no legal validity.<sup>94</sup>

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<sup>93</sup> <https://www.icj-cij.org/sites/default/files/summaries/summaries-2008-2012-ar.pdf> Cited on July 11, 2023

<sup>94</sup> Resolution 446 (1979) / adopted by the Security Council at its 2134th meeting, on 22 March 1979. [https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Co](https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Council+%2834th+year+%3A+1979%29&ln=ar) uncil+%2834th+year+%3A+1979%29&ln=ar (Cited on 25/7/2023)

Resolution 476, issued on June 30, 1980, reiterates the urgent need to end the prolonged occupation of territories by Israel since 1967, including Jerusalem. It strongly condemns Israel's continued refusal to comply with relevant Security Council and General Assembly resolutions. The resolution reaffirms that all actions and legislative and administrative measures taken by Israel to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention, as well as a serious obstacle to achieving a comprehensive and just peace in the Middle East. It emphasizes that all such actions that changed the geographic, demographic, and historical character of Jerusalem are null and void and must be rescinded in accordance with relevant Security Council resolutions.<sup>95</sup>

The most recent of these Security Council resolutions is Resolution 2334, dated December 23, 2016, which states: "Guided by the purposes and principles of the United Nations Charter and reaffirming, among other things, the inadmissibility of the acquisition of territory by force, and reiterating the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Palestinian territory, including East Jerusalem, and other Arab territories occupied since 1967, recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice."<sup>96</sup>

In the same context, the British Mandate for Palestine, or more precisely, the British occupation of Palestine within the boundaries recognized by the preliminary chamber, is affirmed. On September 11, 1922, the League of Nations Mandate officially entrusted the administration of Palestine to Britain based on an agreement among the Allied

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<sup>95</sup> Resolution 476 (1980) / adopted by the Security Council at its 2242nd meeting, on 30 June 1980. [https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Co](https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Council+%2835th+year+%3A+1980%29&ln=ar) uncil+%2835th+year+%3A+1980%29&ln=ar (Cited on 26/7/2023)

<sup>96</sup> <https://news.un.org/ar/tags/qrar-2334> (Cited on 26/7/2023)



Powers to implement the British Royal Declaration of 1917, known as the Balfour Declaration. Regarding the boundaries of the State of Palestine at that time, the Mandate included Palestine as a whole, encompassing East Jordan. However, Article 25 of the Mandate allowed for the deferral of its application, resulting in the exclusion of East Jordan from the Mandate. In 1921, the Emirate of Transjordan enjoyed self-rule and was not subject to the principles of the Mandate or the Balfour Declaration. It became independent from British rule in 1946, eventually becoming the Hashemite Kingdom of Jordan. Therefore, East Jordan was effectively excluded from the boundaries of the Mandate on Palestine. The boundaries of the Mandate on Palestine extended between the Jordan River and the Mediterranean Sea until the end of the Mandate in 1948. These are the boundaries of Palestine in which Israel, the West Bank, and the Gaza Strip are located today.<sup>97</sup>

This fact was reaffirmed through the United Nations Partition Plan, where the United Nations General Assembly issued a resolution in November 1947 (Resolution 181) that called for the partition of Palestine into two states, one Arab and one Jewish. The resolution divided Palestine into three regions, with one of them designated for an Arab state, covering approximately 11,000 square kilometers (4,300 square miles). It included the Western Galilee, Akko, the West Bank, and a coastal region stretching from north of Ashdod to Rafah in the south, as well as a desert region along the border with Egypt, with the exception of Jerusalem and Bethlehem, which were placed under international trusteeship for religious reasons. On June 5, 1967, Israel recaptured the West Bank, including East Jerusalem, and the Gaza Strip.<sup>98</sup>

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<sup>97</sup> [https://info.wafa.ps/ar\\_page.aspx?id=4960](https://info.wafa.ps/ar_page.aspx?id=4960) (Cited on 26/7/2023)

<sup>98</sup> <https://www.un.org/ar/observances/international-day-of-solidarity-with-the-palestinian-people/background>(Cited on 26/7/2023)

This confirms that the boundaries of the State of Palestine as outlined in the preliminary chamber's decision align with all relevant international resolutions, particularly the Mandate and Partition Plan, as well as the advisory opinion issued by the International Court of Justice regarding the separation barrier.

**The Third Point of Contention During the Preliminary Chamber's Deliberation on The Jurisdiction of the International Criminal Court (ICC)** over the situation in Palestine involved Judge Péter Kovács, a Hungarian national, who opposed the extension of the Court's territorial jurisdiction according to the referral request made by the Office of the Prosecutor to investigate the situation in Palestine. This opposition came despite two other judges in the chamber agreeing with the extension, ultimately leading to the chamber's decision by majority, not consensus. It is common in international courts and tribunals for dissenting judges to provide individual dissenting opinions in accordance with the court's legal framework and international practice.<sup>99</sup>

Judge Kovács based his objection on two fundamental issues:

Opposition to extending the judicial territorial jurisdiction of the International Criminal Court over Palestine: He argued that this judicial jurisdiction does not fundamentally extend to the territories occupied by Israel since 1967, specifically Gaza, the West Bank, and East Jerusalem.

Reference to a previous case involving the deportation and expulsion of the Rohingya people from Myanmar to Bangladesh: The judge referenced this case to highlight that the court's founding document intended to allow the ICC to exercise its jurisdiction under Article 12(2)(a) in situations where States Parties grant the court jurisdiction over crimes within their legal systems, provided they are within the bounds of international

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<sup>99</sup> Refer to all details of the dissenting opinion by Judge Peter Kovács on the website: [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021\\_01167.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF) (Cited on 26/7/2023. -Judge Péter Kovács' Partly Dissenting Opinion : N° ICC-01/18 1/154 5 February 2020

law and the court's statute. However, he argued that the judges themselves contradicted their previous findings in the case mentioned.<sup>100</sup>

Additionally, he pointed out that the Prosecutor concluded that continuing the investigation might exceed the limits of Palestine's territorial or personal jurisdiction under the highly complex criminal legal system due to Israeli occupation.

Therefore, the Prosecutor must be convinced that Israel, as a non-party state, does not have jurisdiction over the crimes and perpetrators, whether in terms of location or personal jurisdiction, according to the Oslo Accords. In this context, the Prosecutor must accept the exercise of her jurisdiction under Article 12(3) of the Rome Statute, which states: "If a State which is not a Party to this Statute accepts the exercise of jurisdiction by the Court in accordance with paragraph 2, the Prosecutor may proceed with an investigation in respect of crime in question and request cooperation from that State."

The judge concluded that concerning Regions (A) and (B), the Prosecutor could proceed with the investigation, but only after reaching an advanced agreement with Israel under Article 87(5)(a) of the Rome Statute to secure optimal conditions for court staff and investigations. However, if, after her investigations, the Prosecutor identifies individuals as alleged perpetrators who are not covered by the transfer of jurisdiction between Israel and Palestine under the Oslo Accords, specifically Israeli individuals, she does not have the right to continue investigations against those individuals.<sup>101</sup>

The dissenting judge's final opinion can be summarized as follows: He argued that the International Criminal Court's jurisdiction would be limited regionally to Regions (A) and (B) and would only apply to Palestinians. This exclusion of jurisdiction would

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<sup>100</sup> Judge Péter Kovács' Partly Dissenting Opinion, Op. Cit, P,3

<sup>101</sup> Ibid: P,11

occur if the suspects were Israeli nationals, as the State of Palestine does not have jurisdiction over them according to the Oslo Accords.<sup>102</sup> However, this judge believes that this does not impede the International Criminal Court's international jurisdiction to include them under the principle of ending impunity.<sup>103</sup>

The judge also attempted to separate the legal principle from its practical context, suggesting that Palestinian victims could seek recourse in Israeli courts, but this argument is flawed due to the ongoing Israeli occupation of Palestinian territories and the lack of accountability within the Israeli legal system.<sup>104</sup>

The judge's opinion fails to address the reality of the Israeli occupation and the challenges faced by Palestinian victims seeking justice. In fact, independent UN committees have documented violations of international law committed by Israeli forces, particularly during the Great March of Return protests in Gaza in 2019, where many civilians were killed deliberately and unlawfully. This underscores the need for accountability and the role of the International Criminal Court in addressing such violations.<sup>105</sup>

Indeed, concerns have been raised about the Israeli legal system's ability to provide accountability for violations committed by Israeli settlers or military personnel in Palestinian territories. The perception that the Israeli legal system may not impartially address such violations has led to calls for international mechanisms like the International Criminal Court (ICC) to investigate and prosecute alleged crimes.

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<sup>102</sup> THE ASLO Accords : International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, PP,56-58

<sup>103</sup> Dr. Issam Bara, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, the previous source+ Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the previous source, page 336

<sup>104</sup> Dr. Issam Bara, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, the previous source, page 75

<sup>105</sup> United Nation: A/HRC/40/74. <https://documents-dds-un.un.org/doc/UNDOC/GEN/G19/061/41/PDF/G1906141.pdf?OpenElement> (Cited on 29/7/2023)

David Kretzmer's observation underscores the challenges faced by those seeking justice within the Israeli legal framework. It suggests that the Israeli Supreme Court has sometimes interpreted the law in a way that strengthens and expands the authority of the military authorities, potentially legitimizing their actions. This further highlights the importance of international institutions like the ICC in cases where domestic legal systems may not provide a sufficient avenue for accountability.

In the context of the International Criminal Court's jurisdiction over alleged crimes committed in Palestinian territories, the dissenting judge's opinion, as mentioned earlier, argued for the ICC's authority to investigate and prosecute, especially when the Israeli legal system might not be seen as impartial or effective in addressing such issues.<sup>106</sup>

Therefore, considering the fundamental system in Rome Statute, it is evident that Israel itself does not respect or show willingness to ensure justice. At the same time, it places Palestine in a position incapable of guaranteeing its freedom and stability. Consequently, the opinions mentioned, especially the dissenting judge's opinion, do not provide any precise harm to the Israeli judicial system or its neutrality in the first place. The suggestion that Palestinians have the ability to resort to the Israeli judiciary, regardless of whether this mechanism is effective or not, clearly contradicts what the Rome Statute system aims for. Its purpose is to put an end to impunity, as stated in Article 17 of the basic system.<sup>107</sup> This is a factor that should be considered as the

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<sup>106</sup> Dr. Pierce Clancy, Response to Arguments Raised in the Submissions of the Friends of the Court Regarding the Situation of the State of Palestine before the International Criminal Court, the previous source, page 20

<sup>107</sup> Article 17 of the Statute, under the heading "Issues related to admissibility," states, "Taking into account the tenth paragraph of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: (a) The investigation or prosecution is being carried out by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." This article addresses the admissibility of cases before the International Criminal Court, specifically when another state is already conducting an investigation or prosecution, and the state is either unwilling or unable to genuinely carry out such proceedings. In such cases, the ICC may find the case inadmissible

guiding principle in all aspects of the Palestinian situation, not the other way around, as this opposing opinion wanted to perceive it as a vague feature without significance within the basic system.<sup>108</sup>

Based on this, the final decision issued by the majority of the Pre-Trial Chamber of the International Criminal Court responds to the dissenting judge's opinion by stating that the arguments and submissions related to the Oslo Accords, which were presented as part of these proceedings, are not relevant and not connected to the pending case when it comes to deciding the matter. The Chamber considers that these points can be raised by the concerned states under Article 19 of the basic system, which is related to investigations, and not in the context of studying the issue of jurisdiction after the case was referred to it under Articles 13 and 14 of the basic system. Therefore, the Chamber will not take these arguments into account, as they were not included in the wording of the final decision, because the International Criminal Court does not represent Palestine but acts on behalf of the international community as a whole<sup>109</sup>

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<sup>108</sup> Dr. Piers Clancy, Response to the Arguments Raised in the Submissions of the Friends of the Court Regarding the Situation of the State of Palestine before the International Criminal Court, the aforementioned source, page 20

<sup>109</sup> THE ASLO Accords : International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, P,57

## Chapter Three

### The Role of the International Criminal Court in Addressing War Crimes in Palestine

#### 3.1 Introduction and Division

Israel, the occupying power, has been committing endless acts of criminality against the Palestinian people since the catastrophe of 1948 until our present day<sup>110</sup>. This was exemplified by the Israeli military offensive on the Gaza Strip in 2022, known as "Operation True Dawn," which followed Israel's pattern of violating international laws and norms regulating wars. From the outset of its aggression on the Gaza Strip, Israel targeted civilians and civilian infrastructure, committing heinous crimes and massacres that spared no children, elderly, or women, all without moral or legal restraint, constituting war crimes and crimes against humanity.<sup>111</sup>

On the other hand, Israel systematically destroyed the infrastructure of the Gaza Strip through indiscriminate bombing, clearly violating all international agreements, human rights conventions, and the international humanitarian law that protects civilians during wars and conflicts. It can be argued that Israel encompassed all criminal acts listed in

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<sup>110</sup> The Israeli forces recently committed criminal acts against the Palestinian people in the Jenin camp over two days (July 3rd and 4th). These acts involved both aerial and ground forces engaging in a series of Israeli airstrikes, likely carried out by drones, followed by a significant influx of ground forces into the area, resulting in exchanges of gunfire. This marks the second operation conducted in Jenin involving airstrikes within two weeks this year. The operation, which lasted for two days, resulted in casualties, displacement of residents, and damage to buildings and infrastructure. According to the Palestinian Ministry of Health, 12 Palestinians, including four children, were killed in Jenin during the mentioned operation, and 143 Palestinians were injured, with 20 of them in critical condition. An Israeli soldier was also reported killed. For further details on these official reports, you can refer to the United Nations Office for the Coordination of Humanitarian Affairs website: [https://ochaopt.org/content/israeli-forces-operation-jenin-situation-report-1?\\_gl=1\\*1k47kvb\\*\\_ga\\*MTQ4NzY0OTA0Ni4xNjkwNzMwMDIy\\*\\_ga\\_E60ZNX2F68\\*MTY5MDczMDAyMS4xLjEuMTY5MDczMTI5My42MC4wLjA](https://ochaopt.org/content/israeli-forces-operation-jenin-situation-report-1?_gl=1*1k47kvb*_ga*MTQ4NzY0OTA0Ni4xNjkwNzMwMDIy*_ga_E60ZNX2F68*MTY5MDczMDAyMS4xLjEuMTY5MDczMTI5My42MC4wLjA). (Cited on 25/7/2023)

<sup>111</sup> Dr. Leila Asmani, "Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals," *Al-Huquq Journal*, Kuwait University - Scientific Publishing Council, Volume: 36, Number: 1, 2012, page 614

Article 5 of the Rome Statute, including the crime of aggression, war crimes, crimes against humanity, and even the crime of genocide.<sup>112</sup>

This raises questions about the international legal mechanism for holding Israel accountable and prosecuting its leaders for the crimes committed during the aggression on Gaza. Has there been recourse to national justice systems, whether Palestinian or Israeli, to achieve an effective and fair trial? Or are there multiple obstacles that would hinder Palestine if it were to resort to national mechanisms, leaving the International Criminal Court as the only viable option?

In light of this introduction, it is necessary to address the facts of the Israeli military attack on the Gaza Strip in 2022 and its resulting consequences. Subsequently, we will explore the appropriate legal mechanisms for holding Israeli leaders accountable for the crimes committed against the Palestinian people. Therefore, this chapter should be divided into the following sections:

**Section 1: The Criminal Description of the Israeli Military Attack on the Gaza Strip 2022.**

**Section 2: The Legal Mechanisms for Holding Israel Accountable under the Rome Statute**

**3.2 Section 1: The Criminal Description of the Israeli Military Attack on Gaza in 2022.**

### **1.3.2 Introduction and Division**

The Israeli withdrawal (redeployment) from the Gaza Strip on 12/9/2005 constituted a significant historical event. Israeli forces dismantled their settlements, evacuated their

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<sup>112</sup> Dr. Khalil Hussein, "Israeli Crimes in Gaza and Their Legal and Political Consequences," Strategic Studies Center Journal, Issue: 131, 2009, page 65



residents, and destroyed what remained of them. Following this, Israeli forces spread along the borders of the Gaza Strip, simultaneously gaining control over the Gaza Strip's air, land, and sea crossings, turning it into a large besieged prison. This was a continuation of Israel's violations and blatant breaches of various international norms.<sup>113</sup> Through a series of Israeli occupation forces' attacks on the Gaza Strip, the latest being the military assault on August 5, 2022, to achieve unfounded objectives and claims, Israel has committed international crimes according to the Geneva Conventions and the Rome Statute. This research necessitates recounting the inhuman aspects of this attack and its resulting consequences, with the requirements of this section divided into two subsequent demands:

- A. The Israeli military attack on the Gaza Strip in 2022 and its effects.
- B. The criminal nature of the actions committed during the attack on Gaza in light of the Rome Statute.

#### **A. The Israeli Military Attack on the Gaza Strip in 2022 and its Effects.**

On August 5th, Israeli occupation forces launched military airstrikes on multiple locations in the Gaza Strip, including the cities of Gaza, Beit Hanoun, and Khan Yunis. In response, several rockets were fired from various locations across the Gaza Strip towards Israel. The following provides an explanation of the events of this attack through a chronological sequence of events and highlights some examples of deliberate killings of families in the Gaza Strip. This is divided into two sections:

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<sup>113</sup> Dr. Nabil Salem Marzouk Awad, "International Responsibility Arising from the Israeli Occupation's Blockade of the Gaza Strip," Doctoral Dissertation, Faculty of Law and Political Science, The Arab Academy in Denmark, 2014, page 162

## **1. The Chronological Sequence of Events of the Israeli Military Attack on the Gaza Strip:**

The Israeli aggression on Gaza began with reports through Israeli media sources on the evening of Friday, August 5, 2022, indicating that the Israeli occupation army was making preparations to call up reserve forces due to expected escalation on the border with the Gaza Strip. Then, the Israeli Minister of Defense at that time, Benny Gantz, appeared, confirming, "I say to our enemies and to the leaders of Hamas and Jihad: Your time is limited, and we will eliminate the threat one way or another." Additionally, the spokesperson for the Israeli occupation army, Avichay Adraee, wrote on his Twitter account that "the army has launched Operation 'True Dawn' against Islamic Jihad targets in the Gaza Strip."<sup>114</sup>

Following that, at 4:20 PM (Palestine time), Al Jazeera's correspondent in Gaza reported hearing powerful explosions in the city of Gaza. Shortly after, the Israeli occupation army announced that it had carried out and was currently conducting airstrikes on the Gaza Strip. They also declared a special state on the home front. An Israeli broadcasting authority correspondent further confirmed the news, announcing that the Israeli army had indeed targeted locations inside the Gaza Strip. Later, it was confirmed that they specifically targeted an apartment in the Palestine Tower building in the central part of the Gaza Strip.<sup>115</sup>

The Israeli occupation army then announced that they had launched a military campaign targeting the Islamic Jihad under the name "Operation True Dawn." Directly after the

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<sup>114</sup> "Refer to this matter through the Chinese news agency Xinhua via the website." <http://arabic.news.cn/20220806/1edd26d145704f09928858706be4f2e0/c.html> (Cited on 30/7/2023)

<sup>115</sup> "Look into this matter through Al Jazeera's website at [www.aljazeera.com](http://www.aljazeera.com)." <https://mubasher.aljazeera.net/news/2022/4/21/%D8%B4%D8%A7%D9%87%D8%AF-%D8%A5%D8%B7%D9%84%D8%A7%D9%82-%D8%B5%D8%A7%D8%B1%D9%88%D8%AE-%D9%85%D9%86-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9-%D9%86%D8%AD%D9%88-%D8%B3%D8%AF%D9%8A%D8%B1%D9%88%D8%AA> (Cited on 30/7/2023)

attack, instructions were issued to residents of towns and settlements adjacent to the Gaza Strip to stay near shelters. The Iron Dome defense system was also activated in anticipation of rocket launches from Gaza.

The Ministry of Health in Gaza reported at 6:25 AM that 4 people, including a 5-year-old girl, had been martyred in the Israeli airstrikes. The toll later increased after a new statement was released, mentioning that the number of martyrs had risen to 8, including a young girl, with 44 others injured. Ziad al-Nakhala, the Secretary-General of the Islamic Jihad, stated, "The fighting has started, and it is too early to talk about mediation after the fall of Palestinian martyrs." He added, "We expect more martyrs, and this war has been imposed on us, and we will continue to respond until the end."<sup>116</sup>

## **2. Examples of Israeli Army Targeting Civilians During the Attack:**

Despite Israel seizing every opportunity and international event to boast about its alleged democracy and support for peace in Palestine, it consistently and continuously violates the most basic human rights. Its crimes against the Palestinian people are countless, with Gaza being the hardest hit.<sup>117</sup> The world, including various countries and

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<sup>116</sup> "Look into this matter on Wikipedia's website."

[https://ar.wikipedia.org/wiki/%D8%A7%D8%B4%D8%AA%D8%A8%D8%A7%D9%83%D8%A7%D8%AA\\_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%BA%D8%B2%D8%A9\\_\(%D8%A3%D8%BA%D8%B3%D8%B7%D8%B3\\_2022\)#:~:text=%D8%A3%D8%B9%D9%84%D9%86%D9%8E%20%D8%AC%D9%8A%D8%B4%20%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84%20%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A%20%D8%A3%D9%86%D9%91%D9%87,%D8%AA%D8%AD%D8%B3%D8%A8%D9%8B%D8%A7%20%D9%84%D8%A5%D8%B7%D9%84%D8%A7%D9%82%20%D8%B5%D9%88%D8%A7%D8%B1%D9%8A%D8%AE%20%D9%85%D9%86%20%D8%BA%D8%B2%D8%A9](https://ar.wikipedia.org/wiki/%D8%A7%D8%B4%D8%AA%D8%A8%D8%A7%D9%83%D8%A7%D8%AA_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%BA%D8%B2%D8%A9_(%D8%A3%D8%BA%D8%B3%D8%B7%D8%B3_2022)#:~:text=%D8%A3%D8%B9%D9%84%D9%86%D9%8E%20%D8%AC%D9%8A%D8%B4%20%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84%20%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A%20%D8%A3%D9%86%D9%91%D9%87,%D8%AA%D8%AD%D8%B3%D8%A8%D9%8B%D8%A7%20%D9%84%D8%A5%D8%B7%D9%84%D8%A7%D9%82%20%D8%B5%D9%88%D8%A7%D8%B1%D9%8A%D8%AE%20%D9%85%D9%86%20%D8%BA%D8%B2%D8%A9) (Cited on 30/7/2023)

<sup>117</sup> "Israel has repeatedly attacked the Gaza Strip following its unilateral withdrawal from the territory in 2005, including operations such as Operation Cast Lead/Battle of Al-Furqan in 2009, Operation Pillar of Defense/Operation Stones of Tammuz in 2012, Operation Protective Edge/The Consumed Sword in 2014, and Operation Guardian of the Walls/Sword of Jerusalem in 2021. For details on these assaults, please refer to the website:" <https://1-a1072.azureedge.net/encyclopedia/2022/8/7/%D8%A3%D8%A8%D8%B1%D8%B2-%D8%AD%D8%B1%D9%88%D8%A8->

human rights organizations, witnessed patterns and examples of atrocities and violations against the residents of the Gaza Strip. These violations included the deliberate targeting of Palestinian families during the attack under the guise of combating the Islamic Jihad movement<sup>118</sup>. Below are several examples of these violations:

**Example: The Najm Family - An Example of Deliberate and Systematic Killing:**

On August 7, 2022, Israeli forces conducted an aerial bombardment on the Faluja cemetery in the northern Gaza Strip, resulting in the deaths of 8 civilians, including 5 children, with 4 of them being from the same family. They were visiting their grandfather's grave<sup>119</sup>. Israel, the occupying power, admitted to killing the Najm family through a report published in the Israeli newspaper Haaretz. The newspaper mentioned that "an investigation by the army into the August 7th incident in the Faluja cemetery east of Jabalia led to the killing of Palestinian children in an Israeli airstrike," and that "Israeli army officials confirmed the army's responsibility for the killing of five children on the last day of the escalation that took place in the Gaza Strip at the beginning of August."<sup>120</sup>

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%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%B9%D9%84%D9%89-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9 (Cited on 31/7/2022)

<sup>118</sup> "Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility (The Case of Israeli Occupation Crimes in the Gaza Strip), Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2020, p. 54

<sup>119</sup> Anadolu Agency - (Hebrew Newspaper: Israel Acknowledges Killing 5 Children in an Airstrike on a Cemetery in Jabaliya). For details on this matter, please refer to the website:"

<https://asharq.com/ar/6mOcoQGQZGybEF2ARi9zA6->

%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-

%D8%AA%D8%B9%D8%AA%D8%B1%D9%81-%D8%A8%D9%82%D8%AA%D9%84-5-

%D8%A3%D8%B7%D9%81%D8%A7%D9%84-

%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A%D9%8A%D9%86-

%D9%81%D9%8A/ (Cited on 31/7/2023 )

<sup>120</sup> Haaretz: Israeli army admits to killing 5 Palestinian children in Gaza , Available at:

<https://newscutters.com/world/294955.html> (Cited on 31/7/2023

Victims of the Al-Kulak Family - 21 Civilians, Including Children<sup>121</sup>:

The Al-Kulak family consisted of 21 civilians, including children, who became victims.

There were also victims from the Al-Ifranji family<sup>122</sup>, with 5 civilians among them. In addition to these casualties, the Israeli Center for Human Rights<sup>123</sup> in the Occupied Territories provided data and statistics on Palestinians who did not participate in combat but were killed by Israeli security forces (excluding those targeted in assassination operations) inside the occupied territories, specifically in the Gaza Strip.<sup>124</sup>

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<sup>121</sup> A report from the sole survivor in the family before the Human Rights Council calling for justice." <https://euromedmonitor.org/ar/article/5001/%D8%A7%D9%84%D9%82%D9%88%D9%84%D9%82-%D8%A3%D9%85%D8%A7%D9%85-%D9%85%D8%AC%D9%84%D8%B3-%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%A5%D9%86%D8%B3%D8%A7%D9%86:-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D9%85%D8%AC%D8%AA%D9%85%D8%B9-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A-%D9%85%D8%AD%D8%A7%D8%B3%D8%A8%D8%A9-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%B9%D9%84%D9%89-%D8%A5%D8%A8%D8%A7%D8%AF%D8%A9-%D8%B9%D8%A7%D8%A6%D9%84%D8%AA%D9%8A-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9>

<sup>122</sup> An updated report from the Mediterranean Center for Human Rights on mass killings of families during the Israeli attack.

<https://euromedmonitor.org/ar/article/4408/%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D9%85%D8%AD%D8%AF%D8%AB-%D8%B9%D9%86-%D8%B9%D9%85%D9%84%D9%8A%D8%A7%D8%AA-%D8%A7%D9%84%D9%82%D8%AA%D9%84-%D8%A7%D9%84%D8%AC%D9%85%D8%A7%D8%B9%D9%8A-%D8%A8%D8%AD%D9%82-%D8%A7%D9%84%D8%B9%D8%A7%D8%A6%D9%84%D8%A7%D8%AA-%D8%AE%D9%84%D8%A7%D9%84-%D8%A7%D9%84%D9%87%D8%AC%D9%88%D9%85-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A-%D8%B9%D9%84%D9%89-%D8%BA%D8%B2%D8%A9>

<sup>123</sup> "The Israeli Center for Human Rights submits..."

<https://www.btselem.org/arabic/statistics/fatalities/after-cast-lead/by-date-of-death/wb-gaza/palestinians-killed-during-the-course-of-a-targeted-killing-not-hisul>

<sup>124</sup> <https://euromedmonitor.org/ar/article/4425/%D8%AC%D8%AD%D9%8A%D9%85-%D9%84%D8%A7-%D9%8A%D8%B3%D8%AA%D8%AB%D9%86%D9%8A-%D8%A3%D8%AD%D8%AF%D9%8B%D8%A7...%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D8%B4%D8%A7%D9%85%D9%84-%D9%84%D9%84%D8%A3%D9%88%D8%B1%D9%88%D9%85%D8%AA%D9%88%D8%B3%D8%B7%D9%8A-%D9%8A%D9%88%D8%AB%D9%82-%D8%A7%D9%86%D8%AA%D9%87%D8%A7%D9%83%D8%A7%D8%AA-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D9%81%D9%8A-%D9%87%D8%AC%D9%88%D9%85%D9%87%D8%A7-%D8%A7%D9%84%D8%A3%D8%AE%D9%8A%D8%B1-%D8%B9%D9%84%D9%89-%D8%BA%D8%B2%D8%A9>

You can also refer to the comprehensive report from the Euro-Mediterranean Human Rights Monitor<sup>125</sup>, which documented Israel's violations in its recent attack.

### **Subsection 2: The Criminal Nature of the Actions Committed during the Attack on Gaza in Light of the Rome Statute**

Following the Israeli attack on the Gaza Strip, a statement was issued by the Coordinator for Humanitarian Affairs in the Occupied Palestinian Territory, "Lynn Hastings," expressing deep concern about the ongoing and escalating violence in Gaza. She stated, "The humanitarian situation in Gaza was already deteriorating, and this latest escalation can only make things worse. Combat operations must stop to avoid further civilian casualties, and all parties must respect the principles of international humanitarian law, including principles of distinction, precaution, and proportionality."

Subsequently, the Israeli occupation forces announced the end of the military attack on the Gaza Strip, which took place between August 5th and 7th. A ceasefire came into effect at 23:30 on August 7th. Both the Israeli army and the Islamic Jihad issued statements confirming the end of their military operations.

The aerial bombardment of Gaza resulted in numerous civilian casualties, injuries, and the destruction of residential buildings and infrastructure. Here are the details of the impact of the Israeli attack on Gaza in 2022, as reported by the official statement from the United Nations Office for the Coordination of Humanitarian Affairs (OCHA)<sup>126</sup>:

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<sup>125</sup> Lynn Hastings, the statement issued by the Humanitarian Coordinator for the Occupied Palestinian Territory. Please refer to this statement on the website: <https://www.ochaopt.org/ar/content/statement-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings-escalation-violence-gaza-and> (Cited on 30/7/2023)

<sup>126</sup> Report No. 2, the summary of updates issued by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). Please refer to the details of this summary on the website: <https://www.ochaopt.org/ar/content/escalation-gaza-strip-and-israel-flash-update-2-august-2022> (Cited on 31/7/2023)

## 1. Number of Casualties

The Israeli military attack on the Gaza Strip led to the deaths of approximately 46 Palestinians, including 15 children and four women. The Gaza Ministry of Health reported that 360 Palestinians were injured, including 151 children, 58 women, and 19 elderly individuals<sup>127</sup>. These casualties are clear violations of humanitarian law and first-degree war crimes.

## 2. Infrastructure Losses

The intensive Israeli airstrikes on neighborhoods and residential buildings resulted in damage to approximately 1,761 housing units. Around 450 Palestinians were displaced, affecting nearly 8,500 people. Initial information indicated that 40 families had been displaced since August 5th, seeking refuge in host communities, including 30 families who were residing in the building damaged by an Israeli airstrike in Gaza City. The Ministry of Public Works and Housing confirmed that approximately 650 housing units suffered partial damage, with 29 units becoming uninhabitable and 11 units completely destroyed. Other housing units sustained minor damages. Efforts are ongoing, in coordination with the Ministry of Social Development, to assist the affected individuals. Additionally, Gaza's power generation station, which had been closed since August 6th, resumed operations on the afternoon of August 8th.<sup>128</sup>

These facts illustrate the devastating impact of the Israeli military attack on the Gaza Strip in 2022 and the resulting humanitarian crisis. The targeting of civilians and civilian infrastructure constitutes a grave violation of international law.

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<sup>127</sup> The report issued by the United Nations Office of the High Commissioner for Human Rights (OHCHR). Please refer to this matter through the website: [https://www.ohchr.org/ar/latest?field\\_content\\_category\\_target\\_id\[158\]=158&field\\_content\\_category\\_target\\_id\[162\]=162&field\\_content\\_category\\_target\\_id\[161\]=161&field\\_content\\_category\\_target\\_id\[160\]=160&field\\_content\\_category\\_target\\_id\[159\]=159&field\\_published\\_date\\_value\[min\]=&field\\_published\\_date\\_value\[max\]=&sort\\_bef\\_combine=field\\_published\\_date\\_value\\_DESC&page=13](https://www.ohchr.org/ar/latest?field_content_category_target_id[158]=158&field_content_category_target_id[162]=162&field_content_category_target_id[161]=161&field_content_category_target_id[160]=160&field_content_category_target_id[159]=159&field_published_date_value[min]=&field_published_date_value[max]=&sort_bef_combine=field_published_date_value_DESC&page=13) (Cited on 30/7/2023)

<sup>128</sup> The report number (2) summarizing the updates issued by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), as mentioned earlier

## **2. Israeli Occupation Crimes During the Israeli Attack on the Gaza Strip in 2022 within the Framework of the Rome Statute (Subject-Matter Jurisdiction)**

Subject-matter jurisdiction, also known as substantive jurisdiction, is determined based on the type of crime specified in the Rome Statute that the court has the authority to investigate, prosecute, and adjudicate. Subject-matter jurisdiction is the primary and most important jurisdiction for the court as it defines the scope of its functions fundamentally, and it delineates the court's authority over the specified crimes and their perpetrators.

The crimes that define the subject-matter jurisdiction of the court are outlined in the first paragraph of Article 5 of the Rome Statute. These crimes are the most serious and of international concern, and therefore, the court has jurisdiction to consider the following crimes:

- Genocide,
- War crimes,
- Crimes against humanity,
- Crimes of aggression.<sup>129</sup>

It is undeniable that during Israel's attack on the Gaza Strip in 2022, a series of violations and crimes were committed, collectively representing a blatant violation of international law, international humanitarian law, and human rights, as well as a violation of the principles of international criminal law. Therefore, we must examine the actions (these being the four crimes specified in Article 5) committed during this attack, which fall squarely within the jurisdiction of the International Criminal Court.

