

Arab American University

Faculty of Graduate Studies

Department of Legal Sciences

Master Program in International Law and Diplomacy



**The Role of the International Criminal Court in Achieving
Justice: A Comparative Study between the Palestinian and
Ukrainian Cases**

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and Diplomacy.**

Palestine, February/2025

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Thesis Approval



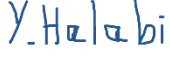

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Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is substantially my own work and has not been submitted for any other degree at the Arab American University or any other institution.

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A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line and a diagonal stroke.

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Dedication

I dedicate this thesis to my family and friends who have given me a lot of support.

I also dedicate this thesis to my supervisor Dr. Majd Owda, thanking her for all her support and assistance.

And also to the thesis committee members..

Raja Bassam Raja Al-Abed

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I wish to express my utmost gratitude to everyone who contributed to the successful completion of my thesis. I would like to extend a special thank you to my supervisor, Dr. Majd Owda, whose unwavering encouragement, meticulous oversight, and unwavering support were crucial in ensuring that I met my deadlines.

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The Role of the International Criminal Court in Achieving Justice: A Comparative Study between the Palestinian and Ukrainian Cases

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Abstract

This study aims to analyze the political factors affecting the legal investigation procedures in the ICC, and to address the Ukrainian and Palestinian cases in the ICC to determine the considerations on which the court relies in its procedures and decisions regarding the two cases. The research problem was to analyze the role of the ICC in the two cases by comparing them in terms of the factors and considerations affecting the court's performance towards them. The importance of the study lies in providing a comprehensive and comparative analysis of the challenges and factors affecting the two cases addressed in the study and highlighting the impact of these factors on international peace and security. The researcher relied on the descriptive and analytical approaches to reach the results of the study, the most important of which was that there are indeed political factors affecting the performance of the court and its legal procedures in light of American hegemony and the prevailing unipolar system in the world, and that the court shows clear double standards in dealing with the Palestinian and Ukrainian cases in terms of the time period taken to respond to the two cases and the American influence supporting its work in Ukraine and opposing it in Palestine, and in terms of the comprehensiveness of the arrest warrants issued against criminals for the crimes committed. Indeed, the researcher recommended the necessity of enhancing the transparency of the Court's work by publishing periodic reports explaining the nature of its decisions and explaining its decision-making mechanisms, and the necessity of pressuring non-member states of the Court to join the Rome Statute, especially the USA and Russia, and enacting laws that would enhance the Court's independence from international powers.

Keywords: ICC, Palestine, Ukraine, Political factors.

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Introduction

The war crimes and crimes of aggression committed in the First and Second World Wars necessitated the world to establish an international body with jurisdiction to investigate serious international criminal cases and hold their perpetrators accountable. The first of these structures was established in 1945, namely the two international military tribunals in Nuremberg and Tokyo to consider crimes against humanity, crimes of aggression and war crimes committed in World War II. However, the work of these two tribunals was halted in the fifties due to the complexities of international politics resulting from the Cold War. Then a series of international negotiations resumed to establish an international criminal court that would ensure that serious crimes would not go unpunished, and would work to stop the impunity of perpetrators of crimes of international concern¹.

As part of global efforts to stop these violations of human rights by investigating war crimes and aggression, 120 countries met in the UN General Assembly on 17/7/1998 in Italy and approved what is known as the Rome Statute, which was considered the Rome basic basis for the establishment of a permanent international criminal court to ensure that serious crimes against children, women and men that threaten international peace and security do not go unpunished. In accordance with this statute, the ICC has defined the jurisdictions that will try individuals accused of them within three main jurisdictions, namely: genocide, which are crimes of killing or causing serious harm with intent to destroy, as a racial or ethnic group; collective, national or religious war crimes, in whole or in part, which are all violations of the 1949 Geneva Convention and violations of the laws of war in international or internal armed conflict; and crimes against humanity, which are prohibited acts stipulated in the Rome Statute if committed in a systematic and organized manner against civilians, such as willful killing, rape, racism, and forced displacement².

¹ Geneva convention 1949: The Geneva Conventions and their Additional Protocols form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. (ICRC official site)

Find Geneva convention on: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>

² Ibid.

Research Problem

The research problem is to analyze the role of the ICC in achieving justice, through a comparative study between the Palestinian and Ukrainian cases. The research seeks to explore the factors and considerations that affect the court's decisions and trends when investigating international crimes and human rights violations.

Since Palestine was recognized in 2012 by the UN as a non-member observer state, popular pressures and demands increased on the Palestinian leadership to join the Rome Statute that established the ICC, meaning the official acceptance of joining the court and recognizing its judicial authority. The actual accession took place in 2015, and despite that, the request to join granted the court jurisdiction over the territory of the State of Palestine as on 13/6/2014, before the start of the aggression on Gaza. Following accession, the Prosecutor announced on her own initiative the opening of a preliminary examination into the situation in Palestine, addressing a range of crimes that indications indicate occurred during the 2014 aggression on Gaza¹.

On 3 March, the Office of the Prosecutor of the ICC confirmed the opening of a formal investigation into the situation in Palestine, after the Court recognized that it has jurisdiction over the occupied Palestinian territories, in particular the West Bank, the Gaza Strip and East Jerusalem. The opening of a formal investigation into the crimes represents the next step in the process. However, it must be emphasized that this procedure does not necessarily mean that the trial of Israeli officers and politicians is approaching, as the investigation will not focus exclusively on the Israeli side, but will also include other incidents carried out by Palestinian resistance factions, such as the firing of rockets at Israeli population centers. The investigation period is expected to extend over a long period, possibly reaching years. Over the course of the Court's existence since 2002, only 30 cases have been dealt with, resulting in 9 convictions and 4 acquittals².