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<sup>129</sup> Article 5(2) states: "The Court exercises jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations



Considering the crimes falling under the jurisdiction of this court, it becomes evident that the evidence and facts presented in reports by the United Nations and Amnesty International are largely sufficient to support a comprehensive indictment for the accountability of Israeli leaders. This would be backed by the events that occurred during the attack on the Gaza Strip, all within the framework of the Rome Statute and the precedents set by the International Criminal Tribunal for the Former Yugoslavia and Rwanda.

### **1- Genocide**

The Rome Statute defines this crime as: "Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (Article 6).<sup>130</sup> Accordingly, this statute outlines the crime of genocide and its forms through Article 6 of the basic statute. The conduct of this crime is translated through specific forms, which include the killing of members of the group, and causing serious bodily or mental harm to members of the group, provided that the material and mental elements of this crime are met. Furthermore, this crime is considered one of the crimes against humanity, as stipulated in Article 7(1) of the same statute, which lists the elements required for the prosecution of its perpetrators.

#### **- Material and Mental Elements of the Crime of Genocide**

The material elements of the crime of genocide are fulfilled when any of the following conditions are met: it is committed with the intent to destroy a national, ethnic, racial, or religious group as such, in whole or in part, or when the perpetrator kills one or more persons,<sup>131</sup> including imposing conditions of life that are calculated to bring about the physical destruction, in whole or in part, of the group. The behavior constituting the

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<sup>130</sup> Please refer to Article 6 of the Rome Statute for further details on the jurisdiction of the International Criminal Court

<sup>131</sup> See the text of Article 7(2)(b) of the Statute of the International Criminal Court

criminal act is the collective killing of civilians or their participation in such acts,<sup>132</sup> carried out through widespread and systematic attacks directed against the civilian population. It is clear from the foregoing texts that the concept of genocide is not limited to cases of direct killing of a group of civilian citizens but, according to these texts, the elements of this crime are met as soon as living conditions are imposed that would inevitably lead to the destruction and suffering of part of the population.<sup>133</sup>

As for the mental element, these crimes are distinguished from others by the need for a specific intent, which is the intent to destroy. This intent is divided into physical, biological, and cultural destruction, with the description of the intent for destruction being left to the judges through the declarations of human rights and minority rights. In fact, the absence of an intent to destroy, whether partial or total, negates the mental element of this crime and strips it of the description of genocide, regardless of its severity and magnitude because it is necessary to prove the intent to destroy, whether partially or entirely.<sup>134</sup>

From what has been mentioned above, it becomes clear that these facts closely resemble the concept of war crimes, but proving them is extremely difficult, especially during the Israeli military attack on the Gaza Strip, where the Israeli occupation forces often invoke vague pretexts such as self-defense, among others, to justify the killing of Palestinians from all walks of life and categories, whether they were civilians or leaders, based on their affiliation with a certain religious and ethnic group (the attack on Islamic Jihad). This is done with the intent to exterminate and annihilate them, which is what actually happened during the so-called "Operation Truthful Promise" against Islamic

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<sup>132</sup> See the text of Article 7(1) of the Statute of the International Criminal Court

<sup>133</sup> Dr. Abdulrahman Mohamed Ali, *Israeli Crimes during the Aggression on the Gaza Strip 27/12/2008-18/1/2009 - A Legal Study*, Zitouna Center for Studies and Consultations, Beirut, Lebanon, 2011, p. 92

<sup>134</sup> Dr. Fida Najib Mohamed, *The International Criminal Court Towards International Justice*, Aleppo Legal Publications, Lebanon, First Edition, 2006, p. 145

Jihad targets in the Gaza Strip. It should be noted that this crime requires a specific criminal intent, which is the intent to destroy the targeted group in whole or in part, and this intent can be determined in the Palestinian case by examining the evidence provided by the International Criminal Tribunal for Yugoslavia on proving the specific intent for this crime through the manner of its commission.<sup>135</sup>

### **3.2.2 Facts Indicating the Commission of Acts of Genocide During the Attack on the Gaza Strip:**

What has been stated about the concept of genocide and its elements applies in all its details to what happened during the attack on the Gaza Strip. The description of the genocide crimes referred to in Article (6) of the Basic Law applies to the practices of the Israeli forces during the aggression in 2022. This concept is further supported by the presentation of facts indicating the occurrence of these crimes in accordance with reports issued by recognized international organizations, as follows<sup>136</sup>:

- Israel launched a military attack on the Gaza Strip on August 5, 2022, which lasted for three days, claiming it was a preemptive campaign targeting the Palestinian Islamic Jihad movement and its military wing, the Al-Quds Brigades. The attack followed the arrest by Israeli forces of Bassam al-Saadi, a prominent member of the Palestinian Islamic Jihad movement, during a raid on the Jenin refugee camp in the occupied West Bank on August 1. Israeli authorities also began closing all crossings leading to the occupied Gaza Strip on that day.

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<sup>135</sup> Dr. Ikhlas Nasser, Assessing the Effectiveness of the Principle of Judicial Complementarity in the International Criminal Court System and Its Impact on the Palestinian Case, Postgraduate Studies Research, Faculty of Law and Public Administration, University of Bizerte, 2019, p. 23

<sup>136</sup> Research Report titled "They Were Just Children" issued by Amnesty International, Evidence of War Crimes during the Israeli Attack on Gaza in August 2022, p. 5. You can refer to this report on their website. <https://www.amnesty.org/ar/documents/mde15/6079/2022/ar/> (Cited on 15/8/2023)

- The attack resulted in the martyrdom of a total of (49) Palestinians during the conflict<sup>137</sup>, according to the United Nations, including (31) civilians, among them (17) children, four women, and (11) men, according to a study conducted by Amnesty International. Amnesty International concluded that (33) individuals, out of the total of (49) Palestinians who were martyred, were confirmed to be killed by Israeli forces. The vast majority of them (32) were killed as a result of airstrikes, while one woman was martyred by a tank shell. According to the organization's estimates, (17) Palestinian citizens, including (8) children, were among the Palestinian civilians.

However, in reality, there remains a practical difficulty in proving the intent to destroy on the part of Israeli officials if they were to be tried on these charges before the International Criminal Court. It is likely that they could be acquitted, as was the case with the accused in the Yugoslavia trials. The main dilemma in this regard revolves around starting to investigate the nature of the intent to destroy and determining its criteria. This is because in most cases, there is no written evidence of the intent to destroy among those who carried out policies and high-level orders. In this regard, the Temporary International Criminal Tribunal for Rwanda in the case of "Jean-Paul Akayesu" saw that the intent to destroy can be inferred from the statements and actions of the accused or from the collective actions committed by a group to which they belong. However, this does not negate the necessity of the existence and presence of an organized plan or organized attacks aimed at destroying any group, as the physical acts

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<sup>137</sup> It should be noted that the number of casualties recorded by Amnesty International for the Palestinian civilian casualties is higher than the number provided by the United Nations Office for the Coordination of Humanitarian Affairs. This difference in numbers is not solely based on the analysis of data from the mentioned office but also includes information collected by the organization through interviews conducted in Gaza and remotely, as well as reports from Israeli and Palestinian media sources and official data from Palestinian armed groups. Page 6

that make up the crime of genocide must come in the form of a systematic pattern of behavior against the targeted group or with the intent to destroy it<sup>138</sup>.

Despite the fact that the crime of genocide gained international recognition, placing it within the realm of international customary law, imposing obligations on the international community as a whole, its widespread application was initially limited. Its application did not extend beyond United Nations General Assembly Resolution 37/123, which described the Sabra and Shatila massacre as genocide in 1982, and the International Court of Justice's decision in the Bosnia and Herzegovina v. Serbia case in 1993. Therefore, the prosecution of the crime of genocide was delayed for a long time until the late 1990s when resolutions related to this crime began to be issued by temporary criminal courts, such as the decisions in the Radislav Krstic case.<sup>139</sup>

## **2- War Crimes:**

According to the Rome Statute, as stated in Article 8(2), war crimes for the purpose of this statute mean: "a) Serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts committed against persons or property protected under the provisions of the relevant Geneva Conventions; b) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts committed against persons or property protected under the provisions of the relevant Geneva Conventions."

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<sup>138</sup> Dr. Fida Najib Mohammad, The International Criminal Court Towards International Justice, previous source, page 145

<sup>139</sup> Ibid, P: 148

Based on the above, war crimes can be defined as any deliberate unlawful act committed by one or more individuals in the armed forces of a state against wounded, sick, shipwrecked, or prisoners of war, or against civilians belonging to another party to the conflict, which constitutes a violation of the rules of international humanitarian law. These rules include Article 50 of the Second Geneva Convention concerning wounded and sick members of the armed forces at sea, and Article 130 of the Third Geneva Convention relating to the treatment of civilian persons in time of war. The violations in question encompass intentional killing, torture, inhuman treatment, wide-scale appropriation of property without military necessity and in violation of the law, and the deliberate launching of attacks with knowledge that such attacks will cause incidental loss of life, injury to civilians, or extensive damage to civilian objects.<sup>140</sup>

Considering these texts of the crimes mentioned in Article 8(2) of the statute, without going into the details of each aspect of these crimes, it becomes clear that there are two conditions that must be met to prove the existence of these crimes: first, there must be an armed conflict, and second, these crimes must be committed within the context and as a result of this conflict, as fully exemplified by what happened in the Gaza Strip. Israel's occupation of Palestinian territories represents an international armed conflict, and the crimes that occurred in the Gaza Strip were a result of this deliberate and planned attack by the Israeli army.<sup>141</sup>

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<sup>140</sup> Dr. Mustafa Ahmed Fouad, *International Law, International Criminal Law, Part Six*, Faculty of Law Printing House, Tanta University, 2014, page 137

<sup>141</sup> Dr. Ikhlas Nasser, *The Effectiveness of the Principle of Judicial Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation*, previous source, page 22

## - **The Criminal Nature of War Crimes**

The Rome Statute primarily relies on the 1949 Geneva Conventions and the two Additional Protocols to elucidate the concept of war crimes. Article 8(2) concerning war crimes is predicated on the specific circumstance of an armed conflict, whether international or non-international. The International Criminal Tribunal for the Former Yugoslavia in the Tadic case recognized, "We are faced with an armed conflict whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Consequently, it is widely agreed upon that acts subject to prosecution for war crimes are those committed during armed conflicts, whether internal or international. The crimes characterized by this description occur in the context of armed conflict. Subsequently, acts committed during non-international armed conflicts were later included within internationally codified crimes.<sup>142</sup> This development was facilitated by Article 8(2) and supported by judicial decisions and practical practice. When the International Criminal Tribunal for the Former Yugoslavia addressed war crimes that occurred within Yugoslavia, it acknowledged and affirmed its jurisdiction as long as these crimes fell within the provisions of the Geneva Conventions, even though they did not rise to the level of customary international law.<sup>143</sup>

Where the court ultimately arrived regarding the applicability of all acts falling within the concept of war crimes to non-international armed conflicts was based on the provisions of Article 3 of the Geneva Conventions, in addition to Article 13 of the Second Additional Protocol. Article 3 explicitly prohibits certain acts in cases of armed conflicts that lack an international character within the territories of one of the High

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<sup>142</sup> United nation: Prosecutor Vs Dusko Tadic , case no. It- 94-1-AR72, judgment of 7 may 1997  
<https://www.icty.org/en/cases/judgement-list#1997> (Cited on 9/4/2023)

<sup>143</sup> International criminal tribunal for the former yugoslavia: 2 October , Tadic, P, 51

Contracting Parties. These prohibited acts include attacks on life and physical integrity, particularly killing in all its forms, mutilation, cruel treatment, torture, taking hostages, outrages upon personal dignity, in particular humiliating and degrading treatment, and sentencing and execution without prior trial by a constituted legally constituted court, as well as affording all judicial guarantees which are recognized as indispensable by civilized peoples. The aforementioned article encompasses all forms and types of war crimes that are applicable to armed conflicts, whether internal or international.

Moreover, in affirming that war crimes committed in internal armed conflicts can fall under the jurisdiction of the International Criminal Court, the Court clarified that this extends not only to conflicts confined between a state and internal factions or groups but also to conflicts between organized armed groups within a single state. This confirms that war crimes occurring in internal armed conflicts can be subject to the jurisdiction of the International Criminal Court. Additionally, it highlights that the jurisdiction of the Court is not limited to what is stated in Article 8(2) of the Rome Statute, based on a more in-depth analysis of this issue. The Rome Statute stipulates that the Court's jurisdiction is complementary to the jurisdiction of national courts, meaning that national courts have primary jurisdiction, but Article 17 of the Statute emphasized the Court's jurisdiction when a state that has jurisdiction is unwilling or unable to carry out investigations or prosecutions.<sup>144</sup>

However, what is stated in Article 17 does not preclude the involvement of the United Nations Security Council in referring criminal acts to the Court under Chapter VII of the United Nations Charter. The Council has the authority to refer conflicts with war crimes to the International Criminal Court if it becomes apparent to the Council that one or

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<sup>144</sup> Dr. Mustafa Ahmed Fouad, International Law, International Criminal Law, previous source, page 142



more such crimes have been committed, or if the Prosecutor of the Court decides that there is a reasonable basis to initiate an investigation. Consequently, it is prohibited for the parties to the conflict who have jurisdiction over the crimes under consideration to take any action, and therefore, if the Security Council deems it appropriate, it can refer an internal armed conflict with war crimes to the International Criminal Court, bypassing the primary jurisdiction of domestic courts, should the Prosecutor decide so. This interpretation has been affirmed by the International Criminal Tribunal for the Former Yugoslavia, considering it as a fundamental and logical authority to which it leans. Hence, war crimes committed internally are subject to the jurisdiction of the International Criminal Court if they are referred by the Security Council or if the Prosecutor decides accordingly.<sup>145</sup>

Based on this, it is necessary to detail the war crimes committed against civilians in the Gaza Strip during the Israeli military attack in 2022 by explaining the material and moral aspects of these crimes as follows:

- The Material Element and Moral Element of the War Crime Involving Attacks on Civilians or Against Civilian Individuals who do not Directly Participate in Hostilities according to Article (8/2/b/1) and the War Crime of Willful Killing as one of the Serious Violations of the Geneva Conventions, as stipulated in Article (8/2/a/1) of the Rome Statute:

Referring to the common Article 2 of the Four Geneva Conventions, these conventions apply during declared wars or any other armed conflicts, and the acts constituting this crime must be related to the armed conflict itself. States have been divided between supporting and opposing the jurisdiction of the International Criminal Court over war

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<sup>145</sup> Dr. Mustafa Ahmed Fouad, The previous source, page 143

crimes committed as part of a plan or policy on a wide scale. Therefore, Article 8 of the Rome Statute has been used to ensure the Court's jurisdiction in prosecuting individual war crimes, with priority given to those crimes that occur on a wide scale or occur as part of a plan.<sup>146</sup>

The material element of the war crime involving attacks on civilians or against civilian individuals not directly participating in hostilities, as specified in Article (8/2/b/1), is derived from various texts. Article 51(2) of the First Additional Protocol to the Geneva Conventions states that civilians, as well as civilian persons, shall not be the object of attack, and acts of violence and threats aimed primarily at spreading terror among civilians are prohibited.

Additionally, Article 85(3) of the same Protocol states that certain acts, including making civilians or individuals the object of an attack, constitute serious violations of the Protocol if committed willfully. The term "attacks" is defined in Article 49(1) as "acts of violence against the adversary." The concept of civilians referred to as the victims of the crime is defined in Article 50 as anyone who does not belong to categories of persons referred to in paragraphs 1, 2, 3, and 6 of Article 4 of the Third Convention and Article 43 of this Protocol. If there is doubt about whether a person is a civilian or not, that person is considered a civilian. All civilian persons fall under the category of civilians, and civilians do not lose their civilian status even if there are individuals among them who do not meet the definition of civilians.

From the above, it can be inferred that civilians enjoy comprehensive protection during armed conflicts unless they are directly participating in hostilities. This is in accordance

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<sup>146</sup> Dr. Fida Najib Mohammad, *The International Criminal Court Towards International Justice*, previous source, page 155

with Article 51(3) of the Protocol, which states that civilian persons enjoy the protection provided by this section as long as they do not take a direct part in hostilities.

### **3.3.3 The Material Element of the War Crime of Willful Killing as one of the Serious Violations of the Geneva Conventions (Article 8/2/a/1) of the Rome Statute**

The basis for this crime is found in Article 147 of the Fourth Geneva Convention, which defines serious violations as including certain acts if committed willfully against protected persons or protected property under the Convention. Willful killing is one of these acts.

### **3.3.4 The Moral Element of these Crimes as Adopted by the Member States in the Rome Statute on September 9, 2002:**

The moral element includes a detailed explanation of Articles 6, 7, and 8. Article 8(2)(b)(1) concerning the war crime involving attacks on civilians or against civilian individuals not directly participating in hostilities specifies that the perpetrator of the crime must intentionally make civilians or civilian individuals not taking direct part in hostilities the object of the attack. To establish the moral element of this crime, it is necessary to demonstrate the perpetrator's intent and willful action against civilians who are the target of the attack.

In this regard, the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia has clarified the moral element in relation to the unlawful attack on civilians in the case of Kordic and Mario Cerkez. The Prosecutor's Office explained that to establish the moral element of this crime, it is required that: "1- the civilian character of the persons or individuals killed or seriously injured is established, 2- the attack was

intentionally and deliberately directed against civilian populations or civilian individuals." The same principles apply to the moral element of the war crime of willful killing as a serious violation of the Geneva Conventions.<sup>147</sup>

### **3.3.4 The Legal Conditions that Must Be Met for the Application of War Crimes to the Facts of the Attack on Gaza:**

In light of what has been previously discussed, it becomes clear that certain legal conditions must be met for the description of a war crime to be applied to the events that occurred during the Israeli attack on Gaza in 2022. These conditions can be outlined as follows:

#### **1- Existence of an International or Internal Armed Conflict:**

According to the rules of public international law, the withdrawal of the Israeli army from Gaza in 2005 was considered a partial redeployment and withdrawal of occupation forces from the area, rather than a complete termination of the occupation of Gaza. This is because the withdrawal only involved the evacuation of Israeli forces from Gaza's territory and did not extend to include all aspects of the Gaza Strip. Palestinians did not regain full sovereignty over Gaza due to Israel's continued control over Gaza's airspace, maritime access, and control of the border crossing between Gaza and Egypt. Consequently, considering Gaza as presently under occupation, the relationship of these lands with the State of Israel remains subject to the rules of international humanitarian law governing occupation.<sup>148</sup>

It is worth noting that this condition has been affirmed by the judges of the International Criminal Court in the case of the former Congolese militia leader Thomas Lubanga,

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<sup>147</sup> Dr. Abdul Rahman Mohammed Ali, *Israeli Crimes During the Aggression on the Gaza Strip*, previous source, page 15

<sup>148</sup> *Ibid* p: 82

who was accused of committing war crimes in northeastern Democratic Republic of the Congo between 2002 and 2003. In the context of discussing the nature of international conflicts, the judges found that the Rome Statute and the elements of crimes contained therein did not provide a definition of international armed conflict. Therefore, they referred to Article 21(1)(b) and Article 21(3) of the Rome Statute, which deal with the application of international treaties and the principles of international law concerning armed conflict. The judges also relied on the Common Article 2 of the Geneva Conventions, which states that the Conventions apply not only in times of declared war but also in other situations of armed conflict. The Conventions also apply in cases of partial or total occupation of a High Contracting Party's territory, even if the occupation meets no armed resistance.<sup>149</sup>

Based on the above, the International Criminal Court considered that a conflict is international if it occurs between two or more states. This concept also extends to encompass partial or total occupation of the territory of another state.<sup>150</sup>

## **2- Existence of a Relationship Between the Crimes Committed in Gaza and the Armed Conflict:**

To qualify the events in Gaza in 2022 as war crimes, it must be legally proven that these crimes occurred within the context of an international armed conflict. This condition was affirmed in the case of Germain Katanga and Mathieu Ngudjolo by the International Criminal Court, where it was stated in the decision: "For a crime to be considered a war crime, the crimes alleged to have been committed during or in

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<sup>149</sup> Icc-01/04-01/06 , 28/1/2007 The Prosecutor v. Thomas Lubanga Dyilo Available at web site: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf> (Cited on 9/4/2023)

<sup>150</sup> ICC-01/04-01/07: The Prosecutor v. Germain Katanga, Available at web site: [https://www.icc-cpi.int/case-records?f%5B0%5D=cr\\_case\\_code%3A1135&f%5B1%5D=cr\\_case\\_doc\\_type%3A44&f%5B2%5D=type\\_of\\_dec%3A785](https://www.icc-cpi.int/case-records?f%5B0%5D=cr_case_code%3A1135&f%5B1%5D=cr_case_doc_type%3A44&f%5B2%5D=type_of_dec%3A785) (Cited on 9/4/2023)

connection with an attack must occur in the context or in relation to an armed conflict of an international character."

The Rome Statute and the elements of crimes contained therein do not provide a definition of the term "international armed conflict." However, the judges in the aforementioned case referred to the Tadić case regarding crimes in the former Yugoslavia. In that case, the court stated: "There is an armed conflict whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. ... In determining whether an armed conflict exists, the Court shall look into the factual circumstances. ... It shall consider the following criteria: that the fact that there is armed fighting, that the armed conflict has a minimum degree of intensity, that the parties involved in the conflict exhibit a certain level of organization, and that the armed conflict occurs in the territory of a State party."<sup>151</sup>

### **3- The Attackers Must Have Knowledge and Awareness of the Existence of an Armed Conflict**

This is the third legal condition related to the presence of war crimes. It is primarily related to the mental element of the crimes being prosecuted, which requires that the attackers have sufficient knowledge and awareness of the actual circumstances confirming the existence of the armed conflict. The judges of the International Criminal Court also emphasized this condition in the Germain Katanga and Mathieu Ngudjolo case, stating: "Based on the evidence referred to, the judges of the Court found that there was a belief that members of the militias and their leader Germain Katanga and

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<sup>151</sup> The Prosecutor v. Thomas Lubanga Dyilo, Op.Cit, Para, 381

Mathieu Ngudjolo were well aware of the existence of an armed conflict and that the attack was part of a joint strategic plan to gain control of the Bogoro village<sup>152</sup>

Applying this to the Palestinian situation, Israeli soldiers were well aware of and had sufficient knowledge that Gaza and the West Bank, as occupied territories, formed the core of the conflict with the State of Israel. Therefore, there is no doubt that the intent to kill and attack civilians systematically, perpetrated by members of the Israeli military, demonstrates the intent to commit these crimes.<sup>153</sup>

### **3.3.5 Facts Indicating the Commission of War Crimes During the Attack on the Gaza Strip**

The International Amnesty Organization documented two attacks carried out by the Israeli forces that may amount to war crimes. This is due to the fact that these attacks deliberately targeted civilians or civilian objects, or because these attacks were indiscriminate. The International Amnesty Organization conducted a thorough investigation into the killing of a five-year-old girl named Ala'a Qadoun, who was killed in an Israeli airstrike on the Shuja'iya neighborhood in Gaza City on August 5, 2022. It also investigated the killing of Layan Al-Shaer, an 11-year-old girl who died on August 11, 2022, as a result of injuries sustained in an Israeli airstrike on Khan Yunis on August 5.<sup>154</sup>

Another incident that points to serious war crimes committed by the Israeli occupying forces against civilians in Gaza occurred on August 5, 2022. A shell hit the home of the

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<sup>152</sup> CC-01/04-01/07-709, 29 August 2008 Situation in the Democratic Republic of the Congo The Prosecutor v. Germain Katanga, Available at web site: <https://www.icc-cpi.int/court-record/icc-01/04-01/07-709> (Cited on 9/4/2023)

<sup>153</sup> Dr. Abdul Rahman Mohammed Ali, Israeli Crimes During the Aggression on the Gaza Strip, previous source, page 85

<sup>154</sup> Amnesty International, Evidence of War Crimes During the Israeli Attack on Gaza in August 2022, previous source, page 8

Al-Amour family in the village of Al-Fukhari, east of Khan Yunis in the southern Gaza Strip, resulting in the death of Duniya Al-Amour, aged 22, and injuring her mother. A field worker contracted by the International Amnesty Organization conducted interviews with members of the Al-Amour family in their home on August 18 and visited the area again on August 20, taking photos of the damage to the house. An expert from the International Amnesty Organization analyzed the photos taken by the field worker and identified the projectile as a tank shell of the type AM 339 with a caliber of 120mm. This shell is described as a "multi-purpose tank shell with high explosiveness" and can cause a high probability of casualties and fatalities with minimal collateral damage. Neither the Palestinian Islamic Jihad nor any other Palestinian armed group possesses this type of ammunition. Therefore, the Israeli army is the only party to the conflict that could have fired it. The damage to the house indicates that the projectile created a hole in one of its walls.<sup>155</sup>

In light of the above, Israel's shelling of the Al-Amour family home constitutes a deliberate and direct attack on civilians or a civilian target. Deliberate targeting of attacks against civilians not taking direct part in hostilities and civilian objects constitutes a war crime under the Rome Statute of the International Criminal Court, including the crimes of murder, torture, and ill-treatment as specified in the Geneva Conventions. These crimes apply to all international and internal armed conflicts. The underlying principle is that the criminal behavior in international crimes during armed conflicts includes actions carried out by the accused in relation to the victim, whether intentional or by negligence. The intentional killing as specified constitutes the war

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<sup>155</sup>Ibid p: 110



crime of willful killing, regardless of the means employed, as long as this act occurs within the context of an armed conflict.

Even if we were to assume, for the sake of argument, that the Israeli forces struck the house due to targeting Palestinian military sites or equipment in the area or deliberately based on false intelligence, they were still required to carry out this attack while taking all possible precautions to minimize harm to civilians and civilian property to the greatest extent possible. Attacks that do not distinguish between military objectives and civilians, as well as civilian objects, are indiscriminate attacks. Launching indiscriminate attacks that may lead to loss of life or injuries among civilians or damage to civilian objectives unequivocally constitutes a war crime under customary international law.<sup>156</sup>

Regarding the application of what occurred by the Israeli army during the 2022 attack on the Gaza Strip, it becomes clear that its members committed the crime of willful killing as one of the grave breaches of the Geneva Conventions and as specified under Article 8(2)(a)(i) of the Rome Statute, during their attack on Gaza in 2022.

Furthermore, the legal conditions established by the International Criminal Court in many of its judgments and decisions are met. The existence of an armed conflict, whether international or non-international, regardless of the legislative gap in the Rome Statute regarding this matter, has been affirmed by the court. It has been established that partially occupied territories such as Gaza fall under the same rules as fully occupied territories. The second of these conditions is that there must be a link between the crimes committed in Gaza and the armed conflict, which is also present according to the International Criminal Court's jurisprudence, especially concerning the former

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<sup>156</sup> Ibid p: 111

Yugoslavia. The third of these legal conditions is that these attacks must have been carried out with knowledge and awareness by the attackers that there is an armed conflict. In relation to this condition, it is present without a doubt, as there is substantial evidence demonstrating the Israeli army's intention to directly target and kill civilians in Gaza. Therefore, these crimes are a strong basis for triggering the jurisdiction of the International Criminal Court, reviewing them, and prosecuting those responsible from Israel.

### **3- Crimes Against Humanity**

The International Criminal Court has jurisdiction to consider acts that constitute crimes against humanity whether they occur in times of peace or war.<sup>157</sup> This jurisdiction applies to acts committed as part of a widespread or systematic attack directed against any civilian population. The International Criminal Tribunal for the former Yugoslavia defined crimes against humanity as acts committed during an armed conflict, whether international or non-international. The text of Article 5 of the Court's statute implies that such crimes are committed within a specific context, namely during an armed conflict. However, the Rome Statute for the International Criminal Court for Rwanda expanded the definition to include acts committed within a general and systematic attack against civilian populations based on national, political, ethnic, or religious affiliation.

Nevertheless, the aforementioned distinction is flawed because it fails to recognize that crimes against humanity can occur in times of peace. Applying this result exclusively to times of armed conflict would legally permit forms of humiliation and slavery during times of peace. Therefore, it is not necessary to restrict the application of crimes against

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<sup>157</sup> Refer to Article 7 of the Rome Statute of the International Criminal Court

humanity, their occurrence, and their suspension only to times of armed conflict, and it is essential to extend the concept of crimes against humanity to encompass situations occurring during times of peace as well.<sup>158</sup>

- **Facts Indicating the Commission of Crimes Against Humanity during the Attack on the Gaza Strip:**

The crimes of shelling and aggression against Palestinians and their property and homes during the 2022 attack on the Gaza Strip resulted in the destruction or partial damage of over 1,700 residential units and the displacement of around 450 Palestinians. These actions are considered crimes against humanity, committed as part of a widespread attack in which Israeli soldiers participated with their armored vehicles and aircraft. The premeditated nature of this attack against civilian populations in Gaza is evident from the scale of the losses inflicted on civilians compared to members of the Jihad movement.<sup>159</sup>

The repeated targeting of civilians in Gaza through coordinated military attacks, with the 2022 attack being the latest, following previous attacks, including the heinous 2008 attack that resulted in the deaths of 1,400 Palestinians and the complete destruction of neighborhoods. This pattern indicates that the Israeli army pursues a deliberate policy aimed at targeting and killing innocent civilians, necessitating the accountability of all criminal leaders for these crimes, which fall under the jurisdiction of the International Criminal Court.<sup>160</sup>

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<sup>158</sup> Dr. Mostafa Ahmed Fouad, International Law, International Criminal Law, previous source, page 184

<sup>159</sup> Report No. (2) Summary of Developments issued by the United Nations Office for the Coordination of Humanitarian Affairs, previous source

<sup>160</sup> Dr. Abdulrahman Mohamed Ali, Israeli Crimes During the Aggression on the Gaza Strip, previous source, page 100

### **3.3.6 The Criminal Nature of Crimes Against Humanity**

Upon close examination of Article 7 of the Rome Statute, it becomes clear that it reflects the subsequent developments in crimes against humanity since their first appearance during the Armenian Massacre in Turkey in 1915. These crimes evolved in 1945 when they were separated from armed conflicts. However, the United Nations Security Council introduced an unwarranted and contradictory requirement that crimes against humanity must occur within an international or non-international armed conflict in the statute of the International Criminal Tribunal for the former Yugoslavia. At the same time, no such requirement was imposed when establishing the International Criminal Tribunal for Rwanda. The Rome Statute, on the other hand, initially sets out the acts constituting crimes against humanity in Article 7 and places them in a special context, elevating them to the international level. This means that attacks do not constitute crimes against humanity unless they occur as part of a defined policy or a deliberate plan aimed at a large number of civilian victims, distinguishing them from war crimes that apply to military personnel.<sup>161</sup>

According to the aforementioned facts that occurred during the military attack on the Gaza Strip, we will attempt to provide a detailed description of some crimes against humanity committed in the Gaza Strip in 2022, namely the crime of deliberate killing and the legal conditions that must be met as follows:

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<sup>161</sup> Dr. Fida Najib Mohamed, *The International Criminal Court Towards International Justice*, previous source, page 149

### **3.3.7 The Material and Moral Elements of the Crime of Deliberate Killing as A Crime Against Humanity Under Article 7(1)(A) of the Rome Statute**

The material element of the crime against humanity is based on a series of serious acts that harm one of the essential interests of a person or a group of humans bound by a common political, racial, ethnic, or religious bond. The victims of this crime belong to a single religious creed, political ideology, nationality, or share a common ethnic identity, both male and female. To complete the material element of this crime, the acts constituting this element must occur within the framework of a widespread or systematic attack directed against a civilian population. This attack is intended to include the repetition of criminal acts against any civilian population tied by the aforementioned bonds as part of a state or organizational policy responsible for carrying out such attacks.<sup>162</sup>

#### **As for The Moral Element of this Crime, As Clarified by Article 30, it is Necessary for the Perpetrator to have the Required Intent.**

From a legal perspective, it is evident that to establish a crime against humanity, the element of widespread or systematic attack must be present, and the perpetrator must have knowledge of the attack, meaning that they understand and comprehend that their actions are part of or intended to be part of a widespread or systematic attack against civilian populations. Knowledge of the attack can be inferred from the surrounding circumstances, such as the position, role, and rank of the accused, their involvement in the military campaign, their presence at the scene of the crime, and their statements.<sup>163</sup>

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<sup>162</sup> Dr. Tarek Dafallah, Crimes Against Humanity Between Criminal Law and the Rome Statute, Al-Adl Journal, Issue: 33, Year: 13, 2011, page 204

<sup>163</sup> Article 30 of the Rome Statute states: "1- Unless otherwise provided, a person shall not be criminally responsible if, at the time of that person's conduct: (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or wrongfulness of the person's conduct, or to control the person's conduct to conform to the requirements of the law; or (b) The person is

Based on this, it is clear that both the material and moral elements of the crime of deliberate killing as a crime against humanity are satisfied when the conditions of a widespread or systematic attack are met. In the case of the Israeli military attack on Gaza in 2022, there is substantial evidence and reports from international organizations confirming systematic killings that meet the legal requirements for a crime against humanity. These crimes occurred against a group of individuals bound by common ties, namely the residents of Gaza.<sup>164</sup> The second condition, a widespread or systematic attack, is met given the repetition of similar acts in multiple attacks on Gaza, with the third condition being the commission of these acts as part of Israeli state policy towards the Palestinian people in various locations within Palestinian territory, all of which align with the requirements of the Rome Statute of the International Criminal Court.<sup>165</sup>

### **3.3.8 Legal Conditions Required for Crimes Against Humanity to Apply to the Events of the Attack on Gaza**

In accordance with the text of Article 7(1) of the Rome Statute, the legal conditions for crimes against humanity require that they be committed on a widespread or systematic basis, and that the act of perpetration is directed against any group of civilian populations, in addition to the element of policy. The following is an explanation and elaboration of the most important of these conditions to determine the extent to which

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in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or wrongfulness of the person's conduct, or to control the person's conduct to conform to the requirements of the law. 2- For the purposes of this article, it is understood that the term 'intoxication' does not include the voluntary intoxication, in which case the provisions of paragraph 1 apply

<sup>164</sup> ICC: No.: ICC-01/04-01/07, 30/9/2008M PRE-TRIAL CHAMBER I, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, v. Germain Katanga and Mathieu Ngudjolo Chui, Para, 401. Available at web site: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008\\_05172.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF) (Cited on 9/5/2023)

<sup>165</sup> Dr. Abdul Rahman Mohammed Ali, Israeli Crimes During the Aggression on the Gaza Strip, Previous Source, Page 91

these conditions apply to what happened during the military attack on Gaza in 2022, as follows:

### **1- Committing the Act of Attack on a Widespread or Systematic Basis**

According to Article 7(1), it is required that acts constituting crimes against humanity be committed within the framework of a widespread or systematic attack, meaning that these crimes are committed regularly or on a widespread basis according to an established plan or policy. This is what the next paragraph of the same article mentioned when it stated that the attack must be based on a behavioral pattern carried out in accordance with a state or organizational policy that calls for or promotes such attacks.

Although this condition indicates that crimes against humanity can occur in times of peace or war, it is important to note that there doesn't have to be the use of physical force for an act to be considered a crime against humanity. This approach was followed by the judges of the International Criminal Tribunal for the Former Yugoslavia, who emphasized that an attack could be non-violent in nature, such as the imposition of a policy of racial cleansing. Additionally, the concept of an attack should involve ill-treatment of civilian populations. In practical terms, it is difficult to separate these elements, as a widespread attack targeting a large group of civilians inherently relies on some form of planning.<sup>166</sup>

### **2- The Act Subject to Criminalization Must be Directed Against any Group of Populations**

Article 7(2)(a) defines the concept of a directed attack within the context of crimes against humanity as follows: "A course of conduct involving the multiple commission of acts referred to in paragraph 1 (murder, extermination, and others) against any

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<sup>166</sup> Dr. Abdul Rahman Mohammed Ali, The Previous Source, Page 93

civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack."

This definition underscores that the acts must be committed repeatedly against any group of civilian populations in line with a state or organizational policy that calls for or promotes such an attack.

It's worth noting that the term "directed act" within the context of crimes against humanity refers to actions directed against a group of civilian populations and not against specific individuals. However, this doesn't mean that all civilian populations in a certain geographic area must be the target of the attack. Instead, this condition emphasizes the collective nature of the attack against civilian populations as a group. At the same time, it doesn't exclude individual criminal acts or actions from the concept of crimes against humanity.<sup>167</sup>

In light of the above and based on the events of the military attack on Gaza in 2022, it becomes evident that the Israeli army committed crimes against humanity against the population of Gaza. This is established by meeting the aforementioned legal conditions required by the Rome Statute, as follows:

Committing acts of aggression against Palestinians and their property and infrastructure in the Gaza Strip through airstrikes during the attack on the territory. These acts occurred within a widespread and systematic attack that involved elements of the occupying army and had been planned for some time to target specific objectives within the Gaza Strip. The pretext for these attacks was the targeting of members of Islamic Jihad, as evidenced by the high number of civilian casualties compared to members of Islamic Jihad.

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<sup>167</sup> Ibid p: 95



The repetition of targeting and exposure of civilian populations, resulting in the deaths of approximately 49 people in Gaza. This indicates Israel's policy aimed at destroying neighborhoods in the Gaza Strip by repeatedly launching such attacks at intervals. Prior to this attack, there were several other attacks, such as the one in 2008, and others. Therefore, it can be inferred from the aforementioned facts that the necessary legal conditions are met to initiate criminal proceedings under the Rome Statute against Israeli officials and leaders to hold them accountable for the crimes against humanity and various types and patterns of war crimes they have committed.

### **3.3.9 The Israeli Aggression on Gaza Strip in 2023**

The researcher believes that with the conclusion of the first section related to the criminal description of the facts of the military attack and the criminal nature of the actions committed during the Israeli military aggression on the Gaza Strip, it is imperative to address the facts of the recent Israeli aggression carried out by Israel, the occupying authority, on the Gaza Strip and its criminal nature on October 9, 2023. Especially since the occupying force declared war on the sector on that date, committing acts of genocide, war crimes, and crimes against humanity against Palestinian civilians after completing this thesis. The researcher could not ignore mentioning it, noting that the thesis's trajectory will not be affected by the timeline of the Israeli aggression on the Gaza Strip, considering it an ongoing international crime, as we mentioned earlier. Still, we specifically discuss below the legal mechanisms for holding Israel accountable within the framework of the Rome Statute establishing the International Criminal Court, which applies to the aggression of 2023.

### **3.3.10 Criminal Description of the Israeli Military Attack on Gaza Strip 2023**

As the Israeli blockade continues to be imposed on the Gaza Strip, and the living conditions of Palestinian citizens are further constrained through the control and surveillance system imposed by the occupying forces on the air, land, and sea crossings of the Strip, turning Gaza into a large and besieged prison as mentioned earlier, and in continuation of its blatant violations and breaches of various international norms, Gaza witnessed Israeli military attacks on October 8. The attacks included air, land, and sea bombardments, targeting various sites and objectives in Gaza, including civilian structures such as homes, buildings, schools, and hospitals. The systematic destruction of the infrastructure in Gaza resulted in Israel committing international crimes according to the Geneva Conventions and the Rome Statute. This necessitates recounting the facts of this inhumane attack and its consequences by dividing this section into two consecutive Subsections.

**Subsection1: The Events of the Israeli Military Attack on the Gaza Strip in 2023 and Its Consequences.**

**Subsection2: The Criminal Nature of the Actions Committed During the Attack on Gaza in Light of the Rome Statute.**

**Subsection1: The Events of the Israeli Military Attack on the Gaza Strip in 2023 and Its Consequences**

On October 8, 2023, Israel declared war against the Gaza Strip, particularly against (Hamas). Israeli aircraft conducted military airstrikes on multiple sites in the Gaza Strip, covering various regions of the territory. In response, several rockets were launched from various locations across the Gaza Strip towards Israel. The following provides an

explanation of the facts of this attack through a chronological sequence of events related to this aggression, highlighting some instances of intentional killing of families in the Gaza Strip. This is done by dividing this section into two parts, as follows:

**A - Timeline of the Israeli Military Attack on the Gaza Strip:**

Following the entry of Palestinian resistance fighters into settlements adjacent to the Gaza Strip, Israel, the occupying force (in a state of war), announced what is known as the "Cabinet for Security Affairs," approving Prime Minister Benjamin Netanyahu's decision to declare a state of war against Gaza under Article 40 of the Basic Law of the Government. What does the declaration of a state of war mean? The approval came amid the continuation of the "Operation Al-Aqsa Storm" and the direct clashes between the Al-Qassam Brigades - the military wing of the Islamic Resistance Movement (Hamas) - and the Israeli army at several points and settlements. The decision states, "War was imposed on Israel at six o'clock on the morning of October 7th in a bloody attack from the Gaza Strip." In the existing situation, the Mini-Cabinet for Security Affairs authorized Prime Minister Benjamin Netanyahu to declare war, and he communicated this decision to the Knesset and the Foreign Affairs and Security Committee in the Knesset.<sup>168</sup>

As a result, the Minister of the Israeli Defense Forces, Yoav Gallant, announced in a press conference broadcasted on all news channels the following: "We are imposing a complete blockade on the Gaza Strip—no electricity, no food, no water, and no fuel... everything is closed." Later on, the Minister of Energy in the occupying government,<sup>169</sup>

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<sup>168</sup> Look into this matter through Al Jazeera News website via the online platform. <https://www.aljazeera.net/news/2023/10/8/%D9%85%D8%A7%D8%B0%D8%A7-%D9%8A%D8%B9%D9%86%D9%8A-%D8%A5%D8%B9%D9%84%D8%A7%D9%86-%D8%AD%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D9%81%D9%8A-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D8%9F>

<sup>169</sup> Ibid

"Katz," ordered the national water company "Mekorot" to immediately cut off water supplies to the Gaza Strip, according to a statement from the minister's office. The minister stated, "Things will not be as they were before."<sup>170</sup>

The Israeli intensive bombardment on the Gaza Strip began with the sound of powerful explosions in the city of Gaza. Shortly afterward, the Israeli occupying army announced that it had carried out and is currently conducting airstrikes on the Gaza Strip. The Israeli army then declared the initiation of a military campaign called "Operation Iron Swords" against the Hamas movement in the Gaza Strip.

According to the UNRWA (United Nations Relief and Works Agency for Palestine Refugees) report number 24 on the situation in the Gaza Strip and the West Bank (including East Jerusalem) until November 6, 2023, approximately 1.5 million people have been displaced across various parts of the Gaza Strip<sup>171</sup> due to the intensity of aerial, ground, and naval bombardments, targeting civilians and civilian infrastructure.

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<sup>170</sup> Look into this through France 24 News Chanel via online website

<https://www.france24.com/ar/%D8%A7%D9%84%D8%B4%D8%B1%D9%82-%D8%A7%D9%84%D8%A3%D9%88%D8%B3%D8%B7/20231009-%D8%A7%D9%84%D8%AC%D9%8A%D8%B4-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A-%D9%8A%D9%82%D8%B1%D8%B1-%D9%81%D8%B1%D8%B6-%D8%AD%D8%B5%D8%A7%D8%B1-%D9%83%D8%A7%D9%85%D9%84-%D8%B9%D9%84%D9%89-%D8%BA%D8%B2%D8%A9-%D9%8A%D8%B4%D9%85%D9%84-%D8%AD%D8%B8%D8%B1-%D8%AF%D8%AE%D9%88%D9%84-%D8%A7%D9%84%D8%BA%D8%B0%D8%A7%D8%A1-%D9%88%D8%A7%D9%84%D9%88%D9%82%D9%88%D8%AF>

<sup>171</sup> UNRWA Report No. 24 on the situation in the Gaza Strip and the West Bank (including East Jerusalem), look Via their website.

<https://www.unrwa.org/ar/resources/reports/%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D8%A7%D9%84%D8%A3%D9%88%D9%86%D8%B1%D9%88%D8%A7-%D8%B1%D9%82%D9%85-24-%D8%AD%D9%88%D9%84-%D8%A7%D9%84%D9%88%D8%B6%D8%B9-%D9%81%D9%8A-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9-%D9%88%D8%A7%D9%84%D8%B6%D9%81%D8%A9-%D8%A7%D9%84%D8%BA%D8%B1%D8%A8%D9%8A%D8%A9-%D8%A7%D9%84%D8%AA%D9%8A-%D8%AA%D8%B4%D9%85%D9%84-%D8%A7%D9%84%D9%82%D8%AF%D8%B3-%D8%A7%D9%84%D8%B4%D8%B1%D9%82%D9%8A%D8%A9>

## **B- Casualties and Injuries Toll, and Examples of Israeli Army Targeting of Civilians During the Attack**

According to the detailed cumulative statistics from the Palestinian Ministry of Health regarding the Israeli aggression on the Gaza Strip up to the completion of writing this thesis, the total number of martyrs reached 10,328, including 3,155 men, 3,900 children, and 2,500 women, including pregnant women. The number of injuries reached 26,000, including 10,200 men, 8,950 children, and 6,020 women, with 2,300 individuals missing, including women, men, and children.

The total number of massacres against families, many of which were erased from civil records, reached 1,006 massacres, including 137 martyrs from medical crews. Sixteen hospitals and 62 health facilities went out of operation. The percentage distribution is as follows: the percentage of child martyrs is 41%, and the percentage of female martyrs is 25.6%.<sup>172</sup> Here are several examples of these violations:

### **1. Examples of Massacres, and Families Massacres:**

Various reports and news sources indicate that more than 50 entire families, totaling at least 600 individuals, have been completely erased from civil records. Additionally, 192 Palestinian families have lost 9-10 of their members, and 444 families have lost 2-5 of their members due to the occupation committing massacres by bombing houses with residents inside in various cities and camps in the Gaza Strip<sup>173</sup>. Among these are the Radwan, Zaarab, Al-Najjar, Alwan, Al-Nabhani, and Abu Al-Reesh families<sup>174</sup>. The

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<sup>172</sup> Look for more in Palestinian Ministry of Health Website.

<https://www.moh.gov.ps/portal/%d8%a7%d9%84%d8%b5%d8%ad%d8%a9-%d8%a7%d9%84%d8%a5%d8%ad%d8%aa%d9%84%d8%a7%d9%84-%d9%82%d8%aa%d9%84-9485-%d9%81%d9%84%d8%b3%d8%b7%d9%8a%d9%86%d9%8a%d8%a7%d9%8b-%d9%88%d8%a3%d8%b5%d8%a7%d8%a8-24173/>

<sup>173</sup> | Look for more in Wafa Website <https://wafa.ps/Pages/Details/81744>

<sup>174</sup> | Look for more in Al Ghad Chanel through Website:

<https://www.alghad.tv/%D8%A7%D8%AE%D8%AA%D9%81%D8%A7%D8%A1-%D8%B9%D8%A7%D8%A6%D9%84%D8%A7%D8%AA-%D9%85%D9%86->

Palestinian Minister of Health, Mai Alkaila, stated that 50 Palestinian families have been completely removed from civil records due to the continuous Israeli bombardment of the Gaza Strip. Alkaila added, in statements to Anadolu Agency, that the situation in the Gaza Strip is "dangerous and catastrophic on all levels."<sup>175</sup>

- **Anglican Hospital (Ahli Arab Hospital) Massacre:**

The Ahli Arab Hospital massacre, is a massacre committed by the Israeli occupation forces. The air force raided the Arab National Hospital "Al-Muadhmi" in the Zaitoun neighborhood, south of Gaza City, in the early hours of October 17, 2023. The Israeli airstrike violently hit the hospital courtyard where dozens of wounded, along with hundreds of civilian refugees, mostly women and children, were present. The Israeli massacre caused a real catastrophe, tearing apart the bodies of the victims and turning them into scattered and burnt remains. The hospital turned into a pool of blood<sup>176</sup>, with a total of 500 martyrs, including men, elderly individuals, women, and children who sought refuge in the hospital.

Dr. Fadel Naeem, the head of the orthopedic surgery department at Al-Muadhmi Hospital, who witnessed all the details, narrates: "The wounds suffered by the victims are incised wounds, indicating the use of a special type of bomb meant to kill the largest number of individuals." He further describes, "I saw the wounds as if knives had

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%D8%A8%D8%B3%D8%A8%D8%A8-%D9%85%D8%AC%D8%A7%D8%B2%D8%B1-%D8%A7/  
<sup>175</sup> Look for more in Al Anadoul News Chanel through Website  
<https://www.aa.com.tr/ar/%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84/%D9%88%D8%B2%D9%8A%D8%B1%D8%A9-%D8%A7%D9%84%D8%B5%D8%AD%D8%A9-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A%D8%A9-%D9%84%D9%84%D8%A3%D9%86%D8%A7%D8%B6%D9%88%D9%84-50-%D8%B9%D8%A7%D8%A6%D9%84%D8%A9-%D8%A3%D9%8F%D8%A8%D9%8A%D8%AF%D8%AA-%D8%AA%D9%85%D8%A7%D9%85%D8%A7-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9/3020878>

<sup>176</sup> Look for more details through wikipedia  
[https://ar.wikipedia.org/wiki/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9\\_%D9%85%D8%B3%D8%AA%D8%B4%D9%81%D9%89\\_%D8%A7%D9%84%D9%85%D8%B9%D9%85%D8%AF%D8%A7%D9%86%D9%8A](https://ar.wikipedia.org/wiki/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9_%D9%85%D8%B3%D8%AA%D8%B4%D9%81%D9%89_%D8%A7%D9%84%D9%85%D8%B9%D9%85%D8%AF%D8%A7%D9%86%D9%8A)

exploded in the crowds, cutting their bodies and limbs." This indicates that this type of shell is specialized in causing such injuries. He added that the destructive and qualitative force of this bombardment still has ongoing effects, stating, "Yesterday morning (Wednesday), we found the body of a child on one of the hospital roofs, and in the evening, we found the body of another child in the church inside the hospital. We found the heads of children on the buildings."<sup>177</sup>

The Israeli bombardment of Hospital, which resulted in hundreds of casualties, has been met with condemnation from Arab and Western countries. The Secretary-General of the United Nations, Antonio Guterres, described the attack on the hospital in Gaza as "horrifying," according to a post on his "Ex" platform. He stated, "My heart is with the families of the victims. Hospitals and medical teams are protected under international humanitarian law." Meanwhile, the Secretary-General of the Arab League, Ahmed Aboul Gheit, condemned the hospital bombing, urging "the West to immediately stop this tragedy." Aboul Gheit wrote on the "Ex" platform (formerly Twitter), "What kind of mind from hell deliberately bombs a hospital with its occupants? Our Arab mechanisms document war crimes, and the criminals will not escape accountability. The West must stop this tragedy immediately." The Secretary-General of the European Union, Charles Michel, said on Tuesday that targeting civilian facilities in Gaza violates international law after the airstrike that claimed at least 200 lives at a hospital. Michel stated after a video conference with EU leaders, "We received this information while we

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<sup>177</sup> Check (The Ahli Arab hospitl Massacre... The Full Story as Narrated by Dr. Fadel Naeem, one of the hospital's doctors) through the Al Jazeera website."

<https://www.aljazeera.net/news/2023/10/19/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9-%D8%A7%D9%84%D9%85%D8%B9%D9%85%D8%AF%D8%A7%D9%86%D9%8A-%D8%A7%D9%84%D9%82%D8%B5%D8%A9-%D8%A7%D9%84%D9%83%D8%A7%D9%85%D9%84%D8%A9-%D9%83%D9%85%D8%A7>

were together during this virtual meeting with leaders. It appears to have been confirmed, and the attack on a civilian facility is inconsistent with international law."<sup>178</sup>

- **"The Jabalia Market Massacre 2023**, also known as the 'Trans Massacre' 2023, was committed by Israeli forces when they bombed the commercial area of 'Trans' in the middle of Jabalia refugee camp, north of the Gaza Strip, on October 9, 2023, coinciding with the third day of the 'Al-Aqsa Deluge' battle. This intense Israeli bombing, focused on a vital and densely populated market area, resulted in the death of at least 50 Palestinians.<sup>179</sup> Israeli planes dropped 5 large MK-type American-made bombs, according to an official source in the Explosive Engineering Police in Gaza, who requested anonymity due to the sensitivity of the current security situation.<sup>180</sup>

It's worth noting that during its aggression on Gaza, Israel dropped the equivalent of two nuclear bombs in terms of explosives and missiles. The Euro-Mediterranean Observatory for Human Rights reported that Israel dropped over 25,000 tons of explosives on Gaza as part of its wide-ranging continuous war since October 7th, equaling the force of two nuclear bombs. The Observatory highlighted the Israeli army's

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<sup>178</sup> Check the news and additional condemnations through the Al Arabiya News Channel website via their online platform.<https://www.alarabiya.net/arab-and-world/2023/10/17/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9-%D9%85%D8%B3%D8%AA%D8%B4%D9%81%D9%89-%D8%A7%D9%84%D9%85%D8%B9%D9%85%D8%AF%D8%A7%D9%86%D9%8A-%D8%A7%D8%AF%D8%A7%D9%86%D8%A7%D8%AA-%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9-%D9%88%D8%AF%D9%88%D9%84%D9%8A%D8%A9-%D9%84%D9%84%D9%82%D8%B5%D9%81-%D8%A7%D9%84%D8%A7%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A>

<sup>179</sup> Look through Wikipedia via the website [https://ar.wikipedia.org/wiki/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9\\_%D8%AC%D8%A8%D8%A7%D9%84%D9%8A%D8%A7\\_\(9\\_%D8%A3%D9%83%D8%AA%D9%88%D8%A8%D8%B1\\_2023\)](https://ar.wikipedia.org/wiki/%D9%85%D8%AC%D8%B2%D8%B1%D8%A9_%D8%AC%D8%A8%D8%A7%D9%84%D9%8A%D8%A7_(9_%D8%A3%D9%83%D8%AA%D9%88%D8%A8%D8%B1_2023))

<sup>180</sup> | Look for more on Al-Araby Al-Jadeed via the website <https://www.alaraby.co.uk/investigations/%D9%85%D8%B0%D8%A8%D8%AD%D8%A9-%D8%AC%D8%A8%D8%A7%D9%84%D9%8A%D8%A7-%D8%AC%D8%B1%D9%8A%D9%85%D8%A9-%D8%AD%D8%B1%D8%A8-%D9%81%D9%8A-%D8%B3%D9%88%D9%82-%D8%A7%D9%84%D9%85%D8%AE%D9%8A%D9%85>



admission that its planes targeted over 12,000 sites in Gaza, with a record number of bombs exceeding 10 kilograms per person in the region.

With the evolution in the effectiveness of bombs and the stability of the explosive quantity, the amount dropped on Gaza could surpass the destructive power of a nuclear bomb. Additionally, Israel intentionally uses a mixture known as 'RDX' (Research Department Explosive), also called 'complete explosive science,' equivalent to 1.34 TNT strength. This means that the destructive power of the explosives dropped on Gaza exceeds that of those dropped on Hiroshima, considering Gaza's smaller area of 360 square kilometers compared to Hiroshima's 900 square kilometers. The Euro-Mediterranean Observatory stated that Israel uses bombs with massive destructive power, ranging from 150 to 1,000 kilograms, and Defense Minister Ya'alon confirmed dropping over 10,000 bombs on Gaza alone (with an area of 56 square kilometers).

The Euro-Mediterranean team documented injuries resembling those caused by dangerous cluster bombs, which contain small high-explosive devices to penetrate the body and cause internal explosions, resulting in severe burns leading to the melting of victims' skin and sometimes death. Additionally, these shrapnel cause strange swelling and poisoning in the body, including transparent shrapnel not visible in X-ray images.

181

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<sup>181</sup> Euro-Med Human Rights Monitor Report (Israel dropped the equivalent of two nuclear bombs on the Gaza Strip, with an individual's share exceeding 10 kilograms of explosives) via the website... <https://euromedmonitor.org/ar/article/5907/%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%A3%D8%B3%D9%82%D8%B7%D8%AA-%D9%85%D8%A7-%D9%8A%D8%B9%D8%A7%D8%AF%D9%84-%D9%82%D9%86%D8%A8%D9%84%D8%AA%D9%8A%D9%86-%D9%86%D9%88%D9%88%D9%8A%D8%AA%D9%8A%D9%86-%D8%B9%D9%84%D9%89-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9-%D9%88%D8%AD%D8%B5%D8%A9-%D8%A7%D9%84%D9%81%D8%B1%D8%AF-%D8%A7%D9%84%D9%88%D8%A7%D8%AD%D8%AF-%D8%AA%D8%AA%D8%AC%D8%A7%D9%88%D8%B2-10-%D9%83%D9%8A%D9%84%D9%88-%D8%AC%D8%B1%D8%A7%D9%85-%D9%85%D9%86-%D8%A7%D9%84%D9%85%D8%AA%D9%81%D8%AC%D8%B1%D8%A7%D8%AA>

Furthermore, Israel has been documented using internationally prohibited weapons in its attacks on Gaza, including cluster bombs and white phosphorous, a toxic substance that rapidly reacts with oxygen, causing severe second and third-degree burns.

Israel's use of explosive bombs with massive destructive effects in populated areas poses the most dangerous threats to civilians in modern armed conflicts, explaining the severity of the massive destruction and the leveling of entire residential neighborhoods into rubble in the Gaza Strip."

### **C- Infrastructure Losses**

The Israeli military attack on the Gaza Strip, through intensive shelling of neighborhoods and residential buildings, resulted in the total destruction of around 5,500 residential buildings, comprising 14,200 housing units. Additionally, approximately 133,370 housing units suffered partial damage, with 10,127 units rendered uninhabitable. This also affected 62 government headquarters and numerous public and service facilities. The impact extended to 160 schools with various damages, including 19 schools that went out of service. Entire residential neighborhoods were destroyed, including complexes such as Al-Karama Towers, Al-Safatawi Towers, and Al-Zahraa Towers. Furthermore, there was a constant threat of bombing hospitals, with Al-Shifa Hospital being a prominent target.<sup>182</sup>

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<sup>182</sup> For more details please look through Al Jazeera Website:  
<https://www.aljazeera.net/news/2023/10/21/%D8%A7%D9%84%D9%82%D8%B5%D9%81-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A-%D9%8A%D8%AF%D9%85%D8%B1-5500-%D9%85%D8%A8%D9%86%D9%89-%D8%B3%D9%83%D9%86%D9%8A-%D9%81%D9%8A>

## **Subsection2: The Criminal Nature of the Actions Committed During the Attack on Gaza in Light of the Rome Statute.**

During the war on Gaza, the UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories, Fransiska Albaniz, stated, "A large part of the besieged population in Gaza is facing extermination, with thousands killed or injured due to continuous Israeli airstrikes since the start of the Palestinian resistance's Operation Al-Aqsa Flood." Albaniz added, "What is happening is that a significant portion of the Palestinian population in Gaza is being eliminated, not unlike what happened before but with increasing brutality." Commenting on Israel's decision to cut off water, electricity, food, and other essential facilities to Gaza, the UN rapporteur clarified that starving the besieged population and depriving them of necessities constitute war crimes and crimes against humanity..<sup>183</sup>

Craig Mokhiber, Director of the New York Office of the UN High Commissioner for Human Rights, resigned from his position in protest of the UN's handling of the situation in Gaza, emphasizing the organization's need to shoulder its responsibilities. Mokhiber stressed, "We are witnessing, once again, a genocide unfolding before our eyes, and the organization we serve seems incapable of stopping it. What is happening in Gaza is a case of genocide, and key UN bodies have surrendered to the United States and the Israeli lobby". The Director of the Commissioner's Office added, "The European

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<sup>183</sup> انظر الخبر عبر موقع الجزيرة الاخباري الالكتروني

<https://www.aljazeera.net/news/2023/10/13/%D9%85%D9%82%D8%B1%D8%B1%D8%A9-%D8%A3%D9%85%D9%85%D9%8A%D8%A9-%D8%B3%D9%83%D8%A7%D9%86-%D8%BA%D8%B2%D8%A9-%D9%8A%D8%AA%D8%B9%D8%B1%D8%B6%D9%88%D9%86-%D9%84%D9%84%D8%A5%D8%A8%D8%A7%D8%AF%D8%A9>

colonial project has entered its final stage, destroying the remnants of original Palestinian life." <sup>184</sup>

UN Secretary-General Antonio Guterres stated, "The transfer of over a million people in Gaza, as per the orders of the Israeli army, through a densely populated war zone to the south of the Strip where there is no food, water, or shelter—when the entire area is under siege—is extremely dangerous and may not be possible in some cases." Guterres added in a press conference on the Middle East, "The Israeli army's ground operations and continuous bombing are hitting civilians, hospitals, refugee camps, mosques, churches, and UN sites, including shelters. No one is safe." <sup>185</sup>

In an interview with the Spanish newspaper El Pais, the former Chief Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, affirmed that the blockade imposed by the Israeli occupation is a crime against humanity. He stated that preventing

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<sup>184</sup> The director of the High Commissioner for Human Rights sends a strong message and announces his resignation, describing what is happening in Gaza as "genocide." Check it out on the Russia Today website. <https://arabic.rt.com/world/1508542-%D9%85%D8%A7-%D9%8A%D8%AD%D8%AF%D8%AB-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9-%D8%A5%D8%A8%D8%A7%D8%AF%D8%A9-%D8%AC%D9%85%D8%A7%D8%B9%D9%8A%D8%A9-%D9%85%D8%AF%D9%8A%D8%B1-%D8%A7%D9%84%D9%85%D9%81%D9%88%D8%B6%D9%8A%D8%A9-%D8%A7%D9%84%D8%B3%D8%A7%D9%85%D9%8A%D8%A9-%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%A5%D9%86%D8%B3%D8%A7%D9%86-%D9%8A%D9%88%D8%AC%D9%87-%D8%B1%D8%B3%D8%A7%D9%84%D8%A9-%D9%82%D8%A7%D8%B3%D9%8A%D8%A9-%D9%88%D9%8A%D8%B9%D9%84%D9%86-%D8%A7%D8%B3%D8%AA%D9%82%D8%A7%D9%84%D8%AA%D9%87/>

<sup>185</sup> Secretary-General of the United Nations Antonio Guterres's conference on the situation in the Middle East. Find more about the topic on the Russia Today website. <https://arabic.rt.com/world/1510175-%D8%A7%D9%84%D9%85%D9%86%D8%B4%D9%89%D8%AA-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D9%88%D9%86-%D8%A8%D8%A7%D8%AA%D9%88%D8%A7-%D8%B6%D8%AD%D8%A7%D9%8A%D8%A7-%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A%D8%A9-%D8%B9%D9%84%D9%89-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9/>

<sup>185</sup> Secretary-General of the United Nations Antonio Guterres's conference on the situation in the Middle East. Find more about the topic on the Russia Today website. <https://arabic.rt.com/world/1510175-%D8%A7%D9%84%D9%85%D9%86%D8%B4%D9%89%D8%AA-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D9%88%D9%86-%D8%A8%D8%A7%D8%AA%D9%88%D8%A7-%D8%B6%D8%AD%D8%A7%D9%8A%D8%A7-%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A%D8%A9-%D8%B9%D9%84%D9%89-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9/>

the passage of water, food, and fuel turns the entire Gaza Strip into an extermination camp<sup>186</sup>

On the other Side, the Chief Prosecutor of the International Criminal Court, Karim Khan, stated during a press conference held at the Rafah crossing, which has been closed since the first day of the war, and where Israel has prevented any assistance to the Palestinian people, that Israel must respect international humanitarian law. He stressed that international law protects mosques, churches, schools, and hospitals. Israel must respect international humanitarian law, and it has a moral and legal responsibility to respect the rules of engagement. No party can do whatever it pleases to achieve its goals.<sup>187</sup>

The researcher must refer to the double standards exercised by the Prosecutor of the International Criminal Court, Karim Khan, regarding the crimes committed by Israel, the occupying power against the Palestinians. It is noted that the decision to identify the grave violations committed by Russia against Ukraine took the Office of the Prosecutor only a year to personally hold Russian President Putin criminally responsible for directly committing acts, in collaboration with others or through others, and issuing an arrest warrant against him among other matters. This is while the Prosecutor has not taken any similar actions in the case of Palestine despite strong and tangible evidence of

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<sup>186</sup> **Louis Moreno Ocampo: "The blockade on Gaza turns it into a concentration camp." SON FM News, available on...** :<https://www.sonfm.tn/news/2023-10-23/lwys-mwrynw-awkambw-alhsar-ala-ghzh-yhwilha-ila-maskr-ibadh>

<sup>187</sup> Check the press conference by the Prosecutor of the International Criminal Court, Karim Khan, on the Sky News Arabic website <https://www.skynewsarabia.com/middle-east/1665883-%D9%85%D8%AF%D8%B9%D9%8A-%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9-%D8%A7%D9%84%D8%AC%D9%86%D8%A7%D9%8A%D9%94%D9%8A%D8%A9-%D9%8A%D8%B2%D9%88%D8%B1-%D9%85%D8%B9%D8%A8%D8%B1-%D8%B1%D9%81%D8%AD-%D9%88%D9%8A%D8%A7%D9%94%D9%85%D9%84-%D8%B2%D9%8A%D8%A7%D8%B1%D8%A9-%D8%BA%D8%B2%D8%A9>

war crimes, crimes against humanity, and genocide. Here, the clear contradiction in the investigations related to the Ukrainian case compared to the Palestinian case is highlighted.

Furthermore, the researcher points out the double standards in the behavior of the Prosecutor himself, who ignored continuous calls from the State of Palestine to visit the country, pressuring the occupying authority to allow passage, meetings with victims, gathering evidence, and other investigation requirements. At the same time, there was a quick response to the invitation to meet with Israeli victims after the attacks of October 7th, where he met with them, listened to their testimonies, and gave them sufficient time for it, while meeting representatives of victims' families from the Palestinian side in the West Bank in haste, leading some victims to boycott the meeting in protest against the court's bias towards victims from both sides, even in the time allotted for listening to testimonies.

As the war on Gaza continues for the sixth consecutive month, and as of the completion of this thesis, the International Criminal Court has not taken any action regarding the various crimes committed by the Israeli occupation army in Gaza, the West Bank, including Jerusalem.

### **3.3.11 Israeli Occupation Crimes during the 2023 Israeli Attack on Gaza under the Rome Statute (Subject-Matter Jurisdiction)**

Subject-matter jurisdiction, or typology, is determined based on the type of crime, as defined by the Rome Statute, which grants the International Criminal Court the authority to investigate, prosecute, and adjudicate these crimes. Subject-matter jurisdiction is the central and most important axis for the Court, defining the scope of its

functions, planning the boundaries of its powers over the specified crimes and their perpetrators.

The crimes specified for the Court's subject-matter jurisdiction are outlined in the first paragraph of Article 5 of the Rome Statute. It restricts the Court's jurisdiction to the most serious crimes that attract the attention and concern of the international community as a whole. Thus, the Court, under this foundational statute, has jurisdiction over the following crimes: (a) genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.<sup>188</sup>

There is no doubt that Israel, during its 2023 attack on Gaza, committed a series of violations and crimes that collectively represent a blatant violation of the rules of international law, international humanitarian law, and rights therein. Additionally, there were violations of the rules of international criminal law. Therefore, we need to delve into the actions committed (the four crimes specified in Article 5, which we will detail later) during this attack, which are at the core of the International Criminal Court's jurisdiction. However, we will focus on the crime of genocide, given that all its elements were fulfilled during the military attack by Israeli forces in 2023. Considering the crimes falling under the jurisdiction of this Court, it becomes apparent that the information and evidence provided by United Nations reports and various international organizations are largely sufficient to bring a comprehensive indictment for holding Israeli leaders accountable. This is supported by the facts that transpired during the attack on the Gaza Strip, all within the framework of the Rome Statute and the

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<sup>188</sup>Article (5/2) stipulates that: "The Court exercises jurisdiction over the crime of aggression whenever a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. This provision must be consistent with the relevant provisions of the Charter of the United Nations."

precedents set by the International Criminal Tribunal for the former Yugoslavia and Rwanda.

### **3.3.12 The Genocide**

The Rome Statute defines this crime as: "Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. Accordingly, the Rome Statute outlines the crime of genocide and its manifestations through Article 6 of the foundational statute. The statute considers the behavior of this crime to be translated through specific acts, including killing members of the group and causing serious bodily or mental harm to them. This is after fulfilling both the material and mental elements of the crime. Additionally, this crime is considered one of the crimes against humanity, according to Article 7(1) of the same statute. This article outlines the elements of the crimes for which the perpetrators can be held accountable.