¹ Referral from the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute," ICC Legal Tools Database, 22/5/2018, accessed on 14/2/2021, at: <https://bit.ly/2ZbX5cy>

² International Criminal Court, "Situation in the Islamic Republic of Afghanistan: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan," ICC-02/17-33, 12/04 /2019, para. 36, accessed on 7/7/2021, at: <https://bit.ly/3y29hfp>

In the Ukraine case, the Prosecutor of the ICC announced a decision to open an immediate investigation into possible war crimes committed by Russia in Ukraine. This decision comes in response to an unprecedented request from 39 States Parties. Officials in Russia, Ukraine, and the UN insist that Russia's full-scale invasion of Ukraine did not topple the government in Kiev, but thousands of people are believed to have been killed or injured in the attack. Prosecutor Karim Khan announced on Twitter that active investigations had officially begun in Ukraine immediately after receiving referrals from the 39 States Parties. Referrals from member states help expedite investigations, allowing the Prosecutor to bypass lengthy procedures to obtain approval from the court in The Hague, saving valuable time in investigating alleged crimes. Earlier, the Prosecutor confirmed that he would seek the court's approval to investigate allegations of war crimes in Ukraine¹.

Hence, the main research question arises:

What are the legal considerations that the ICC relies on in making decisions regarding both the Palestinian issue and the Ukrainian war?

The following questions branch out from the main question:

1. Are there political factors that may affect the independence of the court and make its decisions subject to external considerations?
2. Does the ICC apply its procedures and rulings with the same standards to all countries?
3. Is there evidence indicating the presence of politicization in the decisions of the ICC?

¹ Publishing blog Research and reports entitled Russia's invasion of Ukraine The International Criminal Court begins an immediate investigation into Russian war crimes, and the flight of a million Ukrainian refugees Published on 3/22/2022 Russia's invasion of Ukraine: The International Criminal Court begins an immediate investigation into Russian war crimes, and the flight of a million Ukrainian refugees - BBC News Arabic.

Research Importance

The research addresses the role of the ICC in achieving justice, and this applies particularly to the comparison between the Palestinian and Ukrainian cases. The importance lies in providing a comprehensive and deep understanding of dealing with international cases brought before the ICC. This research provides an opportunity to analyze and compare the legal measures and challenges facing the court in both the Palestinian and Ukrainian cases.

The research contributes to the elements that the court's capabilities include in achieving justice in general, whether those factors are related to politics, law, or legal culture in each of the two cases.

In short, this research contributes to a deeper understanding of international justice and the impact of the court on the international scene, by highlighting the challenges and successes in each case, the research can shed light on the role of the court in promoting international peace and security and protecting human rights, while providing practical recommendations to enhance its efforts to achieve global justice.

Research Objectives

The ICC is one of the important mechanisms for achieving international justice and addressing war crimes and crimes against humanity. With the increasing importance of its role in the international community, the importance of conducting a comparative study between different cases comes. This research aims to analyze the Palestinian and Ukrainian cases in a comparative manner, with the aim of understanding the application of the court and the factors affecting its ability to achieve justice in each case, accordingly, the objectives of the study are:

1. Understanding the differences and similarities in the application of the ICC to the Palestinian and Ukrainian cases.
2. Analyzing the political factors and legal investigation procedures that affect the court's ability to achieve justice in both cases.
3. Providing recommendations based on evidence and analysis to enhance the role of the ICC in achieving global justice.

4. Raising awareness of the importance of applying international law and achieving international justice, and the role of the court in achieving these goals.

Research Hypotheses

The Palestinian and Ukrainian cases witness international challenges and complex issues related to human rights and international justice. Although the ICC plays an important role in dealing with these challenges, the differences in political factors and legal procedures in the investigation between the two cases can significantly affect the court's ability to achieve justice in each case. These differences must be carefully analyzed to understand the unique challenges facing the court in each case. Hence, the research hypotheses arose:

First hypothesis:

The political and cultural factors differ between the Palestinian and Ukrainian cases, which affects the ability of the ICC to achieve justice in each case.

Second hypothesis:

The legal challenges related to the actual application of international law may differ between the two cases, leading to different outcomes in each case.

In short, the importance of analyzing the political factors and legal procedures in the investigation of each case is evident in order to understand the challenges facing the ICC. These differences may affect the course of judicial work and the application of the law in general, which makes it necessary to examine how they affect the court's ability to achieve justice in each case.

Research Spatial and Temporal Limits

The ICC is one of the most important international judicial organizations that works to address war crimes and crimes against humanity. In this context, it is important to conduct a comparative study between the Palestinian and Ukrainian cases to understand how the court deals with each of their cases. The spatial limit of the research focus on the two cases mentioned, while extending from the announcement of the Public Prosecutor to begin studying the Palestinian case in 2014 to the present time.

The research also aims to focus on the period related to the pending cases in each of the two cases, in order to analyze the developments and changes that have occurred in dealing with them over time.

Research Methodology

In this study, we will use the descriptive analytical and comparative approach in the master's thesis as follows:

- **Descriptive and analytical approach**

We will describe and analyze the role of the ICC in achieving justice by studying the relevant legal and political literature, and we will review the history and development of the court, and analyze the mechanisms and procedures it adopts in addressing international crimes.