### **3.3.13 The Material and Mental Elements of the Crime of Genocide**

The material elements of the crime of genocide include the occurrence of any of the following: committed with the intent to destroy a national, ethnic, racial, or religious group based on its characteristics, whether the destruction is total or partial. It involves killing one or more individuals, including forcing victims to live in conditions likely to lead to the destruction of part of the population. The criminal act comprises a collective killing process of civilians or their participation in such a process. The killing occurs through a widespread and systematic attack directed against the civilian population. The texts mentioned earlier indicate that the concept of genocide is not limited to direct



killings of a group of civilian citizens. According to these texts, the elements of this crime are fulfilled by imposing living conditions likely to cause the destruction and suffering of part of the population.

As for the mental element, these crimes differ from others by the necessity of the specific intent, manifested in the intent to destroy. This intent is divided into physical, biological, and cultural destruction. The description of the nature of destruction is left to the judges through human rights and minority rights declarations. The absence of the intent for destruction, whether partial or total, negates the mental element of this crime, stripping it of the description of genocide, regardless of its severity and magnitude. It is essential to prove the specific intent for destruction completely or partially.

Based on the above, it is evident that these facts fully apply to the crime of genocide. This occurred during the Israeli military attack on the Gaza Strip, where Israeli forces consistently justify their actions with unfounded pretexts such as self-defense. They proceed to kill Palestinians of all spectrums and categories, whether civilian or leaders, based on their affiliation with a specific religious and ethnic group, intending to annihilate them. This is what actually happened during the so-called "Operation Iron Sword" against Hamas targets in the Gaza Strip, justifying their brutal crimes during the attack. It should be noted that this crime requires a specific criminal intent, which is the intent to destroy the targeted group completely or partially. This intent was effectively demonstrated in the Palestinian case through the evidence presented by the International Criminal Tribunal for the former Yugoslavia regarding proving the specific intent of this crime based on the method of its commission.

- **The Facts Indicating the Commission of Genocide Crimes during the Attack on Gaza**

What has been elucidated regarding the concept of genocide crimes and its elements applies in detail to what occurred during the attack on Gaza. The description of genocide crimes referred to in Article 6 of the foundational statute is applicable to the practices of the Israeli forces during the 2022 aggression. This concept is further supported by presenting facts indicating the occurrence of these crimes according to reports issued by recognized international organizations, as follows:

Israel launched a wide-ranging military attack (war) on the occupied Gaza Strip on October 8, 2023, which continues until the completion of this thesis. The goal of this war is to eliminate the Hamas movement and its military arm, the Qassam Brigades.

**The Casualties Resulting from the Israeli Military Attack on Gaza, Ongoing to Date, are as Follows:**

- Martyrs: 10,328, including 3,155 individuals, 3,900 children, and 2,500 women, including pregnant women.
- Injured: 26,000, including 10,200 individuals, 8,950 children, and 6,020 women.
- Missing: 2,300 individuals, including women, men, and children.
- Total massacres against families: 1,006, with 137 martyrs among medical teams, and the closure of 16 hospitals and 62 health facilities. The percentage breakdown includes 41% child martyrs and 25.6% women martyrs<sup>189</sup>.

In light of various international treaties and agreements, Israel's destructive, indiscriminate, and disproportionate attacks are considered explicit violations of the

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<sup>189</sup> Look for more through the Palestinian ministry of health website:  
<https://www.moh.gov.ps/portal/%d8%a7%d9%84%d8%b5%d8%ad%d8%a9-%d8%a7%d9%84%d8%a5%d8%ad%d8%aa%d9%84%d8%a7%d9%84-%d9%82%d8%aa%d9%84-9485-%d9%81%d9%84%d8%b3%d8%b7%d9%8a%d9%86%d9%8a%d8%a7%d9%8b-%d9%88%d8%a3%d8%b5%d8%a7%d8%a8-24173/>

laws of war, including the principle of military necessity and the principle of proportionality in international law. Legitimacy of an action is determined by maintaining a balance between the goal, means, and methods used to achieve it, as well as the consequences of that action. These attacks also violate the rules of humanitarian law, which stipulate that the protection of civilians is mandatory in all circumstances. Killing civilians is considered a war crime in both international and non-international armed conflicts, and it may rise to the level of a crime against humanity. The Hague Conventions of 1899 and 1907, in addition to the Fourth Geneva Convention of 1949, have regulated the fundamental human rights in the event of a war, aiming to minimize the deadly health effects of internationally prohibited weapons, some of which may cause "genocide" against civilians.

Article 25 of The Hague Regulations related to the Laws and Customs of War on Land prohibits "the attack or bombardment of cities, towns, villages, dwellings, or buildings not justified by military necessity." Article 53 of the Fourth Geneva Convention states that "an occupying state shall not destroy private property unless absolutely required by military operations." According to Article 147 of the Fourth Geneva Convention, the destruction of property on a large scale that is not justified by military necessity constitutes a serious violation subject to prosecution. Such practices are considered war crimes under the foundational statute of the International Criminal Court.

### **3.3.13 Genocide**

Various compelling pieces of evidence indicate that Israel, the occupying power, has committed genocide against civilians in the Gaza Strip. This includes indiscriminate bombing, disproportionate attacks destroying residential areas, imposing a strategy of

hunger and thirst, and completely cutting off humanitarian supplies to civilian populations. Israel has prevented essential supplies, including food, water, electricity, medications, and fuel, from reaching over 2.3 million people in Gaza, as explicitly announced by the Minister of the Occupation's Army. This has directly caused a severe humanitarian crisis, intentionally exposing the population to famine, constituting a crime against humanity that escalates to the level of Genocide under the guise of war.

Statements from various Israeli politicians since the beginning of the war on the Gaza Strip, such as describing the Palestinian people as "human animals" and stating that Gaza "will not return to what it was before," indicate malicious intent to commit acts of genocide through deliberate killing and restricting the basic conditions of life.

In conjunction with intense attacks and the dropping of over 25,000 tons on the Gaza Strip, which does not exceed an area of 365 square kilometers, numerous Israeli officials have made statements confirming that killing civilians and destroying their homes and neighborhoods is a deliberate act and a premeditated decision. Israeli President Isaac Herzog stated, "There is an entire nation responsible, and false allegation about civilians not knowing or not participating are baseless; we are at war against them." Former Israeli representative to the United Nations, Dan Gillerman, expressed his perplexity about the world's continued concern for Palestinian civilians, saying, "I am puzzled by the world's continued concern for Palestinian civilians and its sympathy with wild, non-human animals." Former Israeli Ambassador to Italy, Dror Eydor, stated that Israel is "not interested, it has one goal, and that is to destroy Gaza."

Experts from the United Nations, including the Special Rapporteur on human rights in the occupied Palestinian territories, Francesca Albanese, issued a joint statement on November 2nd, stating that the Palestinian people are "exposed to the danger of

genocide," and that "Israel's allies also bear responsibility and must act immediately to prevent the catastrophic consequences of its actions." <sup>190</sup>

Israel unquestionably violated the "International Convention on the Prevention and Punishment of the Crime of Genocide" through collective targeting of Gaza's population as Palestinians, including the approach of intentional killing and causing physical and mental harm, undermining the basic living conditions necessary for survival.

Article 1 of the Genocide Convention states: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish."

Article 2 of the Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. <sup>191</sup>

The International Court of Justice affirmed that preventing genocide is a binding legal principle with no exceptions, and individuals attempting or inciting genocide "must be punished, whether they are constitutional rulers, public officials, or private individuals."

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<sup>190</sup> Ibid

<sup>191</sup> "Refer to the provisions of the Genocide Convention and its punishment through the Red Cross website at <https://www.icrc.org/ar/doc/resources/documents/misc/62sgrn.htm>.

<sup>192</sup> "Previous source: There is a consensus among international legal scholars that what is happening in Gaza constitutes a genocide crime, a turning point for holding Israel accountable. Refer to the Mediterranean website for more information."

It is essential to recall Israel's long history of committing forms of genocide against the Palestinian people, including mass killings and displacement since 1948, military occupation for over half a century, the imposition of an apartheid regime, including the separation barrier, and repeated military attacks on the Gaza Strip, culminating in the ongoing war at an unprecedented level of violence in the history of Israeli wars.

### **3.4 Section 2: The Legal Mechanisms for Holding Israel Accountable under the Rome Statute**

Subsection 1: National Jurisdiction in the Trial of Israeli Officials According to the Rome Statute

Subsection 2: The Trial of Israeli Officials Implicated in Crimes before the International Criminal Court

#### **3.4.1 Introduction and Division**

In light of the events that occurred during the Israeli military attack on the Gaza Strip in August 2022, the current question is whether it is possible to pursue criminal responsibility of Israeli leaders for war crimes committed against the Palestinian people in Gaza during this attack, whether this accountability is before national or international criminal courts. In other words, what are the suitable legal mechanisms available at present to prosecute Israeli officials for what the Israeli occupation forces committed during their military attack on Gaza in 2022? In short, can the available legal mechanisms for pursuing Israeli leaders in international courts, whether permanent or temporary (special international criminal courts), or in traditional national courts with universal jurisdiction, be gathered?

**1<sup>st</sup>** : Palestine is a State According to the Rules of International Law, and as mentioned in the first part of applying the description of statehood to it. Here, the following question arises: "Does the State of Palestine have sufficient jurisdiction to hold Israeli leaders accountable for their crimes? Especially considering that the obstacle that stood before the Palestinian judiciary according to the Oslo Agreement<sup>193</sup> (2) has disappeared, which was the lack of Palestinian jurisdiction over Israelis, whether civilians or military, due to the expiration of its legal period, and given that Israel has committed crimes that render the provisions of this agreement and others null and void in practice and in logic."<sup>194</sup>

Therefore, it is necessary to examine the acceptability of resorting to the Palestinian national judiciary to pursue Israeli officials. In this regard, another question arises: "Can Israeli courts be used to prosecute those responsible for the Gaza attack in 2022, especially since international humanitarian law imposes on Israel the duty to investigate and hold accountable for all crimes committed in Palestinian territories based on the texts of the Hague Convention concerning the Laws and Customs of War on Land of 1907."<sup>195</sup>

**2<sup>nd</sup>** : When it comes to temporary international justice, which refers to special international criminal courts, it is established that according to the primary jurisdiction of the Security Council in maintaining international peace and security, the Council, in carrying out this mission based on Article 39 of the United Nations Charter, can

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<sup>193</sup> Clause 17/A/4 of the Oslo II Agreement: "The functional and territorial jurisdiction of the Council shall extend to all individuals except Israelis unless the Agreement provides otherwise contrary to the above paragraph, the Council shall have functional jurisdiction over Area "C" as defined in Article 4 of Annex III

<sup>194</sup>Dr. Aya Abdel Fattah Hussein Safi, "The Israeli Occupation's Plunder of Palestinian Property in International Criminal Law - A Comparative Study in Light of the Rome Statute and Islamic Jurisprudence," Master's Thesis, Faculty of Sharia and Law, Islamic University of Gaza, 2021, p. 72

<sup>195</sup> Article 3 of this agreement states: "The belligerent party violating the provisions of the aforementioned Regulation shall be obliged to provide compensation if necessary, and shall also be responsible for all acts committed by persons belonging to its armed forces

recommend taking any appropriate measures or actions to settle disputes peacefully in accordance with the provisions of Chapter VI of the Charter. The Security Council also has the authority, if it determines that there is a threat to international peace and security, a breach of the peace, or an act of aggression, to use the powers vested in it under Chapter VII. Additionally, the mechanism established for the Secretary-General of the Security Council allows him to draw the Council's attention to any matter he deems a threat to international peace and security in accordance with Article 99 of Chapter XV.

In comparison to international legal precedents in this regard, which can be applied to the case of the military attack on Gaza, it becomes clear that the Kosovo case (a region of Yugoslavia) included the issuance of Security Council resolutions numbers (808/827) based on the recognition that the situation in this case posed a threat to international peace and security. The establishment of a special international court was considered a means to end the violations committed in Yugoslavia.<sup>196</sup>

In reality, it is extremely difficult to hold Israeli officials accountable by establishing a special international court to investigate the crimes committed in the attack on Gaza. This is because the United Nations Security Council is now under the control of major powers and subject to significant political pressures, led by the United States, which fundamentally obstructs any attempts to issue such a decision. Additionally, the veto power held by the five major powers can veto any resolution presented to the Council, especially if it concerns the actions of the Security Council under Chapter VII of the Charter.

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<sup>196</sup> United Nations: S/RES/877 (1993)



Even if we assume that the Security Council or the United Nations General Assembly decided to establish a court based on Chapter VII provisions, or if the prosecutor agreed to open an investigation, as recently happened, the Security Council's authority to postpone the investigation for a year or more would serve as a major obstacle to any investigation or prosecution of Israeli officials for the crimes they committed against the Palestinian people.<sup>197</sup> The only way to overcome this would be for one of the five major powers to use their veto power to prevent the postponement of the investigation or trial based on previous practices.<sup>198</sup>

Furthermore, the difficulties faced by international courts with universal jurisdiction, in comparison to relevant judicial precedents, make the matter almost impossible. For example, the cases brought against Sharon by surviving Palestinians from the Sabra and Shatila massacres, for his responsibility in committing these massacres against the Palestinian people during the 1982 Lebanese invasion, ended with an amendment to the law related to this issue by providing temporary immunity for foreign leaders, allowing the postponement of investigations for those accused of committing such crimes, particularly those who hold official positions.<sup>199</sup>

Therefore, the only recourse in this matter is to turn to the International Criminal Court and national courts. After the preliminary chamber's decision on the jurisdiction of the International Criminal Court over the mentioned territories and the absence of a decision to postpone the investigation by the Security Council, a glimmer of hope has emerged for the future prosecution of Israeli leaders for the crimes committed,

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<sup>197</sup> Article 16 of the Rome Statute's Basic System states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions"

<sup>198</sup> Dr. Nabil Salem Marzouk Aoujamous, "International Responsibility Arising from the Israeli Occupation's Siege of the Gaza Strip," Previous Source, p. 318

<sup>199</sup> Manal Haydar, "The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza," Master's Thesis, Faculty of Law (Ben Aknoun), University of Algiers, 2014, p. 148

especially during the 2022 Israeli attack on Gaza. Consequently, within this discussion, it is necessary to examine the appropriate judicial mechanisms, whether international or national, currently available for pursuing and prosecuting Israeli officials for the crimes committed during the Israeli attack on Gaza in 2022. This can be achieved by dividing the requirements of this discussion into the following two demands:

**Subsection 1: National Jurisdiction in the Trial of Israeli Officials According to the Rome Statute**

**Subsection 2: The Trial of Israeli Officials Implicated in Crimes before the International Criminal Court**

**Subsection 1: National Jurisdiction in the Trial of Israeli Officials According to the Rome Statute**

It is worth noting that international criminal justice, as a fundamental principle, does not aim to replace or strip national criminal justice of its jurisdiction but rather seeks to strengthen and reinforce it in the face of the most serious crimes that concern the international community as a whole, rather than a specific state. This principle is known as complementarity.

From this perspective, national courts have primary jurisdiction to consider highly serious international crimes, and international criminal justice only intervenes when the national courts are unable or unwilling to conduct or complete investigations into the relevant crime. This principle is emphasized in the Statute of the International Criminal Court, which states that "a court established by this Statute shall be complementary to

national criminal jurisdictions," indicating that the system aims not to replace national courts.<sup>200</sup>

In summary, international criminal justice is designed to work in tandem with national criminal justice systems and steps in only when national courts are unable or unwilling to address crimes of international concern, thus promoting the principle of complementarity.<sup>201</sup>

It is worth noting that the principle of complementarity has its origins in several international agreements, such as the Genocide Convention and its punishment from 1948. Article 6 of the Genocide Convention states: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."<sup>202</sup>

Furthermore, the Universal Declaration of Human Rights, in Article 8, affirms that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>203</sup>

Additionally, the Rome Statute emphasizes that the most serious crimes that provoke international concern should not go unpunished, and to ensure the effective prosecution of perpetrators, this should primarily be done through measures taken at the national level.

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<sup>200</sup>Dr. Sameh Khalil Al-Wadia, "International Responsibility for Israeli War Crimes," First Edition, Al-Zaytuna Center for Studies and Consultations, Beirut, 2009, p. 76

<sup>201</sup> Look at Article 1 of the Rome Statute of the International Criminal Court

<sup>202</sup> Refer to the texts of the Genocide Convention through the website."

<https://www.ohchr.org/ar/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide> (Cited on 4/8/2023)

<sup>203</sup> Refer to the texts of the Universal Declaration through the website." <https://www.un.org/ar/universal-declaration-human-rights/> (Cited on 4/8/2023)

In this context, it is crucial to assess the effectiveness of the Palestinian national judiciary<sup>204</sup> in prosecuting those responsible for the crimes committed during the Israeli military attack on Gaza in 2022. This includes considering whether these cases can be pursued before Israeli courts. This assessment can be broken down into the following parts:

### **Firstly, The Territorial Jurisdiction of The Palestinian National Judiciary Over Crimes Committed Within Palestinian Territory**

The political circumstances imposed by Israeli occupation on Palestine have limited the jurisdiction of the Palestinian state, particularly regarding individuals holding Israeli citizenship. This limitation has been exacerbated by international agreements and decisions that weakened this judicial jurisdiction, with one of the most notable being United Nations Resolution 181 of 1947. Additionally, agreements concluded by the Israeli side, including the Oslo Accords, have had an impact on this issue.

However, on the other hand, the jurisdiction of each state concerning criminal offenses is determined by the principles of territoriality and personality of the criminal law. The principle of territoriality means that each state has the authority to prosecute crimes that occur within its territory, regardless of the nationality of the perpetrator, whether they are citizens of the state or foreigners. According to this principle, the courts of the state where the crime occurred have the authority to consider criminal proceedings arising from it.<sup>205</sup>

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<sup>204</sup> Refer to Article 3 of the Rome Statute of the International Criminal Court

<sup>205</sup> Dr. Mustafa Magdi Harjah, Commentary on the Penal Code, Volume One, Dar Mahmoud, Cairo, Edition of the Judges' Club, 2016, p. 13

As for the second principle, which is the principle of personal jurisdiction or the personal nature of criminal law, it complements the principle of territoriality. This principle grants a state the right to monitor and prosecute its nationals wherever they may be<sup>206</sup>. It can be further divided into two aspects:

- Positive Aspect of Personal Jurisdiction: This aspect grants the national courts of a state the authority to consider cases committed by individuals holding its nationality, regardless of where the crime occurred.
- Negative Aspect of Personal Jurisdiction: This aspect means that the jurisdiction of domestic courts is based on the nationality of the victim or the affected person. In other words, if a crime is committed against someone who holds the nationality of the state, the courts of that nationality have jurisdiction over the resulting legal actions.

Analyzing the Penal Code Law No. 74 of 1936, which is applied in the Gaza Strip, it is evident that the principle of territoriality of criminal law is addressed in Article 6, titled "Application of the Territorial Law." It states that for the effective purpose of this law, the jurisdiction of Palestinian courts extends throughout Palestine and within three nautical miles from the shores of Palestine. Additionally, Article 7 deals with partial jurisdiction, stating that if an act is partially committed within the jurisdiction of Palestinian courts and partially outside of it, and if the act constitutes a crime under the provisions of this law if committed entirely within the jurisdiction of those courts, then any person who commits any part of that act within the jurisdiction of Palestinian courts can be tried and punished under this law.

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<sup>206</sup>Dr. Mustafa Magdi Harjah, Commentary on the Penal Code, the same source, p. 68

In summary, both principles, territoriality, and personal jurisdiction, are essential for determining which courts have jurisdiction over a particular criminal case. They help clarify whether the Palestinian national judiciary has the authority to prosecute Israeli officials for crimes committed during the 2022 Israeli military attack on Gaza and whether these cases can be pursued before Israeli courts.

Based on the aforementioned principles, the Palestinian judiciary has the right to pursue those responsible for crimes against Palestinians during the 2022 Israeli military attack on Gaza. This is because all the Israeli crimes committed fall within the jurisdiction of Palestinian courts. It is not valid to argue that the Oslo Accords (Oslo II) prohibit the prosecution of individuals holding Israeli citizenship before Palestinian courts for several reasons.<sup>207</sup>

Firstly, the Oslo Accords (Oslo II) did include an exception regarding the trial of Israelis before Palestinian courts, as specified in Article 17/A/4, which stated that "the territorial and functional jurisdiction of the Council over individuals, except for Israelis, unless otherwise provided in this Agreement, despite the above paragraph, the Council shall have functional jurisdiction over Area 'C' as specified in Article IV of the Third Annex." However, it is important to note that the provisions of this agreement expired after five years from its application, and it should be considered a transitional agreement in the ongoing conflict between the Palestinian state and Israel.

Therefore, the expiration of the Oslo Accords, combined with their transitional nature, has raised questions about their continued validity and applicability. This has led to a situation where the Palestinian judiciary can assert jurisdiction over crimes committed

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<sup>207</sup> Dr. Sara Mehoub Ahmed Al-Asaad, *International Criminal Responsibility*, previous source, p. 117

during the 2022 Israeli military attack on Gaza, especially considering that these crimes occurred within the territory under Palestinian jurisdiction.<sup>208</sup>

In summary, the Palestinian judiciary has the legal basis to prosecute those responsible for crimes against Palestinians during the 2022 Israeli military attack on Gaza, and the Oslo Accords should not be used as an obstacle to this pursuit of justice.

On another note, there is no doubt that Palestine has the capability to prosecute those who commit crimes on its territory, regardless of their nationality. This is considered an aspect and attribute of state sovereignty over its lands. This capability is further evident in its jurisdiction over the occupied territories through the ability to sign and ratify international agreements that the State of Palestine has joined and implement them within its borders. This is demonstrated by Palestine's membership in the United Nations committee dedicated to eliminating all forms of racial discrimination against women, as well as the research presented by the United Nations investigative committee, which concluded that the obligations placed on the Palestinian Authority under international human rights law and international humanitarian law are applicable in all their provisions to the entire occupied Palestinian territory, regardless of the Oslo Accords, despite the limitations and the Palestinian Authority's lack of control over all parts of the occupied Palestinian territories.<sup>209</sup>

Therefore, the researcher believes that the provisions of these agreements are not binding between the parties. Moreover, Israel, as the occupying power, has renounced

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<sup>208</sup> This is also outlined in the first clause of the Oslo Agreement (1), the Declaration of Principles dated 13/9/1993, which states: "A - Objective of the Negotiations: The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the Council) for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years leading to a permanent settlement based on Security Council resolutions 242 and 338." You can refer to the texts of this agreement through the following website: [https://info.wafa.ps/ar\\_page.aspx?id=4888](https://info.wafa.ps/ar_page.aspx?id=4888) (Cited on 1/8/2023)

<sup>209</sup> Dr. Piers Clancy, Responding to Arguments Raised in the Submissions of Friends of the Court in the Situation of Palestine before the International Criminal Court, previous source, p. 47

all obligations imposed on it under these agreements and violated all of their provisions. This means that everything mentioned in these agreements is not legally binding on the State of Palestine. Consequently, the Palestinian domestic courts have the right to prosecute Israeli war criminals for the crimes committed in Gaza during the 2022 attack. Even if the Oslo Accords have expired years ago,<sup>210</sup> Palestine has acquired the status of a non-member observer state in the United Nations and has joined international agreements and treaties. The latest example is its accession to the Rome Statute, which established the International Criminal Court. Recognizing Palestine as a state imposes a new legal reality that goes beyond the limits of the Oslo Accords, placing Palestine in its natural position in international law. It emerges as a fully sovereign state under occupation, governed by authorities derived from the State of Palestine, rather than the transitional self-government authority resulting from the Oslo Accords. If Israel, in turn, refuses to comply with these agreements, it is all the more reason for the Palestinian state not to respect the provisions of these agreements that restrict its authority. Consequently, the Palestinian judiciary has the right to exercise jurisdiction over its internationally recognized territory. This recognition was further enhanced after the United Nations General Assembly Resolution 67/19 in November 2012, which recognized Palestine as a "non-member observer state in the United Nations." This confirms that Palestine is a state entitled to act accordingly, not recognizing the

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<sup>210</sup> Jenin Peace Court: Criminal Lawsuit No. 885 for the year 2014. Date of the verdict: 11/1/2015. You can find the details of this verdict on the following website: <https://legal-agenda.com/%D8%A8%D8%A7%D8%B3%D9%85-%D8%A7%D9%84%D8%B4%D8%B9%D8%A8-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A/> (Cited on 2/8/2023)



provisions of the Oslo Accords, and therefore, it has the right to assert jurisdiction over its entire territory.<sup>211</sup>

In light of the above, several questions arise primarily related to the independent criminal jurisdiction of Palestinian national courts. These questions revolve around three main issues: Firstly, the basis of the criminal jurisdiction of Palestinian national courts. Secondly, the basis of criminal responsibility for Palestinian national courts. Thirdly, responding to the Israeli perspective asserting that Palestine does not have independent criminal jurisdiction capable of ensuring fair trials.

- **Basis of Criminal Jurisdiction for Palestinian National Courts in the Trial of Israelis and Basis of Criminal Responsibility for Palestinian National Courts:**

The jurisdiction of Palestinian national courts to try Israelis is based on various legal and practical foundations. From the perspective of regional sovereignty enjoyed by Palestine over its territories, as established in the first section, it has been recognized that Palestine is a state with the necessary elements that constitute a state and has the capacity to engage in international relations. According to United Nations resolutions, Palestine is a state with legal sovereignty over its territories. Regional sovereignty of a state typically implies full legal jurisdiction exercised by the state over its territory.<sup>212</sup> This sovereignty includes both positive and negative aspects. The positive aspect involves the legal and functional authority exercised by the state through its legislative, executive, and judicial branches. The negative aspect, on the other hand, entails the

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<sup>211</sup> Dr. Bashir Mohammad Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2019, p. 44

<sup>212</sup> Dr. Bashir Mohammad Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, previous source, p.

prohibition of foreign states and international organizations from interfering in the internal laws of the state.<sup>213</sup>

Therefore, the State of Palestine, based on this sovereignty, possesses full independent judicial jurisdiction over its occupied territories. Under Article 30 of the Palestinian Basic Law, litigation is a preserved and guaranteed right for all people. "Every Palestinian has the right to resort to his natural judge." Consequently, the Palestinian Basic Law grants individuals whose rights are violated under Palestinian local laws the right to seek redress in Palestinian courts and seek compensation for their damages.<sup>214</sup>

In the same context, the Palestinian Penal Code No. 74 of 1936, applicable in the Gaza Strip, states in Article 6 of Chapter Three under the title "Application of the Territorial Law" that "Palestinian courts have jurisdiction throughout Palestinian territories, in addition to 3 nautical miles from the shores of Palestine, measured from the outermost marker of the islands."

Furthermore, Article 7 of the same law states, "If an act is committed, part of which falls within the jurisdiction of Palestinian courts and part of which falls outside their jurisdiction, and if that act constitutes a crime under the provisions of this law when committed entirely within the jurisdiction of those courts, any person who commits any part of that act within the jurisdiction of Palestinian courts may be tried and punished under this law as if the entire act were committed within the jurisdiction of those courts."

Another aspect to consider regarding the jurisdiction of Palestinian national courts in trying Israelis is that, according to international agreements and treaties that Palestine has joined, and which Israel, as the occupying power, has also signed, Article 146 of the

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<sup>213</sup> Dr. Khalaf Ramadan Mohammad Bilal Al-Jubouri, *Sovereignty in the Time of Occupation*, Regional Studies Center, Year: 3, Issue: 6, 2007, p. 2

<sup>214</sup> See Article (29) of the Palestinian Penal Code

Fourth Geneva Convention obligates states to enact national legislation to prosecute war criminals regardless of where these crimes are committed or the nationality of the perpetrator. This is known as universal jurisdiction of national courts.

### **3.4.2 Responding to the Israeli Perspective Claiming That Palestine Does Not Have Independent Criminal Jurisdiction Capable of Ensuring Fair Trials**

To ensure fair trials, reference can be made to international texts that address this issue in more depth. According to the Universal Declaration of Human Rights, Article 10 states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Similarly, Article 14 of the International Covenant on Civil and Political Rights of 1966 elaborates on the concept of fair trials, stating that "In the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

In conclusion, Palestinian national courts do have a basis for criminal jurisdiction to try Israelis, and they are bound by principles of fair trials as outlined in international human rights instruments. These principles ensure that anyone facing criminal charges, regardless of their nationality, is entitled to a fair and impartial trial before an independent judicial authority.

Based on this, it can be argued that in order for fair trials to be available according to the perspective of international human rights law, several elements and guarantees are necessary to ensure these trials. These elements include ensuring that trial procedures comply with international standards, which, in general, provide fair trial guarantees.

According to Palestinian Criminal Procedure Law No. 3 of 2001, several fair trial guarantees are evident,<sup>215</sup> whether before or during the trial. First, according to this law, no one can be arrested or detained except by a legal order. In addition, the disclosure of investigation procedures or their results is prohibited. Moreover, it is mandatory to have a lawyer present during investigations, allowing both parties to seek legal counsel during the investigation.<sup>216</sup>

Regarding the most important guarantees during the trial phase provided by the Palestinian legal system, 192they include conducting trials publicly, ensuring that no one can be brought to trial in criminal cases unless there is a charging decision issued by the public prosecutor or their equivalent,<sup>217</sup> and appointing a defense lawyer for the accused.<sup>218</sup>The trial proceedings are documented for criminal evidence, and the accused has the right to make arguments, claims, and defenses after hearing the evidence. <sup>219</sup>

Furthermore, Palestinian Penal Code No. 74 of 1936 guarantees that a person cannot be criminally charged twice for the same act or omission. This is stated in Article 21, which reads: "A person shall not be criminally charged twice for the same act or omission, whether under the provisions of this law or any other law."<sup>220</sup>

In light of the above, it becomes clear that Israeli claims that Palestinian national courts do not provide fair and just trials are baseless. The Palestinian criminal justice system, as outlined in both the Penal Code and the Criminal Procedure Law, contains numerous fair trial guarantees that align with international commitments regarding political rights and human rights.

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<sup>215</sup> See Article (59) of the Palestinian Penal Code

<sup>216</sup> See Article (102) of the Palestinian Penal Code

<sup>217</sup> See Article (237) of the Palestinian Penal Code

<sup>218</sup> See Article (244) of the Palestinian Penal Code

<sup>219</sup> See Article (253) of the Palestinian Penal Code

<sup>220</sup> See Article (271) of the Palestinian Penal Code

### **3.4.3 The Extent of the National Judiciary's Ability to Initiate Criminal Proceedings Against Israeli Officials**

While the Oslo Accords (1 and 2) may have concluded from a practical and realistic perspective, they have had many legal implications that have affected Palestinian domestic laws. These agreements are considered a legal framework that supersedes Palestinian domestic laws, as they explicitly contain clauses that invalidate any laws or proposed laws that contradict these agreements. Consequently, these agreements have posed several obstacles to the Palestinian legal system's ability to hold Israeli leaders accountable for any crimes committed in Palestinian territories, particularly in the context of the Gaza Strip.

One of the most significant challenges and obstacles resulting from the Oslo Accords is the application of Palestinian law to both Palestinian citizens and Israeli leaders. This dual jurisdiction, along with the issuance of Israeli military orders (through the Civil Administration) for the governance of areas known as "Judea and Samaria," while Gaza is excluded from these areas, creates a complex legal landscape. It is worth noting that sovereignty differs from jurisdiction, as sovereignty is granted by a higher authority, which itself exercises actual sovereignty. Therefore, those with jurisdiction cannot provide their citizens with comprehensive fair judicial trials because they lack full state sovereignty. This has significantly undermined the official Palestinian authority's control over its judicial territory and full jurisdiction over all Palestinian territories.<sup>221</sup>

Consequently, what matters most in the study of the Oslo Accords is the discussion of the territorial jurisdiction of the Palestinian state. Article 4 of this agreement aimed to delineate the territorial jurisdiction boundaries. Referring back to the Oslo Agreement,

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<sup>221</sup> Dr. Bashri Mohammad Hasan Abu Tarabi, the aforementioned source, page 103

which treated the West Bank and Gaza Strip as a single unit according to Article 4, this agreement divided the West Bank into four areas as follows<sup>222</sup>:

- Area (A): Full Palestinian civilian and security control under the Palestinian Authority's jurisdiction, comprising approximately 3% of the West Bank, excluding East Jerusalem (Phase I, 1995). In 2011, this percentage increased to 18%. This area includes all Palestinian cities and their surrounding areas, such as Jenin, Qalqilya, Tulkarm, Nablus, Bethlehem, Ramallah, with no Israeli settlements. Entry into this area is prohibited for all Israeli citizens, and the Israeli military is not present in this area. However, the Israeli military occasionally conducts raids to arrest suspected activists, but primarily stays in Hebron.
- Area (B): Palestinian civilian control and joint Israeli-Palestinian security control until June 1997, covering various towns, villages, and Palestinian areas, with no Israeli settlements.
- Area (C): Uninhabited areas where Israel has full security control, with civilian authority granted to Palestinians. Palestinian police forces may conduct joint patrols with the Israeli side.
- Area (D): Israeli settlements, which numbered 124 at the time of the agreement and have increased to around 183 since. This area is entirely under Israeli military control, in addition to coastal areas and ports along 18 square kilometers adjacent to the "Gush Katif" settlements on the southern side of the Gaza Strip.

In accordance with the second clause of the agreement, which granted regional jurisdiction to Palestine over the specified areas, the Palestinian Legislative Council was given regional jurisdiction over the Gaza Strip, except for the settlements and military

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<sup>222</sup> Look at the division of these areas through the website. [https://info.wafa.ps/ar\\_page.aspx?id=5178](https://info.wafa.ps/ar_page.aspx?id=5178)  
(Cited on 7/9/2023)

points. Palestinian regional jurisdiction allows it to impose control over the West Bank without any authority over Area (C). Consequently, it becomes clear that the Oslo Accords imposed several restrictions on the exercise of regional jurisdiction and full control by the Palestinian government over the West Bank and Gaza Strip. While Area (C) constitutes approximately 57% of the total land, it is important to note that the majority of its population is Palestinian. As for Jerusalem, Palestine has no administrative control over it.<sup>223</sup>

Therefore, the Palestinian judicial jurisdiction is determined by the areas specified in the Oslo Accords. Despite the fact that the Oslo Agreement has, in practical terms, ended, its negative effects persist to this day. Consequently, initiating criminal responsibility on the part of Palestinian courts outside these areas would be extremely challenging.