We will analyze the issues and challenges facing the court in dealing with the Palestinian and Ukrainian cases.

- **Comparative approach**

We will compare the judicial approach and dealings of the ICC in both the Palestinian and Ukrainian cases, and we will analyze the similarities and differences in the application of international law and the achievement of justice in each of the two cases.

Using the descriptive analytical approach, we will provide a deep understanding of the role of the ICC and its working mechanisms, while the comparative approach will help us understand the different challenges facing the court in each case and the factors that may affect the application of justice.

Previous Studies

First study is entitled: Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law's selectivity in the wake of the 2022 Ukraine invasion (Patryk I. Labuda, 2023).

The full-scale Russian invasion of Ukraine has revived the debate about the purity of international criminal law, with many welcoming the renewed interest in accountability for international crimes after the “Ukraine moment,” but others pointing to double standards in the application of this law, particularly the lack of accountability for Western violations and the excessive focus on European victims.

This study discusses narratives about the selectivity of international criminal law after the Ukraine crisis, and emphasizes the importance of considering Ukraine’s limited position in the global system and the transnational nature of the aggression as factors explaining the different responses from states. The study suggests that concerns about Ukraine’s negative impact on the enforcement of international criminal law have become less convincing after a decade of conflict between the ICC and the African Union, and that the focus on investigations in the Eurasian region should be seen as an opportunity to rebalance the scales of justice. This study calls for moving beyond criticism that inadvertently focuses on European assumptions, and creating a more comprehensive vision for the enforcement of international criminal law that challenges crimes and inequality between and within states.

This study finds that the Russian war on Ukraine has led to increased demands for accountability of the ICC. The study put forward two proposals for reforming the court:

First, NGOs should support the ICC in all global crises, not just the Russian-Ukrainian crisis, in order to ensure that there are no double standards for every crisis that occurs in the world.

Second, there should be no double standards in multiple cases around the world, and powerful countries such as the United States, China and Russia should join the Rome Statute and submit to the criminal justice issued by the ICC. The ICC should not be a tool for interference in the affairs of certain countries.

As the world moves towards multi-polarity, the International Court should be a fair and independent tool, not in the hands of some states to achieve their own interests.

Commenting on the study and benefiting from it

The researcher chose this study because it addressed the Russian-Ukrainian crisis as a reason for the failure to achieve criminal justice in the world and the ICC showed great interest in investigating crimes committed in this case, while there are other crimes occurring in different parts of the world that the court did not consider and did not begin investigating. This illustrates the double standards followed by the ICC.

In this study, I will explore and focus on the reasons that lead to double standards in the ICC, with a special focus on political factors.

Second study is entitled: Evaluation of the responsibilities of the International Criminal Court in the investigation of war crimes in Ukraine (Sergei Ablamskyi, Denakpon L.R. Tchobo, 2023)

This study aims to identify the fundamental role of the ICC and its importance in the collective investigation in Ukraine. Since the definition of the term war crimes does not exist in the current Ukrainian legislation, this study aims to conduct a coherent analysis of the term in question in the context of international law. In this way, the Committee notes that Ukrainian law enforcement agencies are able to document war crimes committed by the Russian Federation in Ukraine. This indicates that the ICC, compared to its previous international investigations, certainly has a wide range of support resources to hold accountable the “most responsible” for alleged war crimes and crimes against humanity, as confirmed in its procedural policy documents. The study concluded that the war waged by Russia has reoriented Ukrainian government policy in all areas, including criminal justice. In the context of this war, the investigative bodies, the Prosecutor General’s Office and the Court have faced many challenges, including the need for a legal response to actions that harm the interests of Ukraine and its people in terms of security and defense, clarifying procedures during military operations, improving the investigation of war crimes and related crimes, and cooperating with international judicial institutions to implement the decisions of the ICC. Although Ukraine has not fully ratified the Rome Statute of the ICC, it has worked with the ICC to document and consider war crimes. Therefore, the researchers here in this study

proposed amending the Rome Statute of the ICC to allow the investigation and prosecution of aggressors who are not signatories to the Rome Statute. The researchers also proposed in their study to provide accountability measures for the aggressor state under the Rome Statute, and for the state subject to invasion to collect evidence of crimes committed on its territory.

Commenting on the study and benefiting from it

The researcher addressed this study as a previous study to clarify and evaluate international criminal responsibility in investigating war crimes in Ukraine. Although Ukraine has not fully joined the Rome Statute, the ICC has fulfilled its responsibility and started investigating and cooperating immediately with Ukraine to collect evidence related to war crimes committed on its territory.

The researcher wondered why the ICC investigated and cooperated with Ukraine despite its not fully joining the Rome Statute. He added that in this study he will discuss how the ICC deals with cases other than the Ukrainian case, and the criteria followed by the court to start investigating those cases. The researcher will also address whether the court stands before its responsibilities equally and without double standards.

Third study is entitled: Challenges Facing International Cooperation Addressing War Crimes, with Reference to the Ongoing Conflicts in Ukraine and Gaza Strip (Mohammad Ali Sharifi Kia, 2023).

The commission of war crimes in armed conflicts has become widespread and has a negative impact on the world. As a result, international jurists have sought to develop practical solutions to reduce these crimes. Specialized documents have been developed that form the current international system for confronting war crimes, namely the Rome Statute and other international organizations.

This research aims to investigate the main reasons that hinder the effectiveness of the current system in holding perpetrators accountable. It also explores the main international documents related to this topic. The results indicate that the challenges include: the inadequacy of implementation mechanisms in these documents, the failure of governments to prioritize international relations over international law, the absence of participation by major military powers, and the limited use of political tools by other

countries against violating countries. These factors combined weaken the international system in addressing war crimes, and hence we see the difficulties facing any international cooperation in confronting war crimes committed in the world.

In order to confront these war crimes and the difficulties facing international cooperation, there must be specialized institutions that confront these difficulties and derive their legitimacy from the majority of member states of the UN in order to help them achieve international cooperation. The researcher noted that the UN, through its adoption of Resolution 3074 issued by the UN General Assembly, is an initial step that urges international cooperation, as this resolution includes nine basic principles for international cooperation and confronting war crimes in order to maintain international peace and security. This research clarified the challenges facing international cooperation, which are:

First, the absence of appropriate guarantees for the implementation of international documents has made them limited in effectiveness, as they have turned into sources for developing legal rules only.

Second, the international relations' transcendence of international law has made political considerations prevail over international justice, which has hindered the implementation of international obligations.

Third, the failure of major countries to join the Rome Statute weakens the ability of the ICC to confront war crimes.

Finally, the failure of other countries to use political tools against violating countries allows these countries to continue committing crimes without facing international pressure.

Commenting on the study and benefiting from it

This study helps the researcher to know some of the challenges facing the ICC in international cooperation in performing its tasks to investigate international crimes and hold their perpetrators accountable, as it included the dominance of international relations in the international legal arena, which enables the researcher in this study to link these challenges to the political factors affecting its role, the basis of which is the

international relations discussed in the aforementioned study, which are considered part of these challenges.

Fourth study entitled: Comparing the Ukraine and the Gaza wars: the force of law and the law of force (Marc Finaud, June 2024).

This study aims to clarify the difference between the "force of law" and the "law of force" by comparing the Ukrainian case with the war on the Gaza Strip in Palestine, despite the difference in causes and history between the two cases, both witnessed war crimes and crimes against humanity, but there is great international interest in the Ukrainian case while the Palestinian case is marginalized. This gap reveals the influence of the "law of force" instead of the "force of law", which reflects bias and weakens confidence in international justice and the international community.

Commenting on the study and benefiting from it

The researcher chose this study as a previous study because it deals with two current cases on the ground and sheds light on the bias in the investigation procedures of the Office of the Prosecutor of the ICC, and the current study will review the political factors that affect these investigation procedures in the Office of the Prosecutor of the ICC, focusing on how they affect dealing with different cases such as the Ukrainian case and the Gaza Strip case.

Fifth study entitled: Procedures for investigating international crimes before the International Criminal Court between the requirements of justice and the restrictions of practice (Shaalal Rafiq, 2020).

We conclude from this study that the Prosecutor of the ICC has the powers to investigate international crimes that fall within the jurisdiction of the Court, as the Rome Statute authorizes the powers of investigation even if it is on the territory of a state that is not a member and party to the Rome Statute and the case was referred by a member party or through referral by the Security Council of the UN, and the powers of the Prosecutor are represented in collecting evidence from international organizations or the state party to the conflict and that the Prosecutor obtains permission to investigate through the Pre-Trial Chamber of the ICC. This study also developed solutions and suggestions in order to obtain the independence of the investigation by the prosecutor

and that the investigation carried out by the prosecutor be free of double standards and be independent. They are: First, expanding the investigation through the work of the role of judges in the internal systems of countries. Second, the independence of the prosecutor in the investigation through the non-interference of the Security Council in the investigation procedures, as there is an article in the Rome Statute that gives the Security Council the authority to freeze or suspend the investigation, in addition to the non-interference of any political body in the investigation procedures. Third, expanding the collection of information and evidence on international crimes, as the court allows individuals to collect information and submit it to the court in the form of a complaint. Fourth, working on the cooperation of non-party states by establishing investigation committees by the Security Council, these committees specialize in submitting reports on international crimes.

Commenting on the study and benefiting from it

(Rafeeq, 2020) clarified the sequence and conditions of the procedures for investigating international crimes before the ICC and the mechanism for completing them, and made various recommendations to ensure that these procedures are free from double standards in different cases and issues. Accordingly, this study benefits the researcher in tracking these procedures and conditions and comparing them with the two cases addressed in his study - the Palestinian and Ukrainian - and verifying the extent to which they are completed with the correct standards in both cases, and clarifying the impact of political factors on what may appear to be a deficiency or shortcoming in performing their tasks in the researcher's current study.

Research Plan

Introductory chapter:

1. Overview of the International Criminal Court

1.1: Procedures of the parties referring cases to the ICC.

1.2: Procedures of the ICC when referring cases to it.

1.3: Mechanisms for implementing the judgments and decisions of the ICC and the role of the States Parties towards implementation.