On the other hand, when we look at the Palestinian internal laws, we find a lack of unified procedural and legal rules that would allow the prosecution of Israeli criminals. Consequently, this does not ensure full access to justice even if these individuals were to appear before the national judiciary. This can be attributed to the Palestinian division between factions in both Gaza and the West Bank, which has affected the functioning of the judicial and legislative authorities simultaneously, leading to the following challenges<sup>224</sup>:

Having two separate judicial systems in the West Bank and Gaza, each with its own supreme judicial administration, along with two separate heads of public prosecution, has hindered cooperation between members of the judicial authorities in collecting

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<sup>223</sup> Dr. Bashri Mohammad Hassan Abu Tarabe: Criminal Jurisdiction over Palestine, previous source, page 40

<sup>224</sup> Dr. Sarah Mehoub Ahmed Al-Asaad: International Criminal Responsibility, previous source, page 138.+ Dr. Nabil Salem Marzouk Awjamous: International Responsibility Arising from the Israeli Occupation's Blockade of the Gaza Strip, previous source, page 339

evidence and other pre-trial procedures necessary for investigating Israeli occupation crimes.

- Legal amendments in Gaza differ from those in the West Bank, particularly in criminal matters, making it difficult to reach a unified law that serves the documentation of Israeli occupation crimes and the preparation of criminal cases.
- Despite the existence of a specialized body for documentation and criminal prosecution, the Palestinian Independent Commission for the Prosecution of Israeli Occupation Crimes, established on January 21, 2009, by the Palestinian Cabinet, the internal Palestinian division has hindered the operation of the judicial system and such specialized bodies.
- There is a shortage of organized legal texts within Palestinian laws regarding war crimes, crimes against humanity, and crimes of aggression. This contributes to the escape of Israeli officials from appropriate punishment if they were to face national trials.

#### **3.4.4 The Jurisdiction of the Israeli Judiciary to Try Israeli Officials**

International agreements concerning war crimes and crimes against humanity, in addition to the Rome Statute, generally grant the primary right to national courts to exercise jurisdiction over war crimes and other crimes committed within their territories. However, most of these agreements require amendments to domestic legislation to align with the provisions of the relevant agreements, such as the Four Geneva Conventions of 1948.<sup>225</sup> In contrast, the Rome Statute does not require the

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<sup>225</sup> See Article 5 of the Genocide Convention for the wording



consent of the internal legal frameworks of the parties to align with the statute, which often results in the failure to achieve the desired objectives of holding international criminals accountable.<sup>226</sup>

Therefore, it is necessary to clarify the legal basis that allows resorting to the Israeli judiciary to try Israeli war criminals for their actions in Gaza, in light of the Rome Statute, even though Israel is not a party to the statute, as follows:

Based on the principle of complementarity between national and international justice systems, the Israeli judiciary finds its legal basis to exercise jurisdiction over war crimes and crimes against humanity. The International Criminal Court (ICC) operates on the principle of complementarity, aiming to put an end to impunity for the most serious international crimes specified in Article 5 of the ICC Statute. These crimes include genocide, crimes against humanity, war crimes, and the crime of aggression. These crimes fall under the primary jurisdiction of national criminal justice systems. If a national system is unable to prosecute the perpetrators of these crimes due to lack of jurisdiction or failure to do so because of a breakdown in its judicial or administrative system, or a lack of seriousness in bringing the accused to trial, then jurisdiction shifts to the ICC as a complementary mechanism<sup>227</sup>. This means that the jurisdiction of the ICC is not a substitute for national courts, and thus, the ICC will not initiate an investigation or trial as long as the accused can be tried by national courts.

Furthermore, Article 80 of the ICC Statute affirms that it does not interfere with the application of national sanctions and national laws in force in the state party, stating that nothing in this Part shall be interpreted as limiting the application of national laws or the

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<sup>226</sup> Dr. Hani Adel Ahmed Awad: Personal Criminal Responsibility of Perpetrators of War Crimes - Jenin Camp and the Old Town of Nablus as Models, Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2007, page 127

<sup>227</sup> Dr. Hassani Khaled: The Principle of Complementarity in the Jurisdiction of the International Criminal Court, Journal of the College of Law and Political Science, University of Béjaïa, Algeria, page 7

exercise of national sanctions by states. From this perspective, the ICC is fundamentally complementary to the jurisdiction of national criminal courts of the state parties. Therefore, the initiation of ICC jurisdiction is an exceptional occurrence based on the request of the state parties to the statute in cases where their judicial systems cannot or do not wish to exercise jurisdiction.

In the current situation, if a state is not a party to the International Criminal Court (ICC) like Israel (although Israel signed the Rome Statute,<sup>228</sup> it did not ratify it), the ICC cannot exercise jurisdiction over a case unless Israel either submits a declaration accepting the ICC's jurisdiction over a specific crime covered by the Rome Statute or if the United Nations Security Council refers a situation to the ICC under Chapter VII of the UN Charter. However, in practice, it is highly unlikely that either of these scenarios will occur based on current circumstances. Therefore, legally, it remains possible to resort to Israeli courts.

However, the practical effectiveness and impact of Israeli courts in trying their own citizens for crimes committed in Gaza is questionable. The Israeli judicial system has been criticized for its attempts to circumvent the principle of complementarity, which means that it aims to handle cases domestically to avoid international prosecution. Israeli trials have often been seen as attempts to manipulate the path to justice, involving superficial investigations and trials aimed at preventing the ICC from taking jurisdiction.

In this context, the Palestinian Ministry of Foreign Affairs has affirmed its strong rejection of the sham trials of the Israeli soldier who killed martyr Abdul Fattah Al-Sharif. The Ministry stated in a press release, "Since the moment the video footage

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<sup>228</sup> It's worth mentioning that Israel signed the Rome Statute on December 31, 2000

documenting the heinous crime of executing the martyr in Hebron was spread, the Israeli government and its various political, military, and judicial arms have been attempting to mitigate the international reactions to this horrific crime through the theatricality of detaining the soldier-killer 'Azaria' and conducting his trial for show, in order to circumvent international courts and evade legal accountability."<sup>229</sup>

Despite the existence of video evidence proving the intentional killing of Palestinian individuals by Israeli soldiers, Israeli military courts have handed down lenient sentences. This has led to concerns about the lack of fairness and seriousness in these trials. Furthermore, recent decisions by the Israeli Supreme Court not to prosecute former Israeli military leaders for alleged war crimes, despite evidence, reinforce the perception that Israeli courts lack independence and objectivity.

In light of these issues, the primary goal of these trials appears to be creating an impression for the international community that Israel is investigating crimes committed against Palestinians, thus protecting its leaders and soldiers from international prosecution. Consequently, the principle of complementarity significantly limits the effectiveness of Palestinians seeking justice through the ICC.<sup>230</sup>

As a result, Palestinians may need to rely on the exceptions outlined in Article 20(3) of the Rome Statute, which allow for trying an individual twice for the same crime if the national judiciary intentionally shields the person from criminal responsibility or if the trial procedures were not conducted independently or impartially<sup>231</sup>. To reach this point, Palestinians would need to provide evidence of the lack of independence and impartiality in Israeli trials through documenting all internal Israeli trials related to

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<sup>229</sup> For More Details: [www.al-bayader.org/2017/01/51453](http://www.al-bayader.org/2017/01/51453) (Cited on 9/6/2023)

<sup>230</sup> For More Details: <https://amadps.org/ar/post/366441> (Cited on 9/6/2023)

<sup>231</sup> Dr. Badria Bassam Abu Dukhan, "The Principle of Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation," *Journal of Legal and Political Sciences*, Faculty of Law, University of Jerusalem, Issue 5, 2022, page 327

leaders and soldiers involved in crimes against Palestinians<sup>232</sup> and then initiating criminal proceedings before the ICC based on the exceptions mentioned in Article 20(3), arguing that these trials were conducted to circumvent the principle of complementarity.<sup>233</sup>

Taking into consideration that international humanitarian law obliges Israel, as an occupying authority, to conduct investigations and trials when its military personnel commit crimes such as war crimes and others, which applies to Israel as a party to the four Geneva Conventions of 1949. Article 1 of the Conventions' Common Article states, "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances." This implies an implicit obligation on the national judiciary of each party to pursue those who violate the provisions of these Conventions.<sup>234</sup>

In this regard, Article 146(1) of the Geneva Convention relative to the Protection of Civilian Persons states, "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." Therefore, the national judiciary must bring the perpetrators of war crimes, regardless of their identity,

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<sup>232</sup> Article 20(3) of the Statute stipulates that: "A person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall not be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice

<sup>233</sup> Dr. Badria Bassam Abu Dukhan, "The Principle of Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation," previous source, page 328

<sup>234</sup> Dr. Sarah Mehoub Ahmed Al-Asaad, "International Criminal Responsibility," previous source, page 116. Manal Hanidar, "The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza," previous source, page 201

to trial. Investigative committees and military tribunals should fulfill their duties before resorting to international courts.<sup>235</sup>

As a result, there is an international obligation on Israel, as the occupying power, to investigate and hold accountable all those responsible for the violations committed by settlers and the Israeli occupation forces, particularly during the 2022 attack on Gaza. International humanitarian law imposes the duty on Israel to investigate and prosecute all crimes committed during this attack and impose effective and deterrent sanctions on those proven to have committed such crimes.<sup>236</sup>

Furthermore, Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 1907 states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Given the above, and assuming that the jurisdiction of the International Criminal Court (ICC) has not been activated for some reason to prosecute Israeli leaders for their crimes during the 2022 military attack on Gaza, can Israeli domestic courts be used to hold these leaders accountable? Especially since Israel is a party to the Geneva Conventions, which require states parties to amend their domestic laws to align with these conventions.

In reality, regardless of Israel's lack of political will to hold its leaders accountable for their actions against the Palestinian people, Israeli legislation lacks appropriate laws and provisions for prosecuting war crimes, aggression, and crimes against humanity committed against the Palestinian people. This has been emphasized in the recommendations of the Turkel Commission report issued on February 6, 2013, which

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<sup>235</sup> For more details: <https://www.icrc.org/ara/resources/documents/misc/5nsla8.htm> (Cited on 4/8/2023)

<sup>236</sup> Dr. Aya Abdel-Fattah Hussein Safi, "Israeli Occupation's Plunder of Palestinian Properties in International Criminal Law," previous source, page 71

was appointed by the Israeli government to examine its investigations into allegations of war crimes and violations of international law.<sup>237</sup>

The recommendations called for:

- Enacting laws prohibiting all crimes prohibited by international law, which are not covered by Israeli criminal law, such as the absolute prohibition of torture and inhuman or degrading treatment.
- Enacting laws that directly impose criminal liability on army officers and political leadership in case they fail to take all necessary measures to prevent subordinates from committing crimes.

As a result, Israeli military courts, which try soldiers who violate the laws and rules of combat, often impose very lenient penalties. This has led to the military forces taking these violations lightly, even though the acts committed are first-degree war crimes. Even the sanctions provided for in Israeli criminal law, which criminalizes such acts at the international level, such as murder and looting, are inadequate compared to the grave violations committed<sup>238</sup>

Therefore, Israel often, under pressure from the international community, announces its intention to conduct trials for some Israeli soldiers and officers, but in the end, no final convictions are ever issued. In the best-case scenario, sentences are very lenient compared to the serious violations committed, making these trials mostly symbolic. This emphasizes the current viewpoint that the State of Palestine should pursue the trial

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<sup>237</sup> The committee's work was chaired by retired Supreme Court Judge Yaakov Turkel. For all the details regarding the committee's work and its recommendations, please refer to the website provided. [https://www.btselem.org/arabic/publications/summaries/201308\\_position\\_paper\\_on\\_turkel\\_report](https://www.btselem.org/arabic/publications/summaries/201308_position_paper_on_turkel_report) (Cited on 4/8/2023)

<sup>238</sup>Dr. Aya Abdel-Fattah Hussein Safi, "Israeli Occupation's Plunder of Palestinian Properties in International Criminal Law," previous source, page 73

of these leaders through non-Israeli courts, specifically the International Criminal Court (ICC).<sup>239</sup>

Moreover, if the proposed amendments to the Israeli Judiciary Authority Law currently being implemented are passed, these amendments will remove judicial oversight over the decisions and policies of the government coalition. This will further restrict the rights of the Palestinian people with decisions made outside the bounds of Israeli judicial oversight. This confirms that the issue of trying<sup>240</sup> Israeli leaders for the crimes committed during the 2022 military attack on Gaza, in all its forms, is limited to resorting to the International Criminal Court (ICC), as will be clarified in the forthcoming demand.

## **Subsection 2: The Trial of Israeli Officials Implicated in Crimes before the International Criminal Court**

International criminal justice surpasses the regional jurisdiction of national courts through a unified and permanent mechanism, represented by the International Criminal Court. This court begins to appear when the national judicial system is unwilling or unable to conduct investigations and trials for war crimes and related crimes, or lacks jurisdiction for any other reason.<sup>241</sup>

In line with this, there is a legal trend that emphasizes the spirit of cooperation between international criminal justice and national courts. It dictates that international criminal justice should not assert its jurisdiction except after transparent discussions between it and the state concerned about the facts that are subject to international prosecution.

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<sup>239</sup> Dr. Leila Asmani, "Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals," previous source, page 198

<sup>240</sup> For more details:

[https://ar.wikipedia.org/wiki/%D8%A7%D9%84%D8%A5%D8%B5%D9%84%D8%A7%D8%AD\\_%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A\\_%D9%81%D9%8A\\_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84](https://ar.wikipedia.org/wiki/%D8%A7%D9%84%D8%A5%D8%B5%D9%84%D8%A7%D8%AD_%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A_%D9%81%D9%8A_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84) (Cited on 5/8/2023)

<sup>241</sup> Dr. Samih Khalil Alwadia, International Responsibility for Israeli War Crimes, the previous source, page 59

States must explicitly declare their unwillingness or inability to address a certain case. By doing so, this declaration confirms the idea of complementarity between the court's jurisdiction and that of the states.<sup>242</sup>

The accession of Palestine to the International Criminal Court on January 1, 2015, marked an important event in the history of international criminal justice. This was due to Palestine's political and legal significance on various national and international levels. It raised many questions about the effectiveness of resorting to the International Criminal Court in similar cases to what is currently before the court (the Israeli military attack on Gaza in 2014). This leads us to the necessity of determining the jurisdiction of the International Criminal Court to investigate and hold Israeli leaders accountable for the crimes committed during the Israeli attack on Gaza in 2022. This requires us to divide this demand into the following:

**A. Jurisdiction of the International Criminal Court to Investigate Crimes Committed in Gaza in 2022:**

Israel, as the occupying power, committed numerous acts that constitute war crimes in all their forms during its attack on Gaza in 2022. These crimes fall under the jurisdiction of the International Criminal Court, which does not prosecute states, but individuals accused of committing one or more crimes falling within its jurisdiction.

The jurisdiction of the International Criminal Court is determined based on several criteria, including the type of crime, the time and place of its commission, and the identity of the perpetrator. Therefore, it is essential to examine the most important of these criteria to determine the jurisdiction of the International Criminal Court over the

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<sup>242</sup> Dr. Mustafa Ahmed Fouad, Public International Law, The General Framework of International Humanitarian Law, Part Five, First Edition, Faculty of Law, Tanta University, 2014, page 251



situation in Gaza during the 2022 attack, particularly the temporal and spatial jurisdiction.

#### 1. Temporal and Spatial Jurisdiction of the International Criminal Court in Gaza:

Regarding the spatial jurisdiction, the International Criminal Court has jurisdiction over crimes committed within the territory of each state party to the Rome Statute. If the state where the crime occurred is not a party to the statute, or if the accused individuals are present in a non-party state, the general rule, according to the principle of the relative effect of treaties, is that a state is not bound by the provisions of a treaty it is not a party to. However, this principle, while justified in the context of reciprocal obligations on each state, may be a means to obstruct international criminal proceedings. It would be easy for any offending state not to become a party to the Rome Statute and refuse to accept the court's jurisdiction to evade accountability for its nationals.<sup>243</sup>

Nonetheless, the Rome Statute explicitly states that the International Criminal Court has territorial jurisdiction over all states, whether the state where the incident occurred is a party to the court's statute or not. This means that the court's spatial jurisdiction extends to a state that is not a party, unless that state expressly accepts the court's jurisdiction or the United Nations Security Council refers a case to it.<sup>244</sup>

Therefore, since Palestine deposited its instrument of accession to the court with the United Nations Secretary-General and became a party to the Rome Statute on January 1, 2015, the International Criminal Court has had territorial jurisdiction to investigate and adjudicate all forms of international crimes occurring within the territory of Palestine. Consequently, the International Criminal Court has territorial jurisdiction to investigate war crimes that occurred in Gaza during the 2022 attack.

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<sup>243</sup> Dr. Ali Abdelqader Al-Qahwaji, *International Criminal Law*, the previous source, page 329

<sup>244</sup> Refer to Articles 4 and 12 of the Rome Statute of the International Criminal Court

Regarding the scope of jurisdiction in Palestine, it has previously been decided by the Pre-Trial Chamber that the jurisdiction of the International Criminal Court extends to include Gaza. This determination was based on several legal and factual foundations that have been discussed in detail in the past.

However, the current question arises: can the spatial jurisdiction of the International Criminal Court be extended beyond the boundaries defined according to the advisory opinion of the International Court of Justice and the decision issued by the Pre-Trial Chamber?

As a general principle, Palestine has full sovereignty over its territory, including all of historic Palestine, notwithstanding the presence of Israeli occupation. However, the current situation has led to various stages and obstacles for the state of Palestine, resulting in the erosion of many of its rights to full sovereignty over its territory. One of the main reasons for this is the international decisions issued against the State of Palestine and the agreements entered into by the Palestinian state, which have effectively divided Palestine. One of the primary decisions in this regard is United Nations General Assembly Resolution 181 of 1947, which was enacted due to the pressure exerted by colonial powers and the Israelis. Although the Resolution 181 was not implemented, it established international legitimacy for the establishment of the State of Palestine on the borders delineated in the partition plan. In confirmation of this, the 1988 declaration (Resolution 177/43) affirmed that Palestinians everywhere automatically became citizens of the State of Palestine. Analyzing this decision and its content reveals that the United Nations' recognition of the borders of the State of Palestine as of June 4, 1967, is an international recognition of the right of the Palestinian people and the State of Palestine to sovereignty over those territories. It also

constitutes a negation of the legitimacy of Israeli encroachment on these lands. Therefore, Palestinians residing within the borders of these territories enjoy full judicial authority, which cannot be diminished in any way, and the Israeli occupier does not have the authority to exercise any powers over them.<sup>245</sup>

However, in reality, the situation is different. Israeli occupation is an undeniable fact, and the State of Palestine is effectively under occupation, including the territories as of 1967. Hence, there would be practical difficulties in extending the spatial jurisdiction of the International Criminal Court beyond the 1967 borders.

As for the temporal jurisdiction of the International Criminal Court, the Rome Statute contains a provision that deals with the non-retroactivity of the Court's jurisdiction<sup>246</sup> over crimes committed after the entry into force of the Statute. If a state becomes a party to the Statute after its entry into force, the Court cannot exercise its jurisdiction over crimes committed before the entry into force of the Statute in relation to that state unless the state expressly accepts the Court's jurisdiction or in cases where crimes fall under the category of crimes that do not have a statute of limitations.<sup>247</sup>

In practice, the International Criminal Court does not have jurisdiction to adjudicate crimes that occurred before the entry into force of the Rome Statute as a general rule. Consequently, since Palestine became a party to the Rome Statute as of 2015, the International Criminal Court has temporal jurisdiction to investigate and adjudicate crimes that occurred during the Israeli attack on Gaza in 2022 because these crimes were committed after the Statute came into effect for Palestine. Moreover, these crimes do not fall under the statute of limitations, no matter how much time has passed.

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<sup>245</sup> Dr. Bashri Mohammed Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, previous source, page 36

<sup>246</sup> Look at Article 11 of the Rome Statute

<sup>247</sup> Article 29, under the title "No Statute of Limitations," states: "Crimes within the jurisdiction of the Court shall not be subject to any statute of limitations"

Therefore, the International Criminal Court has jurisdiction both spatially and temporally to investigate and adjudicate crimes committed during the Israeli attack on Gaza in 2022, based on the applicable legal and factual foundations.

## **B. Mechanism for Triggering the Jurisdiction of the International Criminal Court:**

The basic system of the International Criminal Court defines three primary ways through which the jurisdiction of the court can be triggered to investigate and prosecute crimes involving war crimes, crimes against humanity, and others. These methods and means are divided according to what Article 13 of the Rome Statute stipulates, as follows:

### **1. Triggering Jurisdiction by the Prosecutor**

The jurisdiction of the International Criminal Court is triggered by the Prosecutor based on the information available to them regarding crimes committed within the relevant state. This information can come in the form of oral or written evidence. According to this mechanism, non-party states to the system, international organizations, and individuals can provide information about crimes to the Prosecutor. Based on this information, the Prosecutor can initiate proceedings against Israel.<sup>248</sup>

Accordingly, the Prosecutor, according to the Rome Statute, can initiate jurisdiction automatically by seeking authorization from the Pre-Trial Chamber to commence an investigation, along with any evidence or proof related to the crimes to be investigated. If the Pre-Trial Chamber finds reasonable grounds to proceed with an investigation and that the case falls within the Court's jurisdiction, it grants authorization to commence

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<sup>248</sup> Article 13(j) states that: "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (j) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15

the investigation. If authorization is denied, the Prosecutor can later submit a request based on additional evidence and facts related to the same case.<sup>249</sup>

## **2. Triggering Jurisdiction by a Resolution of the Security Council**

This is the most challenging method for the jurisdiction of the Court to be established because it depends on a resolution passed by the Security Council. Given the possibility of veto by any of the five permanent members of the Security Council, it is much more likely that such a resolution would be blocked rather than passed. The Rome Statute stipulates that the Security Council has the authority to trigger the Court's jurisdiction by referring a case to the Prosecutor of the International Criminal Court if it becomes evident to the Security Council that one or more crimes falling within the Court's jurisdiction have been committed in a certain country, pursuant to Chapter VII of the United Nations Charter.<sup>250</sup>

## **3. Triggering Jurisdiction by a State Party to the Statute**

This method is more practical and legally sound for applying to the situation during the Israeli military offensive in Gaza in 2022. All the conditions for jurisdiction under this mechanism are met by Palestine. The Rome Statute allows a state party to refer a dispute to the Prosecutor based on a request submitted by any state party to the Statute. A state party may refer a situation where it appears that one or more crimes within the Court's jurisdiction have been committed on its territory. The state party can request the Prosecutor to investigate the situation to determine whether charges should be brought against specific individuals or officials responsible for these crimes.<sup>251</sup>

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<sup>249</sup> Dr. Bouziane Alian, *Legal Adaptation of the Blockade of Gaza and Its Legal Consequences in International Law*, Previous Source, Page 725

<sup>250</sup> Look at the text of Article 13(b) of the Rome Statute of the International Criminal Court

<sup>251</sup> Look at the text of Article 14(1) of the Rome Statute of the International Criminal Court

Indeed, this is what happened on May 22, 2018, when Palestine began to submit a referral to the Office of the Prosecutor of the International Criminal Court regarding crimes committed in Palestine. This was done through the office of the Prosecutor (Fatou Bensouda). Palestine founded its request according to the provisions of Articles 13(a) and 14 of the Rome Statute, considering itself a state party to the Rome Statute since June 13, 2014. The request included initiating an investigation into Israeli crimes committed throughout the territory of Palestine, including the events in Gaza in 2014.<sup>252</sup> Therefore, Palestine has the right to submit a referral to the Prosecutor under this mechanism to request an investigation into the crimes committed in Gaza during the Israeli offensive in 2022. It is likely that this request will be more effective than previous ones, especially since the territorial jurisdiction has already been established by the Pre-Trial Chamber. However, the effectiveness of these mechanisms still depends on political issues and obstacles that may hinder the Court's work, such as the deferral of investigations for 12 months pursuant to a resolution issued by the Council under Chapter VII of the United Nations Charter, which can be renewed under the same conditions.<sup>253</sup>

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<sup>252</sup> Find details about this request on the website. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20191220-otp-statement-palestine-ara.pdf> (Cited on 11/8/2023)

<sup>253</sup> Look at Article (16) of the Statute of the International Criminal Court

## **Chapter Four**

### **Challenges in the Implementation of Justice before the International Criminal Court**

#### **4.1 Introduction and Division**

Many may assume that the international criminal justice system has been completed with the establishment of the Rome Statute as an independent judicial entity, which came into effect in July 2002. Since then, it has been entrusted with addressing international crimes in various forms, particularly those committed against populations. However, the objectives of establishing this court have been thwarted even before it began to consider a single crime. This is due to the political dimensions that have cast their shadows on the nature of this court's work, which over time has become obstacles and challenges hindering the realization of international criminal justice.<sup>254</sup>

These political, legal, and international interest dimensions have been translated into two main aspects: First, by regulating these dimensions within the Rome Statute itself. Second, through the manipulation of major powers in the mechanism for initiating criminal proceedings before the International Criminal Court. On one hand, this court relies on a set of principles to fulfill its assigned tasks, which primarily help ensure the effective legal application of the foundations of international criminal justice. These principles concern individuals responsible for international crimes, such as the principle of no immunity or the principle of individual criminal responsibility. Despite most of these principles being stipulated in the Rome Statute, their implementation is not

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<sup>254</sup> Dr. Marwa Nazeer, The Impact of Political Factors on International Criminal Law - International Crimes as a Model, National Criminal Journal, National Center for Social and Criminal Research, Egypt, Volume: 54, Number: 1, 2011, page 95

straightforward, as these principles also face numerous challenges that require international political will to overcome and eliminate them definitively.<sup>255</sup>

In general, the Palestinian people face many challenges that stand in the way of their pursuit of justice against Israeli leaders responsible for the crimes committed in the occupied Palestinian territories. This includes the repeated invasions of the Gaza Strip, resulting in the death of many innocent civilians, infrastructure destruction, and ongoing economic and social blockade. All of these actions constitute various international crimes.

Therefore, this chapter will address the legal and political challenges that represent obstacles to the overall implementation of international criminal justice. It will also specifically examine the ability of the Palestinian state to prosecute perpetrators of war crimes, crimes against humanity, and crimes of aggression against the Palestinian people in the Gaza Strip and elsewhere. Consequently, this chapter should be divided into the following two sections:

## **4.2 Section 1: Inherent Obstacles in the Rome Statute System of the International Criminal Court**

Subsection 1: Legal Challenges in the Rome Statute

Subsection 2: External Political Challenges

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<sup>255</sup> Dr. Yahya Mejidi, "Obstacles to the Application of Justice before the International Criminal Court," *Legal and Political Thought Journal*, Amar Thelidji University, Algeria, Volume 6, Issue 2, 2022, page 98.



#### **4.2.1 Introduction and Division**

It is universally recognized that the effectiveness of any judicial system, whether national or international, depends on the enforcement of judgments issued by the relevant court. The same applies to the international criminal justice system unless the execution of judgments rendered by the court adjudicating the dispute is ensured. Therefore, the challenges that have been set and regulated within the foundational system itself stand as obstacles to the achievement of international criminal justice. This includes obstacles to the authority to initiate international criminal proceedings against perpetrators of international crimes, challenges to ensuring neutrality and completeness of investigations into these crimes, and impediments to the execution of judgments issued by the International Criminal Court when disputes reach this critical stage.

In practical reality, the application of the Rome Statute to international crimes has revealed the existence of practical limitations that hinder the International Criminal Court from prosecuting perpetrators of international crimes, particularly Israeli perpetrators, even when the Court's jurisdiction is activated, as is the case with the situation in Palestine. There are numerous other challenges that impede reaching the final stage of resolution in this conflict, even if activated. There are mild penalties imposed for these crimes that do not correspond to their severity. This necessitates the examination of these legal and executive issues by dividing this topic into two consecutive demands:

##### **Subsection 1: Legal Challenges in the Rome Statute**

##### **Subsection 2: External Political Challenges**

**Subsection 1: Legal Challenges in the Rome Statute**

The International Criminal Court is the result of efforts in international criminal justice to establish a permanent international court tasked with holding the most serious perpetrators of international crimes accountable. The establishment of this Court came after strenuous efforts by the United Nations and its member states, spanning over half a century. Therefore, this effort had a significant impact on the foundational texts of the International Criminal Court Statute, which contained many contradictions between the objectives of the Statute and the limitations and obstacles imposed on the Court. Many of the provisions were formulated as compromises between the desires of major states and international non-governmental organizations. All parties participating in the Statute sought to include ideas and principles that reflected their preferences, resulting in significant legal gaps in the Court's operational system. These legal gaps were the main reason for creating legal challenges within the Statute's provisions.

Therefore, the current study cannot achieve its main goal, which is to prosecute Israeli officials for their crimes in Palestine, particularly during the Israeli military attack on Gaza in 2022, without addressing the prominent legal gaps in the Rome Statute system. This requires addressing the following question: What are the most significant legal challenges in the Rome Statute system that hinder the operation of the International Criminal Court? This question excludes the issue of the complementarity principle as an opportunity for war criminals to escape international justice, as discussed in the second chapter. The most important of these challenges are the extensive powers granted to the Security Council through the Rome Statute system, such as the Council's authority to refer conflicts to the Court, its authority to defer investigations and prosecutions before

the Court, and the issue of activating the crime of aggression. Therefore, these challenges need to be organized by dividing this demand into the following three points:

**A. The Role of the Security Council in Referring Cases to the International Criminal Court.**

The Rome Statute established the relationship between the International Criminal Court and the Security Council through provisions and articles. These articles affirmed that the Rome Statute reaffirms the purposes and principles of the United Nations Charter, and this relationship between the Court and the United Nations is regulated by an agreement adopted by the Assembly of States Parties to this foundational system. This agreement later confirmed the extensive powers held by the Security Council regarding the International Criminal Court.<sup>256</sup>

In this regard, the Security Council has the right to refer any dispute involving a state to the Court for investigation under the provisions of Chapter VII of the United Nations Charter. This right to refer a dispute to the Prosecutor of the Court is provided for in Article 13(b) of the Statute. In other words, the Security Council can refer any case to the International Criminal Court based on the provisions of Chapter VII of the United Nations Charter concerning the maintenance of international peace and security if a crime or crimes falling within the jurisdiction of the Court appear to have been committed.<sup>257</sup> Importantly, the Court is not bound by the prerequisites for the Court's jurisdiction as stipulated in Article 12 of the Statute when the Security Council activates its jurisdiction. This means that if the Court's jurisdiction is triggered by the Security Council, it is not necessary for the crime to have been committed in the territory of a State Party to the Rome Statute or by a national of a State Party. The Court's jurisdiction

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<sup>256</sup> United nation, A/58/847, 20/8/2004, P, 8. Available at web site: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=48e5d4442> (Cited on 21/8/2023

<sup>257</sup> Look at Article (12) and Article (13) of the Statute of the International Criminal Court

can be triggered regardless of the location of the crime and the nationality of the perpetrator, even if the State where the crime occurred is not a party to the Statute. Activating the Court's jurisdiction by the Security Council effectively overrides the principle of complementary national jurisdiction and deprives the national jurisdiction of jurisdiction over the entire case.<sup>258</sup>

Therefore, as mentioned earlier, the Security Council plays a positive and extensive role in activating the Court's jurisdiction, extending its jurisdiction to all states, whether they have accepted its jurisdiction or not. Thus, it becomes clear that the Security Council has more authority than the Prosecutor of the Court, the state's parties to the Court, or even the state requesting an investigation into crimes committed on its territory, as the Security Council can give the Court the right to consider crimes that have occurred on the territory of non-party states, even if these states explicitly reject the Court's jurisdiction.<sup>259</sup>

The danger lies in granting such extensive authority to the UN Security Council, as its decisions can be vetoed, meaning that any decision to refer a dispute to the International Criminal Court (ICC) may be thwarted due to the existence of the veto power.<sup>260</sup> Furthermore, the Security Council itself has wide discretionary powers to determine when a situation threatens international peace and security. Additionally, it requires the approval of nine members of the Security Council, including the five permanent members, to refer a case to the ICC, which can be a practical challenge when trying to convince countries with shared interests to initiate such jurisdiction.<sup>236</sup>

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<sup>258</sup> Dr. Yahya Mujidi, *Obstacles to the Application of Justice before the International Criminal Court*, previous source, page 100

<sup>259</sup> Article (12/3) of the Statute states: "If acceptance of a State which is not a Party to this Statute is required by paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question

<sup>260</sup> Dr. Manal Hanidar, *Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza*, previous source, page 214

The researcher believes that these challenges are primarily political rather than legal. The relationship between the Security Council and the ICC, concerning jurisdiction and acceptance of cases, is marked by the predominance of political interests over the interests of international peace and security. This is evident in the Security Council's handling of various cases, such as the situation in Rwanda and the former Rwandan Armed Forces, where it expressed strong concern about human rights violations against civilians but ultimately did not refer these cases to the ICC based on Chapter VII.

In summary, the UN Security Council deals with this matter with significant oscillations and contradictions, primarily driven by political considerations rather than legal ones. This is particularly evident in the case of the Israeli-Palestinian conflict. Since the establishment of the Rome Statute, numerous crimes have been committed against the Palestinian people, yet the Security Council has remained largely inactive. It has also refrained from triggering the jurisdiction of the International Criminal Court (ICC) regarding any incidents that have occurred since the Rome Statute came into effect, despite having the authority to do so for states that are not parties to the statute, such as Israel, similar to what was done in the case of Sudan.<sup>261</sup>

This highlights a notable disparity between the Security Council's decisions concerning Palestine and its decisions regarding other international issues, even before the establishment of the Rome Statute. The Security Council has not made any attempt to establish a special criminal court as it did in the cases of Rwanda and the former Yugoslavia. This inconsistency in the Security Council's approach is particularly evident in the current crisis in Ukraine and the Israeli occupation and violations in Palestinian territories. The international community, UN bodies, and Western countries

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<sup>261</sup> Dr. Yahya Mujidi, *Obstacles to the Application of Justice before the International Criminal Court*, previous source, page 101

have faced criticism for their inconsistent responses, where they imposed sanctions on Russia and its President Vladimir Putin in response to the Ukrainian-Russian crisis, while failing to impose any sanctions on the Israeli occupation despite its various forms of violations, including killings, destruction, arrests, and persecution over the course of 74 years.

Assistant Minister of Foreign Affairs Omar Awadallah believes that active responses to the Ukrainian crisis, coupled with the reluctance to take a strong stance against the Israeli occupation and its crimes, reflect a double standard in international treatment and a lack of justice. He points out that European and other countries have demonstrated their ability to take measures to protect civilians, indicating that the issue is related to a lack of political will. Moreover, the selectivity in applying international law can have implications for the status and credibility of international law and its institutions worldwide.<sup>262</sup>

This forms the foundation and general framework upon which international law relies as a basis and legal support for triggering the criminal jurisdiction of the International Criminal Court (ICC) or establishing a special criminal court. When comparing it to previous international legal precedents in this regard, it becomes evident that the case of Kosovo (a region of Yugoslavia) included the issuance of resolutions by the UN Security Council, specifically Resolution numbers 808 and 827. This was based on the assertion that the situation in Kosovo constituted a threat to international peace and security. Furthermore, the establishment of a special criminal court was considered a means and mechanism to address the violations and crimes committed in Yugoslavia.

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<sup>262</sup> Dr. Najah Matar Al-Abd Daqmaq, *Israeli Occupation Tools in Hindering or Halting Investigation before the International Criminal Court and Ways to Overcome Them*, University of Isra'a Journal of Scientific Conferences, Issue 8, 2022, page 35

The Security Council also passed Resolution 1593 on March 31, 2005, which referred the case of Darfur in Sudan to the International Criminal Court (ICC).<sup>263</sup>

Therefore, in accordance with the provisions of Chapter VII of the United Nations Charter, the Security Council can issue a resolution to refer specific situations that threaten international peace and security. Given the descriptions by the Israelis regarding the events in the Gaza Strip, which have been characterized as severe war crimes and crimes against humanity, activating the jurisdiction of the International Criminal Court through a Security Council resolution would carry significant political and international weight against Israel. This could ultimately lead to the prosecution of those responsible for these crimes against humanity and war crimes committed by Israelis in the Gaza Strip during the 2022 conflict. This approach is similar to what the Security Council did in the cases of Rwanda and the former Yugoslavia, where it emphasized that leaving criminals unpunished poses a threat to international peace and security.

However, the researcher believes that reaching and implementing this solution in the current political circumstances in the case of Palestine is extremely difficult and distant. This is because the Security Council will only issue such resolutions when they align with the interests of the five major permanent member states of the Security Council and their allies. This implies that there is a practical challenge at present to prosecute Israelis for the crimes that occurred in Gaza during 2022.<sup>264</sup>

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<sup>263</sup> You can refer to this matter on the website.

<https://www.alhadath.ps/article/154794/%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D8%A7%D9%84%D8%B1%D9%88%D8%B3%D9%8A%D8%A9-%D8%A7%D9%84%D8%A3%D9%88%D9%83%D8%B1%D8%A7%D9%86%D9%8A%D8%A9-%D9%87%D9%83%D8%B0%D8%A7-%D8%AA%D9%83%D8%B4%D9%91%D9%81%D8%AA-%D8%A7%D8%B2%D8%AF%D9%88%D8%A7%D8%AC%D9%8A%D8%A9-%D8%A7%D9%84%D9%85%D8%B9%D8%A7%D9%8A%D9%8A%D8%B1> (Cited on 21/8/2023

<sup>264</sup> Dr. Manal Hanidar, *The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza*, Previous Source, Page 173

**B. The authority Granted to the Council to Defer Investigations and Trials** is considered one of the most significant provisions in the Rome Statute of the International Criminal Court. This provision has the potential to prevent the activation of the Court's jurisdiction in both positive and negative cases. It can also hinder any similar attempts to trigger jurisdiction in other cases or similar situations.

Despite the Rome Statute excluding the prosecution's authority before the International Criminal Court from the conditions outlined in Article 12 and the requirement for consent, the Statute itself did not limit the Security Council's authority. Major powers further imposed restrictions on the Court's freedom to conduct investigations and issue judgments through a mechanism known as "deferral of investigations" based on requests from states or the Prosecutor, all covered by the same text.<sup>265</sup>

In accordance with this, Article 16 of the Rome Statute states, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."<sup>266</sup>

The Security Council has issued numerous resolutions based on this provision, including Resolution 1422 in 2002. This resolution was issued due to the insistence of the United States, which explicitly threatened to use its veto power against the renewal of all United Nations peacekeeping missions, including the renewal of the United Nations mission in Bosnia and Herzegovina. This was unless its citizens were protected

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<sup>265</sup> Dr. Leila Assamani: Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals, Previous Source, Page 633

<sup>266</sup> Dr. Manal Haydar, The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza, Previous Source, Page 222



from prosecution by the International Criminal Court, even if those individuals were on official missions.

This resolution entered into force on July 1, 2002, for one year and was renewed for twelve months under Resolution 1487, issued on June 12, 2003.<sup>267</sup>

Therefore, the Security Council issued Resolution 1422 in 2002, which stated: "Recognizing that the Statute of the International Criminal Court, adopted in Rome on 17 July 1998 and entered into force on 1 July 2002... Acting under Chapter VII of the Charter of the United Nations, 1. Requests, in accordance with the provisions of Article 16 of the Statute, that the International Criminal Court refrain from taking any action for a period of 12 months from 1 July 2002, in the case of investigations or prosecutions relating to current or former officials or personnel from a contributing state that is not a party to the Rome Statute concerning acts or omissions relating to United Nations established or authorized operations unless the Security Council decides otherwise."<sup>268</sup>

At the end of its designated time, Resolution 1422 was not renewed. However, the United States, at the request of the United States, sought to extend this resolution in the following year. The Security Council Proposed Resolution 1487 in 2003, which was presented as a draft to renew the previous Resolution 1422, extending its duration for another twelve months in accordance with the requirements of Article 16 of the Rome Statute. After deliberations, it became clear that no state present opposed this resolution,

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<sup>267</sup> For more details:

[https://ar.wikipedia.org/wiki/%D9%82%D8%B1%D8%A7%D8%B1\\_%D9%85%D8%AC%D9%84%D8%B3\\_%D8%A7%D9%84%D8%A3%D9%85%D9%86\\_%D8%A7%D9%84%D8%AA%D8%A7%D8%A8%D8%B9\\_%D9%84%D9%84%D8%A3%D9%85%D9%85\\_%D8%A7%D9%84%D9%85%D8%AA%D8%AD%D8%AF%D8%A9\\_%D8%B1%D9%82%D9%85\\_1422](https://ar.wikipedia.org/wiki/%D9%82%D8%B1%D8%A7%D8%B1_%D9%85%D8%AC%D9%84%D8%B3_%D8%A7%D9%84%D8%A3%D9%85%D9%86_%D8%A7%D9%84%D8%AA%D8%A7%D8%A8%D8%B9_%D9%84%D9%84%D8%A3%D9%85%D9%85_%D8%A7%D9%84%D9%85%D8%AA%D8%AD%D8%AF%D8%A9_%D8%B1%D9%82%D9%85_1422) (Cited on 22/8/2023)

<sup>268</sup> United nations: S/Res 1422/ 2002, 12 July 2002 ,P,2. Available at web site:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK EwiGyvKS2fCAAxWegP0HHQXDC-AQFnoECBEQAQ&url=https%3A%2F%2Fdigitallibrary.un.org%2Frecord%2F468885%2Ffiles%2FRES\\_1422%25282002%2529-AR.pdf&usg=AOvVaw2FwxtB8krmS\\_DKiY3lrVQd&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK EwiGyvKS2fCAAxWegP0HHQXDC-AQFnoECBEQAQ&url=https%3A%2F%2Fdigitallibrary.un.org%2Frecord%2F468885%2Ffiles%2FRES_1422%25282002%2529-AR.pdf&usg=AOvVaw2FwxtB8krmS_DKiY3lrVQd&opi=89978449)

although three states abstained from voting (France, Germany, and the Syrian Arab Republic). On June 12, 2003, this resolution was issued.<sup>269</sup>

In the subsequent year, the United States attempted to renew this resolution once again. After efforts to garner support among the member states of the Security Council failed, the United States withdrew this proposal. The main reason for opposing and withdrawing this proposal was the emergence of scandals committed by the United States military in Iraq. The Secretary-General at the time opposed the renewal and the continued immunity granted under the mentioned resolution to individuals serving in United Nations missions, especially since the majority of these individuals were soldiers from the United States military. The Secretary-General expressed this by saying, "The United Nations' ability to enforce the law will be affected if the Security Council approves the renewal and expansion of the immunity granted." It is worth noting that the Secretary-General himself was opposed to the original Resolution 1422 and its renewed Resolution 1487.<sup>270</sup>

Therefore, this text raises several concerns because it grants the Security Council the authority to prevent investigations or prosecutions before the Court or to halt them repeatedly without any possibility for the concerned states to limit or stop this extension. This is particularly significant when it comes to commencing investigations or trials of those responsible for the crimes committed in Gaza in 2022, as the United States is certain to employ all means to obstruct the trial and accountability of Israeli leaders for the crimes committed during this attack.

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<sup>269</sup> S/RES/1487 (2003) , 12 June 2003, Available at web site: <http://unscr.com/en/resolutions/doc/1487>  
(Cited on 7/9/2023)

<sup>270</sup> Dr. Manal Saleh Mohammad Saifan, The Compulsory Jurisdiction of the International Criminal Court by Deferral Decision, Master's Thesis, Graduate Studies College, International Islamic University, Jordan, 2021, Page 99

It's important to note that the text of the aforementioned article does not specify when this period begins, whether it is from the date of the request from the Security Council or from the date when the information reaches the Court. This has opened the door to unwarranted textual interpretations in a matter that should not be subject to such interpretations. Moreover, the negative impact of this authority is compounded by granting the Council the right to renew the request an unlimited number of times, which could lead to the termination of investigations or accountability altogether, as well as the disappearance of evidence and the loss of proof. Finally, this text gives the Security Council an unjustified negative constraint on impeding the progress of investigation procedures and undermining the value of international criminal justice.<sup>271</sup>

### **C. The Problem of Activating the Crime of Aggression**

The crime of aggression is considered one of the crimes against humanity of high seriousness. Although the Rome Statute includes this crime among the crimes that the International Criminal Court has jurisdiction over and can prosecute its perpetrators, this statute did not define it or set boundaries for it. This issue was postponed until May 31, 2010, the date of the Kampala Conference in Uganda. This conference took place eight years after the entry into force of the Rome Statute. During this conference, the crime of aggression was defined, its elements were clarified, and Article 8 was added to the statute, which provided a comprehensive definition of the crime of aggression<sup>272</sup>

However, this article had one condition attached to it: the jurisdiction of the court over this crime would remain suspended until 2017, provided that the necessary conditions

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<sup>271</sup> Dr. Yahya Majidi, *Barriers to Implementing Justice before the International Criminal Court*, Previous Source, Page 101

<sup>272</sup> 247. Article 121(3) of the Statute stipulates: "3- The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference shall require the affirmative votes of a majority of three-fourths of the States Parties

were met by the state parties to the statute, as per the provisions of Articles 121 and 123.<sup>273</sup>

On December 15, 2017, the state parties approved the amendments regarding the crime of aggression during the thirteenth plenary session. These amendments activated the court's jurisdiction over these crimes starting from July 2018. However, the same decision imposed several restrictions and obstacles, formulated according to the provisions of the same Rome Statute. These restrictions seemed to aim at emptying this jurisdiction of its content and making it virtually non-existent.

The decision stated: "...according to the Rome Statute, the amendments to the Rome Statute regarding the crime of aggression adopted by the Kampala Review Conference shall enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance. And it further stipulated that in the case of referral by a State Party or initiation of an investigation proprio motu in respect of the crime of aggression, the Court shall exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by the majority of States Parties. Moreover, the decision called for renewing the invitation to all States Parties that have not yet done so to ratify or accept the amendments to the Rome Statute related to the crime of aggression."<sup>274</sup>

Thus, the suspension of the court's jurisdiction over the crime of aggression for states that accepted or ratified the amendments only after one year from the date of approval raises astonishment and perplexity.<sup>275</sup> This condition, as stipulated in the Rome Statute, has the potential to result in the loss of evidence for the commission of these crimes and

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<sup>273</sup> ICC- ASP/ 16/20 Res .5 decision : Available at web site: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ARA.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ARA.pdf) (Cited on 21/8/2023)

<sup>274</sup> Ibid, P, 39

<sup>275</sup> Look at the text of Article 15(2) repeated from the Statute of the International Criminal Court

the escape of those responsible for them. The court's jurisdiction is also contingent on the majority of state parties accepting these amendments<sup>276</sup>. Consequently, states can reject the court's jurisdiction over any incident that constitutes a crime of aggression by depositing a record. Furthermore, non-party states, such as Israel in our case, the occupying power<sup>277</sup>, cannot be subject to the jurisdiction of the International Criminal Court when their citizens commit the crime of aggression or when it is committed within their territory. <sup>253</sup>Therefore, the amendments of the Kampala Conference only represent a blatant and explicit violation that protects the perpetrators of aggression, including Israelis, and undermines the principle of accountability, ultimately serving the interests of these states at the expense of the occupied peoples.<sup>278</sup>

#### **D. The Problem of Immunities of State Leaders**

Immunities are highly significant in the field of international relations, and in brief, they refer to providing protection for diplomats or heads of state in order to safeguard their person or life. It is well-established that the primary focus of international criminal law is the individual, whether they are a leader, executive, or an ordinary person. Therefore, the individual is the primary subject of international criminal law and is directly responsible for crimes such as genocide, war crimes, crimes against humanity, and others. This raises the current question of whether these immunities pose an obstacle to the prosecution of Israeli leaders before the International Criminal Court under the Rome Statute or whether they do not hinder it.

Firstly, it should be emphasized that the Rome Statute of the International Criminal Court affirms individual criminal responsibility for heads of state, government officials,

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<sup>276</sup> Look at the text of Article 15(3) repeated from the Statute of the International Criminal Court

<sup>277</sup> Look at the text of Article 15(4) repeated from the Statute of the International Criminal Court

<sup>278</sup> Look at the text of Article 15(5) repeated from the Statute of the International Criminal Court.

and military leaders for crimes they have committed or that have been committed by those under their command. This is stated in Article 25(2), which specifies that: "The person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

On the other hand, Article 28(1) specifies that the criminal responsibility of leaders and military commanders for crimes falling within the jurisdiction of the International Criminal Court, committed by their subordinates due to their failure to exercise control over these forces properly, results in the indirect responsibility of these leaders in the following situations:

If the military commander or individual knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.

If the military commander or individual failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.

In the event that subordinates commit international crimes according to the Rome Statute, but without orders from their leaders or senior officials, Article 28(2) of the Rome Statute provides that if the crimes relate to activities that fall within the effective responsibility and control of a head of state, in this case, the criminal responsibility of this head of state is presumed for the crimes committed, even if they were not the result of orders issued by them or done with their knowledge. This is due to the following reasons:

- If the head of state knew or consciously disregarded information which clearly indicated that subordinates were committing or were about to commit such crimes.

- If the crimes related to activities that fall within the effective responsibility and control of the head of state.
- If the head of state failed to take all necessary and reasonable measures within their power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.

In this context, different political and legal systems of countries vary in terms of granting immunities. European countries grant their kings absolute immunities that prevent them from being pursued or prosecuted by any international judicial authority.<sup>279</sup> However, other countries have more flexible approaches to this issue. Joining the Rome Statute requires countries to make the necessary legal amendments to their constitutions to make them compatible with the court's system or to interpret them in a way that there are no immunities granted to the perpetrators of international crimes. Therefore, Articles 27 and 28 of the Rome Statute, mentioned earlier, are the only legal and fundamental pillars for the suspension of judicial immunity for heads of state. These principles have been reflected in international law, which has seen significant progress. The principle of immunity for presidents and leaders has significantly diminished and is in line with the Rome Statute's methodology. However, achieving this goal can only be done with the consent of states through joining and ratifying the treaty. It cannot be envisioned to suspend the immunity of leaders without resorting to the consensual method through accession and ratification. The Rome Statute respects the sovereignty of

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<sup>279</sup> Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, The International Criminal Court between Legal Constraints and Political Considerations, Alif Journal for Language, Media, and Society, University of Algeria (2), Volume: 9, Issue: 1, 2022, Page 671

states and their agreement in order to remove and suspend the immunity of presidents and leaders whenever it relates to combating international crimes.<sup>280</sup>

Based on this, there are several challenges related to this issue, including the use of immunity as a reason for non-cooperation with the International Criminal Court (ICC). One aspect of these challenges is the contradiction between the text of Article 27 and Article 98 of the same statute. Article 27, as previously mentioned, emphasizes that official capacity of the person shall not exempt them from criminal responsibility, meaning that immunity does not protect the individual from criminal liability and does not mitigate their punishment.<sup>281</sup> On the other hand, Article 98 considers that the presence of persons with immunity on the territory of a state other than their nationality should be initially surrendered to the ICC. Therefore, this state is requested to surrender them for prosecution, and at the same time, their state of nationality is asked to waive their immunity as provided for in their national legislation. If the state of nationality refuses to surrender the accused person, the states on whose territory they are present cannot act in a way that contradicts their obligations under international agreements that grant immunity based on their national legislation. This is done to avoid any tensions in relations between states.<sup>282</sup>

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<sup>280</sup> Dr. Mohannad Harb Al-Nuaimat, Immunities and the International Criminal Court, Master's Thesis, Faculty of Law, Arab Open University, Jordan, 2017, Page 97

<sup>281</sup> Dr. Nabilah Aqojil, The Problem of Immunity of Heads and Leaders of States in the Rome Statute System, Al-Mufakir Journal, Faculty of Law and Political Science, University of Mohammed Khider, Algeria, Volume: 13, Issue: 2, 2018, Page 479

<sup>282</sup> Article 98 of the Statute stipulates: "1- The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2- The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender



This indicates that the presence of individuals accused of committing international crimes before the International Criminal Court requires the cooperation of both states, which is indeed a challenging matter to achieve. <sup>259</sup> The state requested to surrender the person protected by immunity will find itself facing conflicting obligations. Either it complies with the requests of the International Criminal Court for surrender or adheres to its other obligations under international law regarding state immunity or diplomatic immunity.

This issue becomes even more complex when a state like Israel openly declares that it will not cooperate with the International Criminal Court in any investigation. In this case, it creates a significant obstacle to the prosecution and surrender of Israeli officials for crimes they may have committed before the International Criminal Court.

Therefore, this challenge represents a major obstacle to reaching a trial for Israeli officials and their surrender for the crimes they may have committed before the International Criminal Court. Israel is unlikely to ratify or amend its legislation to align with the provisions of the Rome Statute, and former Israeli leaders and officials may seek refuge in multiple states to ensure that those states will not surrender them to the International Criminal Court in case legal actions are initiated against them. Consequently, addressing this challenge may require amendments to the Rome Statute to find effective ways to overcome these obstacles to justice.<sup>283</sup>

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<sup>283</sup> Dr. Nabilah Aqojil, *The Problem of Immunity of Heads and Leaders of States in the Rome Statute System*, Previous Source, Page 480

## **E. Weak Penalties and the Problem of Enforcing International Criminal Court Judgments**

The issue of enforcing judgments is generally crucial to achieving justice. Without a mechanism for enforcing judgments by the judicial system that issues them, they remain ineffective. Therefore, one of the legal challenges facing the Rome Statute system is the issue of enforcing judgments when a dispute has reached this stage. Additionally, the Rome Statute includes a range of penalties that, in the researcher's opinion, do not adequately match the gravity of the crimes falling within the Court's jurisdiction. This issue can be divided into the following two aspects:<sup>284</sup>

### **1. The Problem of Enforcement**

To begin with, looking at the issue of enforcing international judgments in general, it must be considered that international justice fundamentally relies on the will of sovereign states when it comes to jurisdiction over disputes. States cannot be compelled to resort to the Court without their consent in some form. Naturally, non-state parties are not subject to the jurisdiction of this Court.<sup>285</sup> Therefore, the fundamental challenge in enforcing judgments issued by the International Criminal Court (ICC) lies in the absence of a higher enforcement authority in the international community that can impose and execute international judgments on states. Moreover, the enforcement aspect of these judgments is influenced by the issue of state sovereignty and non-interference.<sup>286</sup>

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<sup>284</sup> Please refer to this matter through the website. <https://www.france24.com/ar/> (Cited on 7/9/2023)

<sup>285</sup> Dr. Sulaiman Salim Falah Al-Husami, *Mechanisms for Implementing Judgments Issued by the International Criminal Court*, Master's Thesis, Faculty of Law, Middle East University, Jordan, 2019, Page 107

<sup>286</sup> Article 103 of the Rome Statute, under the title "Role of States in the Enforcement of Sentences," states: "1. (a) A sentence of imprisonment shall be served in the State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with the provisions of this Part

The Rome Statute of the ICC does not include any obligatory or coercive provisions that require states to enforce its judgments and decisions. Instead, it emphasizes the role of states in implementing sentences, contingent on the consent of the state itself, as determined by the Court from a list of states that have accepted the imprisonment of convicted individuals.<sup>287</sup>

As a result, the researcher argues that due to the lack of binding and compulsory provisions in the Rome Statute requiring states to enforce judgments and decisions, the enforcement of ICC judgments remains largely dependent on the willingness of states. If a state refuses to execute a judgment, there is a gap in the legal framework for enforcement. This gap necessitates supplementary measures, such as enforcement in a host state. The absence of a clear legal provision in the Rome Statute obliging states to adhere to and recognize its judgments or to enforce them leaves a significant weakness in the enforcement mechanism. Furthermore, the lack of an international law enforcement agency responsible for pursuing those convicted adds to the challenges faced in implementing judgments.

## **2. The Issue of Weak Penalties**

There is no dispute that penalties are the typical and essential form of international criminal justice. Penalties represent the consequence of violating provisions of international criminal law,<sup>288</sup> and they are the necessary response to those who are proven to have committed international crimes. Nevertheless, when examining the penalties stipulated in the Rome Statute, it becomes apparent that, despite the

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<sup>287</sup> Dr. Yahya Majidi, Barriers to Implementing Justice before the International Criminal Court, Previous Source, Page 102

<sup>288</sup> Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, The International Criminal Court between Legal Constraints and Political Considerations, Previous Source, Page 672

seriousness of the crimes within the ICC's jurisdiction, the prescribed penalties do not proportionally reflect the gravity of these crimes.<sup>289</sup>

For instance, the Rome Statute does not include the death penalty as a punishment, limiting the maximum penalty to life imprisonment. However, it also allows states parties to apply other penalties as provided for in their national laws.<sup>290</sup> This inconsistency is due to differing opinions among states parties to the Rome Statute, reflecting an attempt to reconcile varying views to encourage states to join the Statute.<sup>291</sup>

In conclusion, the challenges related to the enforcement of ICC judgments and the issue of weak penalties underscore the complexities and limitations of the current international justice system. These challenges call for further international cooperation and legal reforms to ensure that justice is effectively served in cases of grave international crimes.

## **4.3 Section 2: Political Obstacles to the Application of International Criminal Justice**

### **4.3.1 Introduction and Division**

Undoubtedly, Palestinian diplomacy has succeeded in influencing the people and nations of the world regarding the justice of the Palestinian cause and the right of the Palestinian people to self-determination. It has also conveyed the voice of the Palestinian people on many occasions. However, in the era of the Palestinian Authority, Palestinian diplomacy has suffered from political paralysis in all its aspects. This can be

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<sup>289</sup> Please refer to the text of Article 77 of the Rome Statute of the International Criminal Court

<sup>290</sup> Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, *The International Criminal Court between Legal Constraints and Political Considerations*, Previous Source, Page 673

<sup>291</sup> Dr. Najah Matar Al-Abd Daqmaq, *Israeli Occupation's Tools in Obstructing or Halting Investigations before the International Criminal Court and Ways to Overcome Them*, Previous Source, Page 44

attributed to the absence of unified diplomatic efforts, the division within the political system, which has significantly affected diplomatic efforts with the international community. Additionally, the lack of full coordination among Palestinian ministries has hindered diplomacy from achieving its goals in exposing the crimes of the Israeli occupation, including settlement activities, land confiscation, daily killings of civilians, extrajudicial executions, and the siege of Jerusalem. These issues should be within the priorities of Palestinian diplomacy. This does not negate the presence of occasional successes, and Palestinian diplomacy has become more adept in its work. Therefore, it is necessary to examine the internal and external challenges that hinder the achievement of international criminal justice. This examination is carried out through the following two demands:

### **Subsection 1: Internal Palestinian Challenges**

The political aspect forms the major obstacle and barrier to the unity of the Palestinian people in their pursuit of international and local legal action against Israeli criminals. For example, any attempts to exercise legal jurisdiction over Israelis for prosecution face immense pressure on the Palestinian Authority from other governments worldwide. These governments exert pressure to suppress any judicial initiatives aiming to establish jurisdiction by Palestinian courts over Israeli nationals. These pressures exploit the internal division within the Palestinian political landscape.

Furthermore, the United States, in cooperation with Israel, consistently threatens significant sanctions against the Palestinian Authority, such as economic sanctions, among others. In this context, the Palestinian internal division has led to clear procrastination and inaction in this file. The division did not solely affect Palestinian

political parties but also extended to essential matters, such as the unified judicial system, which lacks the principle of cooperation. This has made the idea of prosecuting Israeli officials increasingly difficult to achieve within the framework of Palestinian courts.<sup>292</sup>

Many analysts and observers believe that these negative positions detrimental to the Palestinian cause, and others like them, would not have appeared in this manner, or at least not in such an explicit manner, if it were not for the dangerous atmosphere of division that has cast its negative shadow on the Palestinian people, their political components, and their national cause. Discussing the true objective reasons for the division requires a comprehensive examination of the subject and a return to the roots of the dysfunction in bilateral relations, especially between Hamas and Fatah movements. It also requires addressing the issues within all Palestinian political entities as a whole. Therefore, the pressing question is whether there are solutions that can alleviate this complex situation and bring the issue closer to a resolution before it becomes too late.<sup>293</sup>

Furthermore, Israel, the occupying power, has imposed numerous restrictions on the entry, exit, and siege of the Gaza Strip through all access points. One of the main objectives of this blockade by Israel is to prevent international employees of human rights organizations from documenting its crimes in the Gaza Strip, especially in the 2022 attack. Israel's general policy is not to allow Palestinians, Israelis, or foreign employees of international human rights organizations to enter or leave Gaza. Israel also controls Gaza's airspace and its territorial waters. It has prevented the operation of an

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<sup>292</sup> Dr. Sarah Mihoub Ahmed Al-Asaad, *International Criminal Responsibility*, Previous Source, Page 137

<sup>293</sup> Please refer to this matter in the article published on the website. <https://1-a1072.azureedge.net/blogs/2016/10/24/%D8%A7%D9%84%D8%A7%D9%86%D9%82%D8%B3%D8%A7%D9%85-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A-%D9%88%D8%A7%D9%84%D8%AD%D9%84-%D8%A7%D9%84%D9%85%D8%AA%D8%A8%D9%82%D9%8A> (Cited on 23/8/2023)

airport or a seaport for the past two decades. In this context, the Human Rights Watch organization repeatedly sought permission for its foreign employees to enter Gaza. However, Israeli authorities rejected most of these requests, except for one exceptional approval in September 2016.<sup>294</sup>

In summary, the internal challenges facing the Palestinian situation, in general, ultimately revolve around weakening the accountability and pursuit of criminal cases against Israeli leaders and officials for all the crimes they have committed. This poses an extremely dangerous curve in the road. Therefore, Palestinian parties must take serious and tangible steps to end this division, seek reconciliation, and unify against the Israelis. The Palestinian people, their political administrations, and their civil organizations have no other path but to seek this unity, away from control, domination, and exclusion. This will ensure the emergence of a unified leadership that stands against external obstacles and Israeli crimes.<sup>295</sup>

And this unify becomes more crucial in response to the Israeli aggression on Gaza in 2023, countering Israeli plans to separate Gaza from the West Bank and Jerusalem, forcibly displace its residents, or reoccupy the region. It's worth noting that confronting the Western American alignment with the Israeli forces and exposing its colonial intentions prolongs the occupation. The Palestinian people and their institutions are blackmailed with the cessation of financial aid and the confiscation of Palestinian reconciliation funds. The labeling of the Palestinian people's struggle as terrorism, accusing them of incitement, anti-Semitism, and imposing restrictive conditions on their curriculum and various aspects of life, requires the Palestinian side to move forward without hesitation in holding the occupying authority and its allies accountable in

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<sup>294</sup> Please refer to this matter in the article published on the website <https://www.hrw.org/ar/report/2017/04/04/301672> (Cited on 23/8/2023)

<sup>295</sup> Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility, Previous Source, Page 139

international courts. One of the prominent challenges that emerged during the recent Israeli aggression in October 2023 is the loss of trust and abandonment by the Palestinian people and supporting nations in the power of international law and its enforceability against the political pressures exerted by former colonial powers.

### **Subsection 2: External Political Challenges**

The main source of these challenges lies in the nature of the international legal system itself and the dominant states that control it. This system is supposed to be based on a political foundation that respects state sovereignty and a set of international behavioral rules that safeguard the rights and duties of states. However, when we look at the arrangements related to establishing the basic framework of the International Criminal Court, which is supposed to be a crucial step in protecting the international legal system by holding individuals criminally responsible for war crimes and others, we find that this system is inherently flawed.

The International Criminal Court system faces numerous challenges, primarily due to the political nature of the international legal framework and the power dynamics among states. These challenges hinder the effective pursuit of international criminal justice, especially when powerful states are involved or when there are conflicting political interests at play.<sup>296</sup>

These external political challenges are deeply entrenched in the international legal system, and addressing them requires a concerted effort by the international community to reform and strengthen the mechanisms for enforcing international criminal justice, ensuring that the court can function independently and effectively without political

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<sup>296</sup> Dr. Abdelatif Dahia, Barriers to the Effectiveness of the Permanent International Criminal Court, Al-Haqqiqa Journal, Bouadhi University - Algeria, Issue: 37, 2016, Page 340



interference or bias. However, achieving this goal remains a complex and ongoing process, as it involves navigating the intricate web of international politics and power dynamics.

Therefore, one of the most significant factors that has hindered and continues to obstruct the accountability of Israelis and access to international criminal justice is global complicity by states and international organizations, primarily the United Nations Security Council.<sup>297</sup> Israel has exerted considerable influence over international decision-makers, especially the United States, which consistently opposes any fair decision that could potentially lead to the prosecution of Israeli leaders before the International Criminal Court (ICC). On the other hand, the international community still maintains a preferential policy when it comes to applying the rules of international legitimacy in cases of crimes, leading to inconsistency in dealing with such issues. This was evident in the Gaza attacks, where major powers remained passive in the face of massacres.<sup>298</sup>

And this became evident clearly during the Israeli aggression on Gaza in 2023, even extending to full complicity in the crime.

The United States actively participated in the discussions leading to the establishment of the Rome Statute but later undermined its content by insisting on placing obstacles and restrictions on the operation of the ICC. The U.S. is aware that allowing this system to function impartially would pose a significant threat to its own interests as well as those of Israel, potentially resulting in their prosecution, regardless of the ultimate enforceability of judgments. Therefore, the United States has consistently sought to

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<sup>297</sup> Dr. Sarah Mihoub Ahmed Al-Asaad, *International Criminal Responsibility*, Previous Source, Page 142

<sup>298</sup> Look into this matter through the website. <https://qudsnet.com/post/426348/> (Cited on 23/8/2022)

limit the authority of the ICC, both legally by restricting its jurisdiction and politically through pressure exerted in the UN Security Council and the use of vetoes.

And this is also what the sessions of the United Nations Security Council witnessed from the beginning of October until the completion of the thesis, during which the United States obstructed all draft resolutions calling for an immediate ceasefire with its veto. This necessitates immediate action to reform the structure of the Security Council and its permanent five-member composition, where the legal dimension prevails over political considerations.

The United States has a history of opposing the ICC, as evidenced by President Donald Trump's attacks on the United Nations Human Rights Council and withdrawal of recognition from the ICC. Trump declared that the United States does not recognize the ICC's jurisdiction and has no legal or legitimate authority, primarily due to the ICC's pursuit of criminal cases, including war crimes and crimes against humanity, involving Israeli leaders.