1.4: Challenges facing ICC and the States Parties in implementing the decisions and judgments of the Court

Chapter I:

1. Palestinian Case Study

1.1 Historical Context of the Palestinian Conflict

1.2 Political Factors Influencing the Role of the ICC in the Palestinian case

1.3 Legal Challenges Facing the ICC in Palestine

1.4 Analysis of ICC Investigations and Decisions in the Palestinian case

2. Ukrainian Case Study

2.1 Historical Context of the Ukrainian Conflict

2.2 Political Factors Influencing the Role of the ICC in the Ukrainian case

2.3 Legal Challenges Facing the International Criminal Court in Ukraine

2.4 Analysis of ICC Investigations and Decisions in the Ukrainian case

Chapter II:

1. Another overview of the International Criminal Court

1.1 How does the ICC work

1.2 Previous Studies on the International Criminal Court and Political Influences (Judicial Cases)

2. Comparative Analysis

1.2 Comparison of Political Factors in Palestine and Ukraine

2.2 Comparison of Legal Challenges in Both Cases

3.2 The Impact of Political Factors on the Effectiveness of the International Criminal Court

3. Conclusion and Recommendations

1.3 conclusion and results

2.3 Recommendations for the International Criminal Court and Policymakers Policies

Introductory Chapter: Overview of the International Criminal Court

1. Overview of the International Criminal Court

Cases within the jurisdiction of the ICC go through a number of stages before issuing a ruling on them, from referring the case to the public prosecutor, and the case passing through a number of chambers affiliated with the court. At each stage, there are different procedures. In this chapter, the researcher will provide an explanation of these procedures in order, starting from referring the case to court until decisions are issued regarding it.

1.1 Procedures of Parties That Refer Cases to the ICC

According to Article 13 of the Rome Statute of the ICC, The court exercises its jurisdiction with regard to the crimes referred to in Article 5¹ of the Charter in the following cases:

- a) If a State Party refers to the prosecutor in accordance with Article 14 a case in which one or more of these crimes appears to have been committed
- b) If the Security Council, acting under Chapter VII² of the Charter of the United Nations, refers a situation to the Prosecutor in which it appears that one or more crimes have been committed
- c) If the Public Prosecutor has initiated an investigation in relation to one of these crimes, in accordance with Article 15³.

According to Article 14 of the Charter, a State Party may refer to the Public Prosecutor any case in which it appears that a crime or more crimes within the jurisdiction of the Court have been committed, and request the Public Prosecutor to

¹ Crimes within the jurisdiction of the court:

1- The Court's jurisdiction is limited to the most serious crimes that are of concern to the entire international community. Under this Statute, the Court has jurisdiction to consider the following crimes:

A) The crime of genocide. B) Crimes against humanity. C) War crimes. D) The crime of aggression.

2 - The Court exercises jurisdiction over the crime of aggression whenever a ruling is adopted in this regard in accordance with Articles 121 and 123 that defines the crime of aggression and sets the conditions under which the Court exercises its jurisdiction in relation to this crime. This ruling must be consistent with the relevant provisions of the Charter of the United Nations.

² Chapter Seven of the United Nations Charter, relating to actions taken in cases of threats to the peace, breaches of peace, and the occurrence of aggression

³ The first paragraph of Article 15 of the Rome Statute: The Public Prosecutor may initiate investigations on his own initiative on the basis of information related to crimes within the jurisdiction of the Court.

investigate the case for the purpose of determining whether one or more persons should be charged with committing these crimes, and the case and its circumstances are determined by the supporting documents available by the referring state¹.

Based on the above, referral in these cases means drawing the attention of the ICC to the occurrence of a crime that falls within its jurisdiction, and requesting its summons and intervention. The authorities that have the powers to refer and request the convening of the court are the states parties to the Rome Statute, the Security Council, and the Prosecutor General.

According to Article 12 of the Rome Statute, the State Party that can refer the case to the ICC must be a State in whose territory the criminal conduct occurred or the State of registry of the ship or aircraft if the crime was committed in either of them, or the state whose nationality the person accused of committing the crime holds. In these cases, the state requests the public prosecutor of the court to directly investigate the case, and attaches to its request any documents in its possession proving the crime.

In the event that the case is referred through the Security Council, the Statute of the ICC specifies the conditions for referring the case in a legally sound manner as follows:

1. The Security Council's commitment to correct voting procedures regarding the decision to refer the situation to the ICC, in accordance with Article 27 of the UN Charter, with the approval of nine of its 15 members, without the condition that these votes include the votes of permanent members.
2. Issuing a Security Council decision to refer the case to the ICC in accordance with the provisions of Chapter Seven of the UN Charter.
3. Referral of the written Security Council resolution to the Prosecutor of the Court by the Secretary-General of the UN, provided with documents and materials relevant to the resolution².

¹ Rome Statute of the ICC 1998

² Ahmed, F. (2021). "Criminal cases in the International Criminal Court statute: the problem of procedure and double standards. The Palestinian case as an example". Unpublished study

As for referring the case through the Public Prosecutor to the court, this occurs when the Public Prosecutor has personal knowledge of the occurrence of the crime, and he can initiate investigations regarding the case based on Article 15 of the court system after ensuring the accuracy of the data that enables him to formulate a specific position on the case. In addition to taking other precautionary measures, such as requesting the arrest, attendance, or interrogation of the accused, he also has the right to request additional information from reliable sources from countries, governmental and non-governmental organizations, or UN organizations and other procedures related to the internal work of the ICC upon referral of issues, which the researcher will explain more broadly in the second axis of this research¹.

As for referring cases to the ICC through a state that is not a party to the court's statute, there is a general rule in the statute that indicates that any state has not ratified it and accepted the court's jurisdiction under it does not have the right to refer any case to the Court unless it ratifies the system, and then refer cases if it wants to. But that does not mean that states that are not parties to the system do not abide by the court's decisions, but rather comply with its requests, when the case is referred by the Council. Security, and this is the source of its obligation².