Furthermore, the United States continued its political pressure on the ICC by refusing visas to ICC personnel. In March 2019, U.S. Secretary of State Mike Pompeo announced the denial of visas to ICC staff members, hindering the accountability for serious international crimes. This move was a response to the ICC's potential investigations into Afghanistan, which could examine the conduct of American officials in war crimes committed between 2003 and 2004, as well as potential investigations in Palestine, which may include the behavior of Israeli officials.<sup>299</sup>

As a result, President Trump imposed sanctions on ICC officials who were involved in the investigation of war crimes committed by American soldiers in Afghanistan. After

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<sup>299</sup> Look into the details of threats directed by the United States of America towards the International Criminal Court on the website. <https://www.hrw.org/ar/news/2019/03/16/328215> (Cited on 23/8/2023)

the initial investigation suggested there were grounds to believe war crimes had occurred, Trump imposed sanctions, freezing the assets of ICC officials and preventing them from entering U.S. territory. Additionally, the United States revoked the entry visa of ICC Prosecutor Fatou Bensouda, forcing her to go through a visa application process as a punitive measure for cooperating with the Palestinian case before the ICC.<sup>300</sup>

It's worth noting that several countries, especially Arab nations, have refrained from ratifying or joining the Rome Statute's basic system, fearing future accountability. This includes the United States, which has a long history of violating international humanitarian law, particularly in Afghanistan and Iraq. Similarly, Israel has often abstained from joining the ICC, out of fear that its leaders and officials could be held accountable for serious violations and crimes against Palestinians, falling under the ICC's jurisdiction.<sup>301</sup>

Based on the previously mentioned data, the current situation represents a state of conflict and competition for reshaping the regional equation, specifically within the Arab world and the normalization policy. This policy aims to whitewash Israel's image and save it from an impending economic collapse. Israel is actively supported by the United States in thwarting international accountability for the crimes it has committed against the Palestinian people. Instead of facing international scrutiny for its actions, Israel is building normalization relationships with Arab countries, receiving diplomatic recognition from some states, all the while ignoring the rights of the Palestinian people.<sup>302</sup> This jeopardizes the ongoing support for the Palestinian cause, and these

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<sup>300</sup>Find more details on this matter on the website. <https://www.swissinfo.ch/ara/afp//44876698> (Cited on 23/8/2023)

<sup>301</sup> Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, *The International Criminal Court between Legal Constraints and Political Considerations*, Previous Source, Page 663

<sup>302</sup> Dr. Najah Matar Al-Abd Daqmaq, *Israeli Occupation's Tools in Obstructing or Halting Investigations before the International Criminal Court and Ways to Overcome Them*, Previous Source, Page 39

countries become instruments for undermining the Palestinian issue at its core, serving as auxiliary arms to Israel.<sup>303</sup>

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<sup>303</sup> Dr. Sarah Mihoub Ahmed Al-Asaad, *International Criminal Responsibility*, Previous Source, Page 142

## **Conclusion**

### **The Researcher has Reached Several Conclusions and Recommendations that are Hoped to be Considered and Implemented in the Near Future**

1. The International Criminal Court (ICC) has jurisdiction over the Palestinian territories, whether they are occupied or not, regardless of whether Israel is a party to the Rome Statute.
2. The Pre-Trial Chamber's decision regarding jurisdiction in the situation of Palestine is not an advisory opinion but rather a significant judicial decision on jurisdiction, which lays a strong legal foundation for proceeding with trial proceedings.
3. The ICC has jurisdiction over all crimes committed on Palestinian territories, considering that Palestine became a state party to the Rome Statute upon the entry into legal force of the statute regarding its territory.
4. There is a diversity of opinions regarding the dissenting judge's views in the Pre-Trial Chamber decision on the jurisdiction of the Court in the situation of Palestine, especially concerning the elements of statehood in Palestine, its borders, and a violation of established principles of international law.
5. At present, the Palestinian national judiciary is incapable of pursuing Israeli officials for the crimes committed, particularly in the context of the 2022 Israeli attack on Gaza.
6. Israel has not undertaken serious investigations in accordance with the principle of complementarity, even though it has the capacity to do so. Instead, it avoids opening transparent and comprehensive investigations into the crimes committed by its soldiers and military leaders against the Palestinian people, negating the principle of complementarity and thereby triggering the ICC's jurisdiction.

7. Israel, as the occupying power, does not adhere to the rules of international humanitarian law and human rights law. It does not limit its use of military force, violating principles of proportionality, discrimination, prevention, investigation, and ensuring that civilian protesters are not killed with its military weapons.
8. Israel, the occupying power, has unequivocally committed the crime of genocide in its war on the Gaza Strip in 2023, leaving no room for doubt.
9. The loss of confidence and abandonment by the Palestinian people and supporting nations in the power of international law and its enforceability in the face of political pressures exerted by former colonial powers, especially in the 2023 war.
10. The ICC faces numerous legal and political challenges that hinder its role in applying international criminal justice. Political pressure is the most significant challenge, followed by legal loopholes.

**Recommendations:**

1. It is essential to utilize the Pre-Trial Chamber's decision regarding the ICC's jurisdiction over Palestinian territories as a strong legal basis that can be used if a two-state solution is implemented.
2. Arab and friendly countries must use all available means of pressure to prevent obstruction of ICC investigations. If a verdict of guilt is issued against any official, it will have significant legal and political implications.
3. Immediately collaborate with UN member states to reform the structure of the Security Council and its permanent five-member composition, ensuring that the legal dimension takes precedence over political considerations.

4. The Rome Statute should be amended to address clear legal loopholes, particularly limiting the Security Council's powers to indefinitely defer investigations and prosecutions.
5. It is imperative to unify the current division within the Palestinian Authority, as it would carry numerous political and legal benefits, including the full assertion of judicial authority over Palestinian territories and the possibility of prosecuting Israelis in Palestinian courts.
6. Forming an independent international committee to investigate the scale of explosives and internationally prohibited weapons used by Israel against civilians in the Gaza Strip. Holding those responsible accountable, including those who issued orders, devised plans, and executed them. Taking necessary actions to achieve justice for the Palestinian victims.
7. The ICC should be continuously used for all crimes committed since the entry into force of the Rome Statute, especially those related to the 2022,2023 Israeli attack. This will exert pressure on the international community to hold Israeli leaders accountable for all crimes against the Palestinian people.

## References

The Euro-Mediterranean Human Rights Monitor (Life Almost Impossible After 15 Years of Siege) via the website (<https://euromedmonitor.org/en/gaza>).

Please refer to the text of Article 11 of the Statute of the International Criminal Court.

Find it at the following link: [https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22\\_ref-palestine.pdf](https://www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22_ref-palestine.pdf) (Cited on 5/6/2023).

Article 12(3) of the Statute, regarding the prerequisites for the exercise of jurisdiction, states: "3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

International court criminal: Policy Paper on Preliminary Examinations, The Office of the Prosecutor, November 2013, P, 9. (Jurisdiction).

Please refer to the full statement on the International Criminal Court's website: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20191220-otp-statement-palestine-ara.pdf> (Cited on 5/6/2023).

Please review the texts of the articles of the Rome Statute of the International Criminal Court on the following website: <https://www.ohchr.org/ar/instruments->



mechanisms/instruments/rome-statute-international-criminal-court (Cited on 5/6/2023).

International Criminal Court: Situation in The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P, 10.

International criminal court: Situation in Palestine, the office of the Prosecutor:  
<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (Cited on 5/7/2023)

The report issued by the Office of the Prosecutor on December 14, 2020, page 55.  
<https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-pal-ara.pdf> (Cited on 10/6/2023).

Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, issued on February 5, 2021, Journal of Legal and Political Sciences, University of Wadi, Volume: 13, Number: 1, 2022, page 317.

Dr. Issam Barra, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, Journal of Judicial Deduction - Mohamed Khider University in Biskra, Volume: 13, Number: 28, 2021, page 71.

In a press release from the Office of the Prosecutor, it was stated: "I am convinced that there is a reasonable basis to proceed with an investigation into the situation in Palestine, pursuant to Article 53(1) of the Statute. In summary, I am satisfied that: (1) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (2) the potential cases arising from the situation would be admissible; (3) there are no substantial reasons to believe that an investigation would not serve the interests of justice. However, given the unique and highly contested legal and factual issues pertaining to this situation – the question of the territory within which the investigation may be conducted – I have sought a ruling by the Pre-Trial Chamber I today on the Court's territorial jurisdiction under Article 12(2)(a) of the Rome Statute in Palestine."

International criminal court: Situation in The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P, 53.

This article states: "b) Other serious violations of the laws and customs applicable in armed conflicts within the established framework of international law, namely, any of the following acts: 8 (b) 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."

This article states: "1. Subject to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible in accordance with this article where: (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court."

International criminal court: Situation in The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P,54.

International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, No. ICC-01/19, 14 November 2019, P,4.5.

International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, Op. Cit, P,4.

Ibid, P,24, Para, 54.

Ibid, P,27, Para, 60.

Ibid, P,27, Para, 60.

Ibid, P,27, Para 61.

Article 54 of the Rome Statute states: "Duties and powers of the Prosecutor with respect to investigations: 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In conducting an investigation, the Prosecutor shall, as appropriate, gather and examine evidence, from a variety of sources, including the information

provided by the States, the information gathered by the preliminary examination process, and the evidence collected pursuant to article 56. He or she shall seek the cooperation of the State Party concerned in the collection of such evidence."

Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, issued on February 5, 2021, in the same source, page 318.

- ICC Pre-Trial Chamber I 2020, pp. 16-19, pars. 34-39. Review the reports of the International Criminal Court in the case of Palestine on the website: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020\\_01033.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01033.PDF) (Cited on 15/6/2023)

international criminal court: PRE-TRIAL CHAMBER I, situation in the state of Palestine, 5 February 2021, pre-trial chamber 1, icc-01/18 no. Icc-01/18, P,32, Para 69.

international criminal court: PRE-TRIAL CHAMBER I, situation in the state of Palestine, 5 february 2021, Op, Cit, P,32, Para72.

This is because this chamber had previously concluded on the former Prosecutor's request for a ruling on jurisdiction regarding the forced deportation of the Rohingya people from Myanmar to Bangladesh. The Prosecutor's reliance on the mechanism provided for in Article 19(3) to address the issue of jurisdiction had sparked controversy.

Ibid, P, 35, Para, 78.

Ibid, P, 36, Para, 81.

Article 58 of the Rome Statute states: "1. The Pre-Trial Chamber shall issue a warrant of arrest at any time after the initiation of the investigation and on the basis of a request by the Prosecutor if it is satisfied, after the examination of the request and the evidence or information submitted, that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court..."

Look regarding temporal jurisdiction in the book authored by Dr. Ali Abdul Qader Al-Qahouji, "International Criminal Law - Key Crimes, International Criminal Courts," published by Halabi Legal Publications, Beirut, 2001, page 329.

Dr. Chiter Abdelwahab, "The Consequences of Palestine's Accession to the International Criminal Court in the Face of Israeli Crimes," *The Academic Journal of Legal Research, Faculty of Law and Political Science, University of Abdelrahman Mira, Bejaia, Algeria*, Volume: 12, Number: 2, 2015, page (102)

The principle of non-applicability of statutes of limitations to war crimes and crimes against humanity is established in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Article 4 of this convention states: "The States Parties to this Convention undertake to adopt, in accordance with their respective

constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the crimes mentioned in articles I and II of this Convention, and to provide effective penalties for persons guilty of such crimes wherever they are found. "As a result, Article I of the convention refers to:

- (a) War crimes defined in the Charter of the International Military Tribunal (Nuremberg Trials) as "grave breaches of the Geneva Conventions of 12 August 1949, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  - (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."
- (b) Crimes against humanity, whether committed in time of war or in time of peace, as defined in the Charter of the International Military Tribunal (Nuremberg Trials).

In essence, this convention ensures that there are no statutory limitations that prevent the prosecution or punishment of individuals for war crimes and crimes against humanity, regardless of when and where these crimes occurred.

Dr. Chiter Abdelwahab, "The Consequences of Palestine's Accession to the International Criminal Court in the Face of Israeli Crimes," in the same source, page 242.

Refer to the details of this report on the website:"  
[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiLn66A\\_f\\_\\_AhVUUaQEHD3kCcEQFno](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiLn66A_f__AhVUUaQEHD3kCcEQFno)

ECA4QAQ&url=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FHRCBodies%2FHRCouncil%2FSpecialSession%2FSession9%2FPressReleaseArabic.doc&usg=AOvVaw1rH8A64di8pcOwoMl4j\_Yg&opi=89978449 ((Cited on 7/5/2023)

"Look at the timeline of this matter in: the report issued by the Office of the Prosecutor on December 14, 2020, in the previous source, page 55."

Article 13(a) of the Rome Statute of the International Criminal Court states: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A State Party refers a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed to the Prosecutor pursuant to article 14."

Dr. Ali Abdul Qader Al-Qahouji, International Criminal Law, in the previous source, pages 329-331.

This is what happened on the part of Palestine when the documents of accession to the Rome Statute were deposited with the Secretary-General of the United Nations. On January 1, 2016, the State of Palestine joined the Rome Statute establishing the International Criminal Court, and the treaty came into force for Palestine after three months, on April 1, 2016. Citation: Dr. Riham Salah Khalid Al-Husari, "The Jurisdiction of the International Criminal Court over the Occupation Crimes Committed in Gaza Strip from 2014 to 2018 in Light of Law and Islamic Sharia," Master's Thesis, Faculty of Sharia and Law, Islamic University, Gaza, 2021, page 29.

Please refer to the legal sources in detail in the first section.

International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic Of The Union Of Myanmar, Op. Cit, 26, Para, 60.

International criminal court: SITUATION IN THE STATE OF PALESTINE, 22 January 2020, Pre- Trial Chamber 1, ICC-01/18 1/112 22 January 2020, No. ICC-01/18 , P, 55. To access all the decisions issued by the Pre-Trial Chamber and related documents regarding the request of the Prosecutor, please visit the following website: <https://legal-tools.org/doc> (Cited on 9/7/2023)

Dr. Mariam Lukal, Commentary on the International Criminal Court's Decision Regarding its Territorial Jurisdiction in Palestine, in the previous source, page 318.

State on the territory of which the conduct in question occurred”.

International criminal court: Situation In The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P,75.

International criminal court: PRE-TRIAL CHAMBER III, Situation In The People's Republic Of Bangladesh/Republic of The Union Of Myanmar, Op. Cit, 24, Para, 54.



The Office of the Prosecutor: Situation in Palestine, Op.Cit, Para, 1. <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> ((Cited on 15/7/2023))

"Refer to the United Nations resolutions regarding Palestine." <https://www.un.org/ar/ga/67/resolutions.shtml> ((Cited on 10/7/2023))

International court criminal: The Office of the Prosecutor, 14, December, P,55. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-pal-ara.pdf> (Cited on 10/7/2023)

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, ICC-01/18 No. ICC-01/18 P,38

Article 125(3) of the Rome Statute states: "Signature, ratification, acceptance, approval or accession: 3. Accession to this Statute shall be open to all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, 44.

<https://www.legal-tools.org/doc/7qm3y8/> (Cited on 10/7/2023)

<https://www.legal-tools.org/doc/i3unoe/> (Cited on 10/7/2023)

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<https://legal-tools.org/doc/u96u9u> (Cited on 10/7/2023)

<https://legal-tools.org/doc/rvaogc> (Cited on 10/7/2023)

Czech Republic, Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020, PP, 4- 10.

Federal Republic of German, Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020, P, 12, Para. 23.

he Badinter Commission, originally established by the European Community (EC), was created as a body of members of the European Commission during the conference held by the European Commission through the announcement on August 27, 1991. This was done in the context of the EC's involvement in the disintegration of the former Socialist Federal Republic of

Yugoslavia (SFRY, or Yugoslavia). The Badinter Commission was formed in this context.

Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," Al-Haq Foundation, Ramallah, West Bank, Palestine, 2020, page 20.

Hungary , Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 , PP5, Para, 5.

Dr. Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," in the previous source, page 21.

Uganda , Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 , P, 12, Para

Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103, ICC--01/18 , 12 March 2020 01/18-69, PP,

The term "individual act of the State" refers to a unilateral declaration made by a state with the intention of producing specific legal effects under international law.

Dr. Pierce Cansie, "Response to Arguments Raised in the Submissions of Friends of the Court Regarding the Situation of the State of Palestine Before the International Criminal Court," in the previous source, page 22.

ICJ, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) (25 February 2019) para 172, <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf> (Cited on 20/7/2023) This judgment is referred to in the book authored by Dr. Pierce Cansie, in the previous source, on page 24.

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, P,45, Para, 101.

Article 126(2) of the Statute provides that: "Entry into force: 2. For each State that ratifies, accepts, approves or accedes to this Statute after the deposit of the sixtieth instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the sixtieth day following the deposit of its instrument of ratification, acceptance, approval or accession."

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, P,44.

Dr. Maryam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the aforementioned source, p. 320.

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, 45.

International criminal court: Situation In The State of Palestine, 22 January 2020, Pre-Trial Chamber 1 Op. Cit, P,76.

Maryam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the aforementioned source, p. 328.

Please provide more context :[https://info.wafa.ps/ar\\_page.aspx?id=4963](https://info.wafa.ps/ar_page.aspx?id=4963)(Cited on 20/7/2023)

Article 4 - Legal Status of Parties to the Conflict: "The application of agreements and this Protocol, as well as the conclusion of agreements provided for in these texts, shall not affect the legal status of the parties to the conflict. The occupation of a territory or the application of agreements and this Protocol shall not affect the legal status of that territory. "Article 5(5) - Appointment and Acceptance of Protecting Powers and Their Substitutes: "The appointment and acceptance of protecting powers for the purposes of applying agreements and this Protocol shall not affect the legal status of the parties to the conflict or the legal status of any territory, including occupied territory, in accordance with Article 4." These articles emphasize that the application of agreements and protocols, as well as the appointment of protecting powers, should not alter the legal status of parties involved in a conflict or the territories, even in cases of occupation.

Dr. Abdulsalam Abdullah and Dr. Benaamer Tunisian, "The State of Palestine from the Perspective of International Law," Yearbook of the University of Algeria, Volume 34, Issue 1, 2020, Page90

United nation: A/RES/67/19.  
[https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_67\\_19.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_67_19.pdf) (Cited on 10/7/2023)

he United Nations General Assembly Resolution No. 23/77 A/RES, dated November 30, 2022, includes a request from the Palestinian Rights Division within the Secretariat, in accordance with paragraph six of the resolution, to dedicate its activities in 2023 to commemorate the seventy-fifth anniversary of the Nakba, including by organizing a high-level event in the General Assembly Hall on May 15, 2023, and by disseminating relevant records and certificates. For more details on this resolution, please refer to the following website:  
<https://documentsddsny.un.org/doc/UNDOC/GEN/N22/717/67/PDF/N2271767.pdf?OpenElement>.  
<https://news.un.org/ar/story/2023/05/1120367>

Dr. Pierce Clancy, "Responding to the Arguments Raised in the Submissions of the Friends of the Court in the Case of the State of Palestine before the International Criminal Court," the source mentioned above, page 31.

See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, para. 49.

International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre-Trial Chamber I, Op.Cit ,PP, 53-55.

Dr. Wafa Dridi and Dr. Wisalaa Marzouki, "The Situation of Palestine before the International Criminal Court: A Reading of the Decision of Pre-Trial Chamber I," Journal of Humanities Sciences, University of Batna, Algeria, Volume 9, Issue 2, 2022, page 744.

United Nations, General Assembly, Question of Palestine, 15 December 1988, A/RES/43/177, para. 2.

United Nations, General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, 6 May 2004, A/RES/58/292, para. 1

United Nations, General Assembly, The right of the Palestinian people to self-determination, 19 December 2011, A/RES/66/146, preamble.

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Resolution 446 (1979) / adopted by the Security Council at its 2134th meeting, on 22 March 1979.

<https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Council+%2834th+year+%3A+1979%29&ln=ar> (Cited on 25/7/2023)

Resolution 476 (1980) / adopted by the Security Council at its 2242nd meeting, on 30 June 1980.

<https://digitallibrary.un.org/search?f1=author&as=1&sf=title&so=a&rm=&m1=p&p1=UN.+Security+Council+%2835th+year+%3A+1980%29&ln=ar> (Cited on 26/7/2023)

<https://news.un.org/ar/tags/qrar-2334> (Cited on 26/7/2023)

[https://info.wafa.ps/ar\\_page.aspx?id=4960](https://info.wafa.ps/ar_page.aspx?id=4960) (Cited on 26/7/2023)

<https://www.un.org/ar/observances/international-day-of-solidarity-with-the-palestinian-people/background>(Cited on 26/7/2023)

Refer to all details of the dissenting opinion by Judge Peter Kovács on the website:

[https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021\\_01167.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF) (Cited on 26/7/2023. -Judge Péter Kovács' Partly Dissenting Opinion : N° ICC-01/18 1/154 5 February 2020

Judge Péter Kovács' Partly Dissenting Opinion, Op. Cit, P,3.

Ibid: P,11.

THE ASLO Accords : International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1,Op.Cit, PP,56-58.



Dr. Issam Bara, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, the previous source, page [unknown].

Dr. Mariam Lokal, Commentary on the International Criminal Court's Decision on its Territorial Jurisdiction in Palestine, the previous source, page 336.

Dr. Issam Bara, Regional Jurisdiction of the International Criminal Court in the Case of Palestine, the previous source, page 75.

United Nation: A/HRC/40/74. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/061/41/PDF/G1906141.pdf?OpenElement> (Cited on 29/7/2023)

Dr. Pierce Clancy, Response to Arguments Raised in the Submissions of the Friends of the Court Regarding the Situation of the State of Palestine before the International Criminal Court, the previous source, page 20.

Article 17 of the Statute, under the heading "Issues related to admissibility," states, "Taking into account the tenth paragraph of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: (a) The investigation or prosecution is being carried out by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." This article addresses the admissibility of cases before the International Criminal Court, specifically when another state is already conducting an investigation or prosecution, and the state is either unwilling or unable to genuinely carry out such proceedings. In such cases, the ICC may find the case inadmissible.

Dr. Piers Clancy, Response to the Arguments Raised in the Submissions of the Friends of the Court Regarding the Situation of the State of Palestine before the International Criminal Court, the aforementioned source, page 20.

THE ASLO Accords : International criminal court: SITUATION IN THE STATE OF PALESTINE, 5 February 2021, Pre- Trial Chamber 1, Op.Cit, P,57.

The Israeli forces recently committed criminal acts against the Palestinian people in the Jenin camp over two days (July 3rd and 4th). These acts involved both aerial and ground forces engaging in a series of Israeli airstrikes, likely carried out by drones, followed by a significant influx of ground forces into the area, resulting in exchanges of gunfire. This marks the second operation conducted in Jenin involving airstrikes within two weeks this year. The operation, which lasted for two days, resulted in casualties, displacement of residents, and damage to buildings and infrastructure. According to the Palestinian Ministry of Health, 12 Palestinians, including four children, were killed in Jenin during the mentioned operation, and 143 Palestinians were injured, with 20 of them in critical condition. An Israeli soldier was also reported killed. For further details on these official reports, you can refer to the United Nations Office for the Coordination of Humanitarian Affairs website: [https://ochaopt.org/content/israeli-forces-operation-jenin-situation-report-1?\\_gl=1\\*1k47kvb\\*\\_ga\\*MTQ4NzY0OTA0Ni4xNjkwNzMwMDIy\\*\\_ga\\_E60ZNX2F68\\*MTY5MDczMDAyMS4xLjEuMTY5MDczMTI5My42MC4wLjA](https://ochaopt.org/content/israeli-forces-operation-jenin-situation-report-1?_gl=1*1k47kvb*_ga*MTQ4NzY0OTA0Ni4xNjkwNzMwMDIy*_ga_E60ZNX2F68*MTY5MDczMDAyMS4xLjEuMTY5MDczMTI5My42MC4wLjA). (Cited on 25/7/2023).

Dr. Leila Asmani, "Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals," Al-Huquq Journal, Kuwait University - Scientific Publishing Council, Volume: 36, Number: 1, 2012, page 614.

Dr. Khalil Hussein, "Israeli Crimes in Gaza and Their Legal and Political Consequences," Strategic Studies Center Journal, Issue: 131, 2009, page 65.

Dr. Nabil Salem Marzouk Awad, "International Responsibility Arising from the Israeli Occupation's Blockade of the Gaza Strip," Doctoral Dissertation, Faculty of Law and Political Science, The Arab Academy in Denmark, 2014, page 162.

"Refer to this matter through the Chinese news agency Xinhua via the website."  
<http://arabic.news.cn/20220806/1edd26d145704f09928858706be4f2e0/c.html>  
 tml (Cited on 30/7/2023)

"Look into this matter through Al Jazeera's website at [www.aljazeera.com](http://www.aljazeera.com)."  
<https://mubasher.aljazeera.net/news/2022/4/21/%D8%B4%D8%A7%D9%87%D8%AF-%D8%A5%D8%B7%D9%84%D8%A7%D9%82-%D8%B5%D8%A7%D8%B1%D9%88%D8%AE-%D9%85%D9%86-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9-%D9%86%D8%AD%D9%88-%D8%B3%D8%AF%D9%8A%D8%B1%D9%88%D8%AA> (Cited on 30/7/2023).

"Look into this matter on Wikipedia's website."  
[https://ar.wikipedia.org/wiki/%D8%A7%D8%B4%D8%AA%D8%A8%D8%A7%D9%83%D8%A7%D8%AA\\_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%BA%D8%B2%D8%A9\\_\(%D8%A3%D8%BA%D8%B3%D8%B7%D8%B3\\_2022\)#:~:text=%D8%A3%D8%B9%D9%84%D9%86%D9%8](https://ar.wikipedia.org/wiki/%D8%A7%D8%B4%D8%AA%D8%A8%D8%A7%D9%83%D8%A7%D8%AA_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%BA%D8%B2%D8%A9_(%D8%A3%D8%BA%D8%B3%D8%B7%D8%B3_2022)#:~:text=%D8%A3%D8%B9%D9%84%D9%86%D9%8)

E%20%D8%AC%D9%8A%D8%B4%20%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84%20%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A%20%D8%A3%D9%86%D9%91%D9%87,%D8%AA%D8%AD%D8%B3%D8%A8%D9%8B%D8%A7%20%D9%84%D8%A5%D8%B7%D9%84%D8%A7%D9%82%20%D8%B5%D9%88%D8%A7%D8%B1%D9%8A%D8%AE%20%D9%85%D9%86%20%D8%BA%D8%B2%D8%A9 (Cited on 30/7/2023).

"Israel has repeatedly attacked the Gaza Strip following its unilateral withdrawal from the territory in 2005, including operations such as Operation Cast Lead/Battle of Al-Furqan in 2009, Operation Pillar of Defense/Operation Stones of Tammuz in 2012, Operation Protective Edge/The Consumed Sword in 2014, and Operation Guardian of the Walls/Sword of Jerusalem in 2021. For details on these assaults, please refer to the website:"  
<https://1-a1072.azureedge.net/encyclopedia/2022/8/7/%D8%A3%D8%A8%D8%B1%D8%B2-%D8%AD%D8%B1%D9%88%D8%A8-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%B9%D9%84%D9%89-%D9%82%D8%B7%D8%A7%D8%B9-%D8%BA%D8%B2%D8%A9> (Cited on 31/7/2022)

"Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility (The Case of Israeli Occupation Crimes in the Gaza Strip), Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2020, p. 54.

Anadolu Agency - (Hebrew Newspaper: Israel Acknowledges Killing 5 Children in an Airstrike on a Cemetery in Jabaliya). For details on this matter, please refer to the website:"

<https://asharq.com/ar/6mOcoQGQZGybEF2ARi9zA6-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%AA%D8%B9%D8%AA%D8%B1%D9%81-%D8%A8%D9%82%D8%AA%D9%84-5-%D8%A3%D8%B7%D9%81%D8%A7%D9%84-%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A%D9%8A%D9%86-%D9%81%D9%8A/> (Cited on 31/7/2023 ).

Haaretz: Israeli army admits to killing 5 Palestinian children in Gaza , Available at:  
<https://newscutters.com/world/294955.html> (Cited on 31/7/2023)

A report from the sole survivor in the family before the Human Rights Council calling for justice."

<https://euromedmonitor.org/ar/article/5001/%D8%A7%D9%84%D9%82%D9%88%D9%84%D9%82-%D8%A3%D9%85%D8%A7%D9%85-%D9%85%D8%AC%D9%84%D8%B3-%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%A5%D9%86%D8%B3%D8%A7%D9%86:-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D9%85%D8%AC%D8%AA%D9%85%D8%B9-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A-%D9%85%D8%AD%D8%A7%D8%B3%D8%A8%D8%A9-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D8%B9%D9%84%D9%89-%D8%A5%D8%A8%D8%A7%D8%AF%D8%A9-%D8%B9%D8%A7%D8%A6%D9%84%D8%AA%D9%8A-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9>

"An updated report from the Mediterranean Center for Human Rights on mass killings of families during the Israeli attack.

<https://euromedmonitor.org/ar/article/4408/%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D9%85%D8%AD%D8%AF%D8%AB-%D8%B9%D9%86-%D8%B9%D9%85%D9%84%D9%8A%D8%A7%D8%AA-%D8%A7%D9%84%D9%82%D8%AA%D9%84-%D8%A7%D9%84%D8%AC%D9%85%D8%A7%D8%B9%D9%8A-%D8%A8%D8%AD%D9%82-%D8%A7%D9%84%D8%B9%D8%A7%D8%A6%D9%84%D8%A7%D8%AA-%D8%AE%D9%84%D8%A7%D9%84-%D8%A7%D9%84%D9%87%D8%AC%D9%88%D9%85-%D8%A7%D9%84%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A-%D8%B9%D9%84%D9%89-%D8%BA%D8%B2%D8%A9>

"The Israeli Center for Human Rights submits..."

<https://www.btselem.org/arabic/statistics/fatalities/after-cast-lead/by-date-of-death/wb-gaza/palestinians-killed-during-the-course-of-a-targeted-killing-not-hisul>

<https://euromedmonitor.org/ar/article/4425/%D8%AC%D8%AD%D9%8A%D9%85-%D9%84%D8%A7-%D9%8A%D8%B3%D8%AA%D8%AB%D9%86%D9%8A-%D8%A3%D8%AD%D8%AF%D9%8B%D8%A7..-%D8%AA%D9%82%D8%B1%D9%8A%D8%B1-%D8%B4%D8%A7%D9%85%D9%84-%D9%84%D9%84%D8%A3%D9%88%D8%B1%D9%88%D9%85%D8%AA%D9%88%D8%B3%D8%B7%D9%8A-%D9%8A%D9%88%D8%AB%D9%82->

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%D9%81%D9%8A-  
%D9%87%D8%AC%D9%88%D9%85%D9%87%D8%A7-  
%D8%A7%D9%84%D8%A3%D8%AE%D9%8A%D8%B1-  
%D8%B9%D9%84%D9%89-%D8%BA%D8%B2%D8%A9

Lynn Hastings, the statement issued by the Humanitarian Coordinator for the Occupied Palestinian Territory. Please refer to this statement on the website: <https://www.ochaopt.org/ar/content/statement-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings-escalation-violence-gaza-and> (Cited on 30/7/2023)

Report No. 2, the summary of updates issued by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). Please refer to the details of this summary on the website: <https://www.ochaopt.org/ar/content/escalation-gaza-strip-and-israel-flash-update-2-august-2022> (Cited on 31/7/2023)

he report issued by the United Nations Office of the High Commissioner for Human Rights (OHCHR). Please refer to this matter through the website: [https://www.ohchr.org/ar/latest?field\\_content\\_category\\_target\\_id\[158\]=158&field\\_content\\_category\\_target\\_id\[162\]=162&field\\_content\\_category\\_target\\_id\[161\]=161&field\\_content\\_category\\_target\\_id\[160\]=160&field\\_content\\_category\\_target\\_id\[159\]=159&field\\_published\\_date\\_value\[min\]=&field\\_published\\_date\\_value\[max\]=&sort\\_bef\\_combine=field\\_published\\_date\\_value\\_DESC&page=13](https://www.ohchr.org/ar/latest?field_content_category_target_id[158]=158&field_content_category_target_id[162]=162&field_content_category_target_id[161]=161&field_content_category_target_id[160]=160&field_content_category_target_id[159]=159&field_published_date_value[min]=&field_published_date_value[max]=&sort_bef_combine=field_published_date_value_DESC&page=13) (Cited on 30/7/2023)

The report number (2) summarizing the updates issued by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), as mentioned earlier.

Article 5(2) states: "The Court exercises jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

Please refer to Article 6 of the Rome Statute for further details on the jurisdiction of the International Criminal Court.

See the text of Article 7(2)(b) of the Statute of the International Criminal Court.

See the text of Article 7(1) of the Statute of the International Criminal Court.

Dr. Abdulrahman Mohamed Ali, *Israeli Crimes during the Aggression on the Gaza Strip 27/12/2008-18/1/2009 - A Legal Study*, Zitouna Center for Studies and Consultations, Beirut, Lebanon, 2011, p. 92.

Dr. Fida Najib Mohamed, *The International Criminal Court Towards International Justice*, Aleppo Legal Publications, Lebanon, First Edition, 2006, p. 145.

Dr. Ikhlas Nasser, *Assessing the Effectiveness of the Principle of Judicial Complementarity in the International Criminal Court System and Its*



Impact on the Palestinian Case, Postgraduate Studies Research, Faculty of Law and Public Administration, University of Bizerte, 2019, p. 23.

Research Report titled "They Were Just Children" issued by Amnesty International, Evidence of War Crimes during the Israeli Attack on Gaza in August 2022, p. 5. You can refer to this report on their website. <https://www.amnesty.org/ar/documents/mde15/6079/2022/ar/> (Cited on 15/8/2023)

It should be noted that the number of casualties recorded by Amnesty International for the Palestinian civilian casualties is higher than the number provided by the United Nations Office for the Coordination of Humanitarian Affairs. This difference in numbers is not solely based on the analysis of data from the mentioned office but also includes information collected by the organization through interviews conducted in Gaza and remotely, as well as reports from Israeli and Palestinian media sources and official data from Palestinian armed groups. Page 6.

Dr. Fida Najib Mohammad, The International Criminal Court Towards International Justice, previous source, page 145.

Ibid, P: 148.

Dr. Mustafa Ahmed Fouad, International Law, International Criminal Law, Part Six, Faculty of Law Printing House, Tanta University, 2014, page 137.

Dr. Ikhlas Nasser, The Effectiveness of the Principle of Judicial Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation, previous source, page 22.

United nation: Prosecutor Vs Dusko Tadic , case no. It- 94-1-AR72, judgment of 7 may 1997 <https://www.icty.org/en/cases/judgement-list#1997> (Cited on 9/4/2023)

International criminal tribunal for the former yugoslavia: 2 October , Tadic, P, 51.

Dr. Mustafa Ahmed Fouad, International Law, International Criminal Law, previous source, page 142.

Dr. Mustafa Ahmed Fouad, The previous source, page 143.

Dr. Fida Najib Mohammad, The International Criminal Court Towards International Justice, previous source, page 155.

Dr. Abdul Rahman Mohammed Ali, Israeli Crimes During the Aggression on the Gaza Strip, previous source, page 15.

Ibid p: 82

Icc-01/04-01/06 , 28/1/2007 The Prosecutor v. Thomas Lubanga Dyilo Available at web site: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf> (Cited on 9/4/2023)

ICC-01/04-01/07: The Prosecutor v. Germain Katanga, Available at web site:[https://www.icc-cpi.int/case-records?f%5B0%5D=cr\\_case\\_code%3A1135&f%5B1%5D=cr\\_case\\_doc\\_type%3A44&f%5B2%5D=type\\_of\\_dec%3A785](https://www.icc-cpi.int/case-records?f%5B0%5D=cr_case_code%3A1135&f%5B1%5D=cr_case_doc_type%3A44&f%5B2%5D=type_of_dec%3A785) (Cited on 9/4/2023)

The Prosecutor v. Thomas Lubanga Dyilo, Op.Cit, Para, 381.

CC-01/04-01/07-709, 29 August 2008 Situation in the Democratic Republic of the Congo The Prosecutor v. Germain Katanga, Available at web site: <https://www.icc-cpi.int/court-record/icc-01/04-01/07-709> (Cited on 9/4/2023)

Dr. Abdul Rahman Mohammed Ali, Israeli Crimes During the Aggression on the Gaza Strip, previous source, page 85.

Amnesty International, Evidence of War Crimes During the Israeli Attack on Gaza in August 2022, previous source, page 8.

Ibid p: 110

ibid p: 111

Refer to Article 7 of the Rome Statute of the International Criminal Court.

Dr. Mostafa Ahmed Fouad, International Law, International Criminal Law, previous source, page 184.

Report No. (2) Summary of Developments issued by the United Nations Office for the Coordination of Humanitarian Affairs, previous source.

Dr. Abdulrahman Mohamed Ali, Israeli Crimes During the Aggression on the Gaza Strip, previous source, page 100.

Dr. Fida Najib Mohamed, The International Criminal Court Towards International Justice, previous source, page 149.

Dr. Tarek Dafallah, Crimes Against Humanity Between Criminal Law and the Rome Statute, Al-Adl Journal, Issue: 33, Year: 13, 2011, page 204.

Article 30 of the Rome Statute states: "1- Unless otherwise provided, a person shall not be criminally responsible if, at the time of that person's conduct: (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or wrongfulness of the person's conduct, or to control the person's conduct to conform to the requirements of the law; or (b) The person is in a state of intoxication that destroys that

person's capacity to appreciate the unlawfulness or wrongfulness of the person's conduct, or to control the person's conduct to conform to the requirements of the law. 2- For the purposes of this article, it is understood that the term 'intoxication' does not include the voluntary intoxication, in which case the provisions of paragraph 1 apply."

ICC: No.: ICC-01/04-01/07, 30/9/2008M PRE-TRIAL CHAMBER I, SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, v. Germain Katanga and Mathieu Ngudjolo Chui, Para, 401. Available at web site: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008\\_05172.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF) (Cited on 9/5/2023)

Dr. Abdul Rahman Mohammed Ali, Israeli Crimes During the Aggression on the Gaza Strip, Previous Source, Page 91.

Dr. Abdul Rahman Mohammed Ali, The Previous Source, Page 93.

Ibid p: 95

Clause 17/A/4 of the Oslo II Agreement: "The functional and territorial jurisdiction of the Council shall extend to all individuals except Israelis unless the Agreement provides otherwise contrary to the above paragraph, the Council shall have functional jurisdiction over Area "C" as defined in Article 4 of Annex III."

Dr. Aya Abdel Fattah Hussein Safi, "The Israeli Occupation's Plunder of Palestinian Property in International Criminal Law - A Comparative Study in Light of the Rome Statute and Islamic Jurisprudence," Master's Thesis, Faculty of Sharia and Law, Islamic University of Gaza, 2021, p. 72.

Article 3 of this agreement states: "The belligerent party violating the provisions of the aforementioned Regulation shall be obliged to provide compensation if necessary, and shall also be responsible for all acts committed by persons belonging to its armed forces."

United Nations: S/RES/877 (1993).

Article 16 of the Rome Statute's Basic System states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

Dr. Nabil Salem Marzouk Aoujamous, "International Responsibility Arising from the Israeli Occupation's Siege of the Gaza Strip," Previous Source, p. 318.

Manal Haydar, "The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza," Master's Thesis, Faculty of Law (Ben Aknoun), University of Algiers, 2014, p. 148.

Dr. Sameh Khalil Al-Wadia, "International Responsibility for Israeli War Crimes," First Edition, Al-Zaytuna Center for Studies and Consultations, Beirut, 2009, p. 76.

Look at Article 1 of the Rome Statute of the International Criminal Court.

"Refer to the texts of the Genocide Convention through the website."  
<https://www.ohchr.org/ar/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide> (Cited on 4/8/2023)

"Refer to the texts of the Universal Declaration through the website."  
<https://www.un.org/ar/universal-declaration-human-rights/> (Cited on 4/8/2023)

"Refer to Article 3 of the Rome Statute of the International Criminal Court."

Dr. Mustafa Magdi Harjah, Commentary on the Penal Code, Volume One, Dar Mahmoud, Cairo, Edition of the Judges' Club, 2016, p. 13.

Dr. Mustafa Magdi Harjah, Commentary on the Penal Code, the same source, p. 68.

Dr. Sara Mehoub Ahmed Al-Asaad, International Criminal Responsibility, previous source, p. 117.

This is also outlined in the first clause of the Oslo Agreement (1), the Declaration of Principles dated 13/9/1993, which states: "A - Objective of the Negotiations: The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the Council) for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years leading to a permanent settlement based on Security Council resolutions 242 and 338." You can refer to the texts of this agreement through the following website: [https://info.wafa.ps/ar\\_page.aspx?id=4888](https://info.wafa.ps/ar_page.aspx?id=4888) (Cited on 1/8/2023)

Dr. Piers Clancy, Responding to Arguments Raised in the Submissions of Friends of the Court in the Situation of Palestine before the International Criminal Court, previous source, p. 47.

Jenin Peace Court: Criminal Lawsuit No. 885 for the year 2014. Date of the verdict: 11/1/2015. You can find the details of this verdict on the following website: <https://legal-agenda.com/%D8%A8%D8%A7%D8%B3%D9%85-%D8%A7%D9%84%D8%B4%D8%B9%D8%A8-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A/> (Cited on 2/8/2023)

Dr. Bashir Mohammad Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2019, p. 44.



Dr. Bashir Mohammad Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, previous source, p. 15.

Dr. Khalaf Ramadan Mohammad Bilal Al-Jubouri, Sovereignty in the Time of Occupation, Regional Studies Center, Year: 3, Issue: 6, 2007, p. 2.

See Article (29) of the Palestinian Penal Code.

See Article (59) of the Palestinian Penal Code.

See Article (102) of the Palestinian Penal Code.

See Article (237) of the Palestinian Penal Code.

See Article (244) of the Palestinian Penal Code.

See Article (253) of the Palestinian Penal Code.

See Article (271) of the Palestinian Penal Code.

Dr. Bashri Mohammad Hasan Abu Tarabi, the aforementioned source, page 103.

Look at the division of these areas through the website.  
[https://info.wafa.ps/ar\\_page.aspx?id=5178](https://info.wafa.ps/ar_page.aspx?id=5178) (Cited on 7/9/2023)

Dr. Bashri Mohammad Hassan Abu Tarabe: Criminal Jurisdiction over Palestine, previous source, page 40.

r. Sarah Mehoub Ahmed Al-Asaad: International Criminal Responsibility, previous source, page 138.+ Dr. Nabil Salem Marzouk Awjamous: International Responsibility Arising from the Israeli Occupation's Blockade of the Gaza Strip, previous source, page 339.

See Article 5 of the Genocide Convention for the wording.

Dr. Hani Adel Ahmed Awad: Personal Criminal Responsibility of Perpetrators of War Crimes - Jenin Camp and the Old Town of Nablus as Models, Master's Thesis, Graduate Studies College, An-Najah National University, Nablus, 2007, page 127.

Dr. Hassani Khaled: The Principle of Complementarity in the Jurisdiction of the International Criminal Court, Journal of the College of Law and Political Science, University of Béjaïa, Algeria, page 7.

It's worth mentioning that Israel signed the Rome Statute on December 31, 2000.

For More Details: [www.al-bayader.org/2017/01/51453](http://www.al-bayader.org/2017/01/51453) (Cited on 9/6/2023)

For More Details: <https://amadps.org/ar/post/366441> (Cited on 9/6/2023)

Dr. Badria Bassam Abu Dukhan, "The Principle of Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation," *Journal of Legal and Political Sciences, Faculty of Law, University of Jerusalem*, Issue 5, 2022, page 327.

Article 20(3) of the Statute stipulates that: "A person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall not be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

Dr. Badria Bassam Abu Dukhan, "The Principle of Complementarity in the International Criminal Court System and Its Impact on the Palestinian Situation," previous source, page 328.

Dr. Sarah Mehoub Ahmed Al-Asaad, "International Criminal Responsibility," previous source, page 116. Manal Hanidar, "The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza," previous source, page 201.

For more details: <https://www.icrc.org/ara/resources/documents/misc/5nsla8.htm> (Cited on 4/8/2023)

Dr. Aya Abdel-Fattah Hussein Safi, "Israeli Occupation's Plunder of Palestinian Properties in International Criminal Law," previous source, page 71.

The committee's work was chaired by retired Supreme Court Judge Yaakov Turkel. For all the details regarding the committee's work and its recommendations, please refer to the website provided. [https://www.btselem.org/arabic/publications/summaries/201308\\_position\\_paper\\_on\\_turkel\\_report](https://www.btselem.org/arabic/publications/summaries/201308_position_paper_on_turkel_report) (Cited on 4/8/2023)

Dr. Aya Abdel-Fattah Hussein Safi, "Israeli Occupation's Plunder of Palestinian Properties in International Criminal Law," previous source, page 73.

Dr. Leila Asmani, "Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals," previous source, page 198.

For more details:  
[https://ar.wikipedia.org/wiki/%D8%A7%D9%84%D8%A5%D8%B5%D9%84%D8%A7%D8%AD\\_%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A\\_%D9%81%D9%8A\\_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84](https://ar.wikipedia.org/wiki/%D8%A7%D9%84%D8%A5%D8%B5%D9%84%D8%A7%D8%AD_%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A_%D9%81%D9%8A_%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84) (Cited on 5/8/2023)

Dr. Samih Khalil Alwadia, International Responsibility for Israeli War Crimes, the previous source, page 59.

Dr. Mustafa Ahmed Fouad, Public International Law, The General Framework of International Humanitarian Law, Part Five, First Edition, Faculty of Law, Tanta University, 2014, page 251.

Dr. Ali Abdelqader Al-Qahwaji, International Criminal Law, the previous source, page 329.

Refer to Articles 4 and 12 of the Rome Statute of the International Criminal Court.

Dr. Bashri Mohammed Hassan Abu Tarabi: Criminal Jurisdiction over Palestine, previous source, page 36.

Look at Article 11 of the Rome Statute.

Article 29, under the title "No Statute of Limitations," states: "Crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."

Article 13(j) states that: "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:  
(j) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15."

Dr. Bouziane Alian, Legal Adaptation of the Blockade of Gaza and Its Legal Consequences in International Law, Previous Source, Page 725.

Look at the text of Article 13(b) of the Rome Statute of the International Criminal Court.

Look at the text of Article 14(1) of the Rome Statute of the International Criminal Court.

Find details about this request on the website. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20191220-otp-statement-palestine-ara.pdf> (Cited on 11/8/2023)

Look at Article (16) of the Statute of the International Criminal Court.

Dr. Marwa Nazeer, The Impact of Political Factors on International Criminal Law - International Crimes as a Model, National Criminal Journal, National Center for Social and Criminal Research, Egypt, Volume: 54, Number: 1, 2011, page 95.

Dr. Yahya Mejidi, "Obstacles to the Application of Justice before the International Criminal Court," Legal and Political Thought Journal, Amar Thelidji University, Algeria, Volume 6, Issue 2, 2022, page 98.

United nation, A/58/847, 20/8/2004, P, 8. Available at web site: <https://www.refworld.org/cgi-bin/tehis/vtx/rwmain/pendocpdf.pdf?reldoc=y&docid=48e5d4442> (Cited on 21/8/2023)

Look at Article (12) and Article (13) of the Statute of the International Criminal Court.

Dr. Yahya Mujidi, *Obstacles to the Application of Justice before the International Criminal Court*, previous source, page 100.

Article (12/3) of the Statute states: "If acceptance of a State which is not a Party to this Statute is required by paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question."

Dr. Manal Hanidar, *Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza*, previous source, page 214.

Dr. Yahya Mujidi, *Obstacles to the Application of Justice before the International Criminal Court*, previous source, page 101.

Dr. Najah Matar Al-Abd Daqmaq, *Israeli Occupation Tools in Hindering or Halting Investigation before the International Criminal Court and Ways to Overcome Them*, *University of Isra'a Journal of Scientific Conferences*, Issue 8, 2022, page 35.

You can refer to this matter on the website.  
<https://www.alhadath.ps/article/154794/%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D8%A7%D9%84%D8%B1%D9%88%D8%B3%D9%8A%D8%A9-%D8%A7%D9%84%D8%A3%D9%88%D9%83%D8%B1%D8%A7%D9>

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 8%B1 (Cited on 21/8/2023)

Dr. Manal Hanidar, The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza, Previous Source, Page 173.

Dr. Leila Assamani: Israeli Aggression on Gaza - Criminal Responsibility of Israeli War Criminals, Previous Source, Page 633.

Dr. Manal Haydar, The Criminal Responsibility of Perpetrators of Israeli War Crimes in Gaza, Previous Source, Page 222.

For more details:

[https://ar.wikipedia.org/wiki/%D9%82%D8%B1%D8%A7%D8%B1\\_%D9%85%D8%AC%D9%84%D8%B3\\_%D8%A7%D9%84%D8%A3%D9%85%D9%86\\_%D8%A7%D9%84%D8%AA%D8%A7%D8%A8%D8%B9\\_%D9%84%D9%84%D8%A3%D9%85%D9%85\\_%D8%A7%D9%84%D9%85%D8%AA%D8%AD%D8%AF%D8%A9\\_%D8%B1%D9%82%D9%85\\_1422](https://ar.wikipedia.org/wiki/%D9%82%D8%B1%D8%A7%D8%B1_%D9%85%D8%AC%D9%84%D8%B3_%D8%A7%D9%84%D8%A3%D9%85%D9%86_%D8%A7%D9%84%D8%AA%D8%A7%D8%A8%D8%B9_%D9%84%D9%84%D8%A3%D9%85%D9%85_%D8%A7%D9%84%D9%85%D8%AA%D8%AD%D8%AF%D8%A9_%D8%B1%D9%82%D9%85_1422) (Cited on 22/8/2023)

United nations: S/Res 1422/ 2002, 12 July 2002 ,P,2. Available at web site:  
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiGyvKS2fCAAxWegP0HHQXDC->



[AQFnoECBEQAQ&url=https%3A%2F%2Fdigitalibrary.un.org%2Frecord%2F468885%2Ffiles%2FS\\_RES\\_1422%25282002%2529-AR.pdf&usg=AOvVaw2FwxtB8krmS\\_DKiY3lrVQd&opi=89978449](https://www.un.org/2Fdigitalibrary.un.org%2Frecord%2F468885%2Ffiles%2FS_RES_1422%25282002%2529-AR.pdf&usg=AOvVaw2FwxtB8krmS_DKiY3lrVQd&opi=89978449)

S/RES/1487 (2003) , 12 June 2003, Available at web site:  
<http://unscr.com/en/resolutions/doc/1487> (Cited on 7/9/2023)

Dr. Manal Saleh Mohammad Saifan, The Compulsory Jurisdiction of the International Criminal Court by Deferral Decision, Master's Thesis, Graduate Studies College, International Islamic University, Jordan, 2021, Page 99.

Dr. Yahya Majidi, Barriers to Implementing Justice before the International Criminal Court, Previous Source, Page 101.

Article 121(3) of the Statute stipulates: "3- The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference shall require the affirmative votes of a majority of three-fourths of the States Parties."

ICC- ASP/ 16/20 Res .5 decision : Available at web site: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ARA.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ARA.pdf) (Cited on 21/8/2023)

Ibid, P, 39

Look at the text of Article 15(2) repeated from the Statute of the International Criminal Court.

Look at the text of Article 15(3) repeated from the Statute of the International Criminal Court.

Look at the text of Article 15(4) repeated from the Statute of the International Criminal Court.

Look at the text of Article 15(5) repeated from the Statute of the International Criminal Court.

Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, *The International Criminal Court between Legal Constraints and Political Considerations*, *Alif Journal for Language, Media, and Society*, University of Algeria (2), Volume: 9, Issue: 1, 2022, Page 671.

Dr. Mohannad Harb Al-Nuaimat, *Immunities and the International Criminal Court*, Master's Thesis, Faculty of Law, Arab Open University, Jordan, 2017, Page 97.

Dr. Nabilah Aqojil, *The Problem of Immunity of Heads and Leaders of States in the Rome Statute System*, *Al-Mufakir Journal*, Faculty of Law and Political Science, University of Mohammed Khider, Algeria, Volume: 13, Issue: 2, 2018, Page 479.

Article 98 of the Statute stipulates: "1- The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2- The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

Dr. Nabilah Aqojil, *The Problem of Immunity of Heads and Leaders of States in the Rome Statute System*, Previous Source, Page 480.

Please refer to this matter through the website. <https://www.france24.com/ar/> (Cited on 7/9/2023)

Dr. Sulaiman Salim Falah Al-Husami, *Mechanisms for Implementing Judgments Issued by the International Criminal Court*, Master's Thesis, Faculty of Law, Middle East University, Jordan, 2019, Page 107.

Article 103 of the Rome Statute, under the title "Role of States in the Enforcement of Sentences," states: "1. (a) A sentence of imprisonment shall be served in the State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. (b) At the time of declaring its willingness to accept sentenced persons, a State may attach

conditions to its acceptance as agreed by the Court and in accordance with the provisions of this Part."

Dr. Yahya Majidi, *Barriers to Implementing Justice before the International Criminal Court*, Previous Source, Page 102.

Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, *The International Criminal Court between Legal Constraints and Political Considerations*, Previous Source, Page 672.

Please refer to the text of Article 77 of the Rome Statute of the International Criminal Court.

Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, *The International Criminal Court between Legal Constraints and Political Considerations*, Previous Source, Page 673.

Dr. Najah Matar Al-Abd Daqmaq, *Israeli Occupation's Tools in Obstructing or Halting Investigations before the International Criminal Court and Ways to Overcome Them*, Previous Source, Page 44.

Dr. Sarah Mihoub Ahmed Al-Asaad, *International Criminal Responsibility*, Previous Source, Page 137.

Please refer to this matter in the article published on the website. <https://1-a1072.azureedge.net/blogs/2016/10/24/%D8%A7%D9%84%D8%A7%D9%86%D9%82%D8%B3%D8%A7%D9%85-%D8%A7%D9%84%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86%D9%8A-%D9%88%D8%A7%D9%84%D8%AD%D9%84-%D8%A7%D9%84%D9%85%D8%AA%D8%A8%D9%82%D9%8A>  
(Cited on 23/8/2023)

Please refer to this matter in the article published on the website <https://www.hrw.org/ar/report/2017/04/04/301672> (Cited on 23/8/2023)

Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility, Previous Source, Page 139.

Dr. Abdelatif Dahia, Barriers to the Effectiveness of the Permanent International Criminal Court, Al-Haqqiqa Journal, Bouadhi University - Algeria, Issue: 37, 2016, Page 340.

Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility, Previous Source, Page 142.

Look into this matter through the website. <https://qudsnet.com/post/426348/> (Cited on 23/8/2022)

Look into the details of threats directed by the United States of America towards the International Criminal Court on the website.  
<https://www.hrw.org/ar/news/2019/03/16/328215> (Cited on 23/8/2023)

Find more details on this matter on the website.  
<https://www.swissinfo.ch/ara/afp//44876698> (Cited on 23/8/2023)

Dr. Miloud bin Abdul Aziz / Assia bin Bouaziz, The International Criminal Court between Legal Constraints and Political Considerations, Previous Source, Page 663.

Dr. Najah Matar Al-Abd Daqmaq, Israeli Occupation's Tools in Obstructing or Halting Investigations before the International Criminal Court and Ways to Overcome Them, Previous Source, Page 39.

Dr. Sarah Mihoub Ahmed Al-Asaad, International Criminal Responsibility, Previous Source, Page 142.

## الملخص

تفرض إسرائيل، القوة القائمة بالاحتلال، حصاراً جويًا وبريًا وبحريًا على قطاع غزة، منذ العام 2007، وبما يخالف أحكام وقواعد القانون الدولي لحقوق الإنسان وخاصة العهدين الدوليين في حرية الحركة والتنقل والحصول على مسكن والتعليم والصحة، وخاصة في قطاع غزة. وكان للقيود التي تفرضها إسرائيل، القوة القائمة بالاحتلال، معاناة شديدة، وأثر عميق على السكان المدنيين، والأوضاع المعيشية فيها، حيث منع الحصار الإسرائيلي التعسفي المفروض على قطاع غزة السكان المدنيين من البحث عن الأمان والملاذ خارج قطاع غزة أثناء الهجمات العسكرية، وتسبب في تشريد، وترحيل قسري لجزء كبير من السكان أو نزوحهم داخليا حتى بعد وقف الأعمال العدائية، وأدت قسوة الحصار المستمر إلى جانب الهجمات العسكرية الإسرائيلية الدورية، بأوامر مباشرة من أعلى الهرم في الحكومة الإسرائيلية، وقادة جيش الاحتلال، إلى تدمير البنية التحتية الأساسية لقطاع غزة، وتآكل سبل عيش الفلسطينيين بشدة.

وعلى الرغم من وجود الدلائل القوية على الاستهداف الممنهج وواسع النطاق من قبل إسرائيل، القوة القائمة بالاحتلال، للمدنيين في قطاع غزة في هجومها العسكري الأخير على قطاع غزة بتاريخ 5 أغسطس/آب 2022، وما سبقها من هجمات عسكرية على القطاع في الأعوام 2008-2009 و2012 و2014، 2018، 2019، 2021، أدت إلى مقتل واصابة عدد كبير من المدنيين، بما في ذلك مئات الأطفال والنساء وكبار السن، وتدمير واسع النطاق للأعيان والممتلكات المدنية، بما يشكل جريمة حرب وفقاً لنظام روما المنشئ للمحكمة الجنائية الدولية؟

على الرغم من وجود الدلائل القوية على الاستهداف الممنهج من قبل إسرائيل، القوة القائمة بالاحتلال، للمدنيين والأعيان والممتلكات المدنية في قطاع غزة في هجومها العسكري الأخير على قطاع غزة بتاريخ 5 أغسطس/آب 2022، وما سبقها من هجمات عسكرية على القطاع في الأعوام 2008-2009 و2012 و2014، 2018، 2021، والتي أدت إلى مقتل واصابة عدد كبير من المدنيين، بما في ذلك مئات الأطفال والنساء وكبار السن، وتدمير واسع النطاق للأعيان والممتلكات المدنية، بما يشكل جريمة حرب، وفقاً لنظام روما المنشئ للمحكمة الجنائية الدولية، إلا أنه لم تتم لغاية الآن مساءلة أو محاسبة أي من قادة الاحتلال الإسرائيلي المدنيين والعسكريين المسؤولين عن ارتكاب هذه المخالفات الجسيمة ضد أبناء الشعب الفلسطيني، ودون تحريك المجتمع الدولي ومنظماته لمساءلة مرتكبي هذه الجرائم، وعدم حصول الفلسطينيين على حقهم في سبل الانتصاف الفعال، في الوقت يتم الذي يتحرك فيه العالم أجمع لتشكيل محاكم دولية لمحاكمة كجرمي الحرب، يقوم قادة الاحتلال بالتنقل بكل حرية وحصانة دبلوماسية في مختلف أنحاء العالم، والبحث في الآليات التي يتم تصنيف مجرمي الحرب من خلالها، والأدوات الواجبة التطبيق لذلك، بالإضافة إلى المعوقات التي تواجهها في جلب مجرمي الحرب الإسرائيلي إلى العدالة.

وإن ما يؤكد الازدواجية في التعامل مع الملف الفلسطيني في هذا السياق، واستهتار إسرائيل، القوة القائمة بالاحتلال، لأبسط المبادئ والقيم الإنسانية، هو استمرارها في اتباع نهج القوة والقتل والتدمير، ضاربة بعرض الحائط كافة القرارات الدولية، ومخالفة بشكل فاضح لأبسط قواعد القانون الدولي، والاستمرار كذلك في الانتهاكات الممنهجة لمبادئ القانون الدولي الإنساني، ليضع أمامنا وبما لا يدع مجالاً للشك بأنه لا يوجد ما يلزم إسرائيل كقوة احتلال على تحمل مسؤولياتها وخاصة في حماية المدنيين الفلسطينيين وفقاً للاتفاقيات الدولية واتفاقية جنيف وبروتوكولاتها، وخاصة من خلال اعتداءاتها العسكرية المتكررة على قطاع غزة، وخاصة كذلك في الاعتداء العسكري الأخير في العام 2022، كحالة تطبيقية لمسؤولية إسرائيل ومستوياتها السياسية والعسكرية، ووضع العالم أمام مسؤولياته في ضرورة محاسبة مرتكبي جرائم الحرب فيها وتقديمهم للعدالة.

كما أن هذه الدراسة عملت على البحث في ممارسات الاحتلال الإسرائيلي العدائية ضد شعبنا، وتصنيفها قانونياً ومقارنتها بجرائم الحرب، والكشف عن فظاعة جرائمه بحق أبناء شعبنا، والبحث عن أمثل السبل والأدوات والآليات التي تحقق الهدف النهائي في جلب مجرمي الحرب الإسرائيليين إلى العدالة الدولية من خلال المحكمة الجنائية الدولية، والضغط على صناعات القرار ووضع بين أيديهم أمثل السبل لتحقيق ذلك، وكذلك والضغط على المجتمع الدولي لإلزام إسرائيل بالنقد بقواعد القانون الدولي، والمساعدة في تقديم مجرمي الحرب إلى العدالة، وتحقيق سبل الانتصاف العادل للشعب الفلسطيني، هذا بالإضافة إلى أهمية رفع الإلمام ومستوى التحقق والكشف عن جرائم الحرب الإسرائيلية وشرعية هجومها العسكري على قطاع غزة، والبحث في مدى انطباقه مع القوانين الدولية، وتقييم حجة الضرورة العسكرية، واستخدام القوة المفرطة وتناسب هذه العقوبة مع خطورة الجريمة، بالإضافة إلى وضع مبادئ وقواعد القانون الدولي للمساءلة الجنائية الفردية عن ارتكاب جريمة الحرب تحت الضوء، وبحث إمكانية المساءلة الفردية جنائياً عن ارتكاب أي من جرائم الحرب، وتطبيق قواعد المساءلة على تلك الممارسات التي ترتكب في الأرض الفلسطينية المحتلة، ووما قد يعد منها خرقاً للقوانين الدولية وخاصة ميثاق روما، وكذلك البحث في الوسائل والآليات والأدوات القانونية على الصعيد الدولي لمحاكمة مجرمي الحرب والمعوقات التي تواجهنا لتقديمهم للعدالة، وتحفيز الجهات ذات الصلة ووضع الوقائع القانونية أمامها لاتخاذ الموقف المناسب بهذا الشأن.

حيث اعتمد الباحث بشكل رئيسي منهج البحث الوصفي والتحليلي، لاتفاقه مع طبيعة البحث من الناحية العملية والنظرية، وتوظيف هذه المناهج في وصف أثر الاعتداءات الإسرائيلية، ومدى انطباقها مع القوانين الدولية والإنسانية، وتحليل مختلف المفاهيم المتعلقة بالموضوع بما فيها المبادئ الأساسية من قانون حقوق الإنسان واجبة التطبيق في حالات الاضطرابات والتوترات، بالإضافة إلى تحليل مبدأ التمييز



والتناسب في القانون الدولي، وصولاً إلى اتفاقيات جنيف، وميثاق روما، لخلق تفسيرات منطقية وبراهين تمنحنا القدرة على وضع أطر محددة للمشكلة، وتكييفها كجرائم حرب وأهمية تقديم مرتكبيها إلى العدالة.

حيث خلص البحث إلى عدد من النتائج الهامة وتتمثل في

1. تمتع المحكمة الجنائية الدولية بولاية قضائية على الأرض الفلسطينية سواء كانت هذه الأراضي محتلة أم لا، وبغض النظر عما إذا كانت إسرائيل دولة طرف بالنظام الأساسي للمحكمة الجنائية الدولية.

2. قرار الدائرة التمهيدية بشأن الاختصاص في حالة فلسطين لا يمثل رأياً استشارياً بل سيكون قراراً قضائياً مهماً بشأن الاختصاص القضائي، والذي من شأنه أن يضع أساساً قوياً للمضي قدماً في إجراءات المحاكمة.

3. اختصاص المحكمة الجنائية الدولية بكافة الجرائم التي وقعت على الأراضي الفلسطينية، تأسيساً على أن فلسطين أصبحت دولة طرف بالنظام منذ دخول نظام روما حيز النفاذ القانوني في جانبها.

4. تهافت الآراء المتعلقة بالقاضي المعارض في قرار الدائرة التمهيدية بشأن اختصاص المحكمة في حالة فلسطين، سواء فيما يتعلق بتوافر عناصر الدولة في حق فلسطين، أو فيما يخص حدودها وانتهاءً بمخالفة هذا الرأي للمبادئ المستقرة في القانون الدولي بصفة عامة.

5. عدم قدرة القضاء الوطني الفلسطيني في الوقت الحالي بملاحقة المسؤولين الإسرائيليين عما اقترفوه من جرائم وبالأخص فيما يتعلق بالهجوم على قطاع غزة عام 2022م.

6. إسرائيل لم تقم يوماً من الأيام بالقيام بتحقيقات جديّة، وفقاً لمبدأ التكاملية، حيث أن إسرائيل قادرة ولكن لا ترغب بأن تفتح تحقيقاً جدياً شفافاً في الجرائم التي ارتكبتها جنودهم وقياداتهم العسكرية ضد أبناء الشعب الفلسطيني، وبذلك مبدأ التكاملية غير موجود، وهذا يفعل الاختصاص الخاص بالمحكمة الجنائية الدولية.

7. عدم تقيد "إسرائيل" القوة القائمة بالاحتلال، بأي من قواعد القانون الدولي الإنساني وقانون حقوق الإنسان، وذلك بسبب عدم التزامها بأي حدود في استعمال القوة العسكرية، ولم تتقيد كذلك بمبادئ التناسب والتميز وبمبادئ المنع والتقصي وتحييد المتظاهرين المدنيين من القتل بنيران أسلحتها.

8. إسرائيل، القوة القائمة بالاحتلال، قامت وبشكل محقق وبما لا يدع مجالاً للشك في ارتكاب جريمة الإبادة الجماعية في حربها على قطاع غزة في العام 2023.

9. فقدان الشعب الفلسطيني والشعوب المناصرة له الثقة والخذلان بقوة القانون الدولي وإمكانية إنفاذه في مواجهة الضغوط السياسية التي تمارسه دول الإستعمار القديم، وخاصة في حرب 2023.

10. تواجه المحكمة الجنائية الدولية الكثير من التحديات القانونية والسياسية التي تتسبب في عرقلة مهامها في تطبيق العدالة الجنائية الدولية، ولعل الضغوطات السياسية هي أقوى ما تتعرض له، يليها في المرتبة الأخرى الثغرات القانونية.

فيما تمثلت التوصيات بما يلي

1. ضرورة استغلال قرار الدائرة التمهيدية في يتعلق بنطاق اختصاص المحكمة على الأراضي الفلسطينية، والبناء عليه كأساس قانوني قوي يُمكن اللجوء إليه في حال تنفيذ حل الدولتين.
2. ضرورة استخدام كافة وسائل الضغط التي تملكها الدول العربية والدول الصديقة لفلسطين لعدم عرقلة سير التحقيقات أمام المحكمة الجنائية الدولية، لأنه في حال صدور حكم بإدانة أي مسؤل سترتب عليه آثار قانونية وسياسية هامة للغاية.
3. يجب أن يتم تعديل ميثاق روما وذلك لسد الثغرات القانونية الواضحة والتي لا خلاف عليها، ولعل أهم هذه الثغرات تحجيم سلطات مجلس الأمن في إرجاء التحقيق والمقاضاة لمدد غير نهائية.
4. العمل فوراً بالتعاون مع الدول الأعضاء في الأمم المتحدة على إصلاح بنية مجلس الأمن وتركيبته الخماسية دائمة العضوية ليسيّطرها البعد القانوني على الإعتبارات السياسية.
5. ضرورة توحيد الانقسام الحالي في السلطة الفلسطينية، لأنه سترتب عليه العديد من الفوائد السياسية والقضائية، وذلك لكي يتم بسط الولاية القضائية الكاملة على الأراضي الفلسطينية، ومن ثم يكون هناك بادرة أمل في مقاضاة الإسرائيليين أمام المحاكم الفلسطينية بشكل عام.
6. تشكيل لجنة تحقيق دولية مستقلة في للتحقيق في حجم المتفجرات وفي الأسلحة المحرمة دولياً التي استخدمتها إسرائيل ضد المدنيين في قطاع غزة، ومحاسبة المسؤولين عن ذلك بما يشمل من أصدر الأوامر وخطط وتنفيذ، واتخاذ الإجراءات الكفيلة بتحقيق العدالة للضحايا الفلسطينيين.
7. يجب تكرار اللجوء إلى المحكمة الجنائية الدولية في كافة الجرائم التي تم ارتكابها منذ دخول النظام الأساسي حيز النفاذ، وبالتحديد الجرائم التي تم ارتكابها في الهجوم الإسرائيلي عام 2022م، و عام 2023، وذلك للضغط على المجتمع الدولي لكي يتم مساءلة هؤلاء القادة عن كافة الجرائم المرتكبة ضد الشعب الفلسطيني.