Accordingly, we conclude that the case is referred to the ICC through the states parties to its statute, the Security Council and the Public Prosecutor, who has the right to initiate an investigation immediately upon his personal knowledge of the occurrence of a crime, and all of these parties must refer the cases in the correct legal manner by submitting a request to look into the case in writing. Evidence is provided that proves the validity of the occurrence of the case within the jurisdiction of the court, as well as evidence and documents confirming the occurrence of the crime and supporting the position of the party referring the case.

It is important here to point out that referring the case to the ICC by the Security Council or a state party to the statute does not necessarily mean directly investigating it. In these cases, the court has the right to consider the case by accepting or rejecting the investigation, or postponing the investigation to request additional information and documents about the case to initiate the investigation, and it also has the right to refuse

¹ Rome Statute of the ICC 1998 (Ibid)

² Ahmed, F. (2021) (Ibid)

to investigate the case if the information and documents provided by the party referring the case are insufficient.

1.2 Procedures of the ICC When Referring Cases to It

When cases are referred to the ICC, it first confirms whether the case referred to it falls within its jurisdiction, and that it was committed in a state party, or by the knowledge of one of its nationals. The court also exercises its jurisdiction when a state that is not a party agrees to this, and the crime is within the scope of the state, or the accused is one of its citizens, and in these cases in which the court exercises its jurisdiction over the cases referred to it, the court implements several procedures carried out by each authority side of the court, which the researcher explains in this requirement.

Prosecutor's procedures

The case is first referred to the Public Prosecutor of the Court, and the Public Prosecutor decides whether to initiate a preliminary investigation into the case or not after ensuring that there are no other justice bodies competent to look into, investigate, and prosecute the crime, in accordance with the preamble to the Statute of the Court and Article 1 thereof, and to ensure that the Security Council will not take over processing the case, in addition to his evaluation of the referral information. This is called the initial investigation, from which he concludes whether he should begin investigation procedures into the case or not.

The next stage is after ensuring that the investigation must begin. The Public Prosecutor submits a written request to the Pre-Trial Chamber of the court granting him permission to conduct the investigation. This request is accompanied by the evidence and materials he has collected that support his request. The Public Prosecutor informs the victims of this, and then the Pre-Trial Chamber issues its decision to grant permission to investigate or not, explaining its position, whether it is rejection or acceptance, according to Article 15 of the statute.

It is worth noting that the Pre-Trial Chamber's refusal to grant permission to the Prosecutor to begin an investigation does not prevent him from submitting another request based on new evidence and considering other information submitted to him¹.

Accordingly, we conclude that the Public Prosecutor does not initiate an investigation into the case except after granting permission from the Pre-Trial Chamber of the Court, and this Chamber is competent to issue summons, arrest and pretrial detention orders, not the Public Prosecutor, and according to Article 57 of the Court's Statute, the Public Prosecutor then decides to initiate of the investigation, and he shall notify the Pre-Trial Chamber of this in writing as soon as possible after taking the decision, including the reasons for making this decision. Even if he decides not to initiate the investigation, he must also notify the Pre-Trial Chamber of this in writing.

After the court and its competent authorities investigate the case, the Pre-Trial Chamber shall issue, at any time thereafter, upon the request of the Public Prosecutor, an order to arrest the accused person if it is convinced of this after examining the Public Prosecutor's request, and the evidence and information he provided. The arrest order shall remain in effect until the court orders otherwise, and the public prosecutor may also submit a request for a summons, conditionally or unconditionally, and the state party in which the accused is located must expedite the steps to arrest and interrogate the person in accordance with its laws, and in accordance with the principle of cooperation in Article 59 of the law.

The wanted person is then presented to the competent judicial authority, as soon as the order to bring him to trial is issued, and he is transferred to the court as soon as possible².

Procedures for confirmation of charges hearing

Once the wanted person arrives at the court, he appears before the Pre-Trial Chamber of the Court, and in the presence of the Public Prosecutor. The Chamber sets the date for the hearing to confirm the charges, then implements the necessary decisions regarding the disclosure of evidence between the Public Prosecutor and the person

¹ Al-Baqirat, A. (2008). "Litigation proceedings before the International Criminal Court". Algerian Journal of Legal and Political Sciences.

² Rome Statute of the ICC 1998 (Ibid)

against whom the arrest warrant was issued, and then sends the evidence that has been disclosed to the Pre-Trial Chamber between the Public Prosecutor and the person for the purposes of the hearing to confirm the charges within a maximum period of 30 days before the hearing, then after the list of charges is filed, the Registry of the Court opens a file of all proceedings before the Pre-Trial Chamber in which all documents that were referred to the Chamber are kept.

This is followed, in the presence of the accused, by reading out the person's charges in the form presented by the Public Prosecutor, and determining the methods for conducting the session. The head of the Executive Chamber asks the Public Prosecutor and the accused to express any objections or observations about the conduct of the procedures before the hearing to confirm the charges. Accordingly, the Pre-Trial Chamber approves the charges with sufficient evidence and refers them to the person is taken to a court of first instance to be tried, and the charges with insufficient evidence are rejected, or the session is postponed until the public prosecutor looks into them again and presents more evidence. Once the charges are approved, the Presidium of the Court forms a preliminary chamber for the trial in accordance with Article 64 of the law, and the plaintiff is notified. The public Prosecutor notify the accused or his lawyer, and the decision is referred to the Presidency of the Court accompanied by the minutes of the Pre-Trial Chamber sessions. In the event that the accused person does not attend, his lawyer may represent him during these procedures¹.

Trial

The court's pleadings chamber sets a date for the trial and notifies all relevant parties of this date, and any postponements are made public. It then appoints one or more judges of its members for the trial. The judge or judges prepare an action plan specifying the obligations owed to the parties according to specific dates, then the court can at this stage may order a physical or psychological medical examination of the accused in the circumstances specified in Article 31 of the law. The pleadings chamber shall explain the reason for that order in writing, and then it will be determined whether the accused's condition is suitable for trial or not, and the pleadings chamber shall order the postponement of the trial in this case. The final trial session is then held. It is worth

¹ Al-Baqirat, A. (2008) (Ibid)

noting that there are joint trial sessions and separate sessions. The trial sessions are joint when there is a group of people accused of the same crime, and they are tried jointly unless the pleadings chamber or the public prosecutor orders separate trials to avoid causing serious harm against the accused or to protect the interests of justice, or because a co-accused has made another confession that must be pursued separately in accordance with Article 65. Each accused in joint trials enjoys the same rights as if he were being tried separately¹.

Certificates

According to Article 64 of the Statute of the Court, witnesses at trial have the right to be examined by:

1. The parties that provided evidence about the case, in accordance with Article 69 of the Law
2. The Public Prosecutor and the defense regarding witness testimony and related matters
3. The pleading room before and after the questioning of witnesses
4. The defense shall be the last party entitled to question witnesses, unless the pleadings chamber orders otherwise

The President of the Chamber then announces the closure of the presentation of evidence, and invites the Public Prosecution and the Defense to present their closing arguments, and the Defense always has an opportunity to have the final word. The Pleadings Chamber then sets a date to announce its decision and informs all parties to the trial proceedings of this date within a reasonable period after it convenes a Pleadings Deliberation Chamber, and when there is more than one charge, the pleadings chamber must decide on each charge separately, and when there is more than one accused, it must decide separately on the charges against each accused.

Then, a session will be held to announce the pleading chamber's decision on the case, the criminal responsibility of the accused, the penalty and compensation, in the presence of the accused, the public prosecutor, the victims or the legal force representing the victims, and representatives of the states that participated in the trial

¹ Rules of procedures and evidences, ICC Publications, 2019.

procedures. The court will then provide copies of all these decisions as soon as possible to all participants in the trial and case procedures in the working language of the court, and for the accused in the language he understands or speaks. After the trial session is completed and the ruling is issued regarding the accused, the Secretary General of the court must preserve all the evidence, materials and documents that were presented during the session¹.

Accordingly, we arrive at the conclusion that the procedures of the ICC, after the case is referred to it by the parties authorized to do so, begin with the procedures of the Public Prosecutor by deciding whether to begin an investigation into the case or not, then obtaining permission from the Pre-Trial Chamber of the Court to begin the investigation, then the Chamber issues a subpoena and arrest warrant to brought the accused to trial, and the charges against him are determined based on the evidence and information presented at the charges confirmation session. The trial takes place, a decision is made regarding a case, and a sentence is issued against the accused based on this list and the testimonies of witnesses.

1.3 Mechanisms for implementing the judgments and decisions of the ICC and the role of the States Parties towards implementation

The implementation of the decision issued by the ICC begins by submitting the convicted persons to the court. The court submits a request to the state in whose territory the person is present. The state must cooperate with the court in arresting and presenting the person, then the state party authorizes, in accordance with the procedures of its national law, that the desired person be transferred from it to the court in accordance with Article 89 of the Rome Statute, and the court's request from the state must be submitted in writing and include:

1. A description of the wanted person sufficient to determine his identity and information about the place where he may be found.
2. A copy of the arrest and surrender order.
3. A brief statement of the facts of the case and its legal ambiguity.
4. A copy of the conviction judgment.

¹ Ibid

5. Information proving that the wanted person is the same person referred to in the conviction.
6. In the event that a prison sentence is issued, a statement explaining the period that has actually passed and the remaining period.

It is worth noting that if there are ongoing procedures in the state to which the request is directed against the wanted person, or if the person is executing a sentence in the state for a crime other than the crime for which the court requested him to be brought, then the state may consult with the court about its decision to approve the request ¹.

Arrangements for surrender and submission to court

The state to which the request is made must notify the court as soon as the person requested for extradition becomes available. The person shall be handed over to the court by the date and method agreed upon between the authorities of the state and the court. If circumstances prevent the person from being extradited on the specified date, then the authorities of the state and the court must agree on a new date and method for handing over the person, and it remains the court in contact with state authorities regarding these arrangements until the person is handed over to the court ².

Execution of the judgment

The procedures for implementing the sentence after presenting the accused to the court are regulated by Chapter 10 of the Rome Statute of the ICC in Articles 103 to 111. This task is divided between the court and the relevant countries. When a prison sentence has been imposed, the sentence is implemented in a state designated by the court from a list of states that has expressed its readiness in advance to accept the convicts, and the state may condition its acceptance to receive the convicts with conditions approved by the court, provided that they do not conflict with the provisions of the aforementioned section. The state informs the court immediately upon its acceptance, and the state notifies the court of any circumstances that may affect the conditions and duration of imprisonment, and the court gives the state a period of time not less than 45 days from the date of notification; To determine whether or not it will

¹ Rome Statute of the ICC 1998 (Ibid).

² Rules of procedures and evidences, ICC Publications, 2013.

agree to implement the sentence in this country under these circumstances. If it does not agree, it may decide at any time to transfer the convict to a prison belonging to another state. During these procedures, the court must take into account:

1. The principle that states parties share responsibility for implementing judgments.
2. Standards for the treatment of prisoners established by acceptable international treaties.
3. Opinions of the convict.
4. The nationality of the convict.
5. Any other factors related to the circumstances of the crime, the convict, or the state of implementation.

Prison conditions are governed by the law of the implementing state, such that these conditions are consistent with the standards of accepted international treaties, and in no case may the conditions be less or more comfortable than the conditions available to prisoners convicted of the same crimes in the implementing state.

After the accused completes the sentence, the person who is not a national of the implementing state may be transferred to a state that the court requires to receive him, or another state that agrees to receive him, taking into account the desire of the person himself, or he may remain in the implementing state if the state permits it, and the court shall bear the costs of the transfer, unless any country bears those costs¹.

Fines and confiscation measures

States Parties shall implement fines and confiscation measures under Chapter 7 of the Law in accordance with the procedures of their national law. If they are unable to enforce a confiscation order, they must implement measures to recover the value of the property that the court orders confiscated, or implement the confiscation and fine order by transferring property or proceeds from the sale of real estate or any of the following. The state obtains it as a result of its implementation of the court ruling².

¹ Rome Statute of the ICC 1998 (Ibid).

² Rome Statute of the ICC 1998 (Ibid).

States cooperate with the Court in implementing its rulings and decisions

The ICC relies heavily on the states parties to the Rome Statute as its main pillars in implementing its decisions. This Charter includes a decision that the Court has judicial and prosecutorial powers, but it does not have its own executive powers, and the states parties to the Charter bear the responsibility of supporting and facilitating the functions of the court, from a prosecutorial and judicial perspective, provides and works under the principle of effective cooperation with the court's procedures at all stages, in compliance with Part 9 of the Rome Statute, which clearly states that there are legal obligations on states parties to support and facilitate the work of the court throughout its judicial procedures, and this includes various forms of cooperation, Such as transferring witnesses and other forms of cooperation, the researcher explains in detail.

In 2007, the Assembly of States Parties to the Rome Statute (ASP) adopted a comprehensive document containing a comprehensive list of 66 recommendations on cooperation as a useful tool for States Parties and the Court, identifying the main areas of priorities for cooperation, in addition to providing guidance and proposed solutions on overcoming the challenges that may arise and face States when applying the principle of cooperation. The Court has designated national points of contact for matters related to the ICC, and adopted simplified and focused national procedures identified as practices for effective cooperation. These practices include:

1. Cooperation in supporting preliminary examinations, trials, investigations and judicial proceedings, including cooperation with the defense, which is a legal obligation of every State party to the Charter under Article 86¹ thereof.
2. Positively consider requests for information submitted by the court to the state, and give the public prosecutor the ability to obtain information from reliable sources to make a clear decision on whether to open an investigation or not.
3. States provide concrete evidence that the state is actively investigating crimes during the preliminary examination phase.
4. Identifying, seizing and freezing assets for the purposes of providing potential evidence showing the link between the crime and the wanted person.

¹ Article 86: General commitment to cooperation.

In accordance with the provisions of this Statute, States Parties shall cooperate fully with the Court in the investigations and prosecutions of crimes it conducts, within the framework of the Court's jurisdiction.

5. Securing funds to compensate those affected if the person is convicted, and to cover the costs of legal assistance.
6. Transfer of witnesses and those threatened.
7. Receiving individuals proven innocent, suspects or accused persons who have been provisionally released (the procedures at this point consider voluntary cooperation on the part of States, as the Court cannot perform these functions alone).
8. Concluding joint cooperation agreements between the Charter countries and the Court.
9. Cooperation in the areas of logistics and security for personnel.
10. Issuing public statements in international forums and diplomatic dialogues to express support and cooperate with the Court to ensure the support of the UN and other international and regional bodies.

Thus, we arrive at the conclusion that the ICC is a judicial body that cannot work in isolation from the states parties to its founding Statute, as completing its procedures regarding its cases requires the actual cooperation of these states, as the court's fulfillment of its mandate is the collective responsibility of the states parties, and both the court and states have roles in court proceedings complement each other to reach its goals and those of the statute.

1.4 Challenges facing ICC and the States Parties in implementing the decisions and judgments of the Court

The court, despite its judicial power and the abidingness of its decisions, still faces continuous and difficult challenges in enforcing its decisions and rulings, despite the cooperation of states with it, as the states themselves also face challenges in assisting the court in extraditing criminals, protecting witnesses and other tasks for several considerations, such as their location, the defendants, the difficulty of reaching them, their nationalities, the mechanism for handing them over to the court, and other challenges and obstacles that sometimes make it difficult to implement the decisions of the ICC, are explained by the researcher in this section.

Since the responsibility for arresting and extraditing the accused lies with the state parties, the court simply follows a method of “no arrests, no trials”, and this may make the trial of criminals or the implementation of the sentence against them take a very

long time, as up to this moment there are still cases whose implementation has been pending for more than 10 years for not reaching the locations of the criminals and not extraditing them during this period, the court also points out the difficulty in obtaining the required evidence from the areas of the cases that are thousands of kilometers away from The Hague, where traveling to is difficult and whose security situation is volatile. Some states parties have also been trying since 2007 to restrict Financing the Court Repeated broad requests from the Court to increase the awareness or work of victims in the Court, or to refer more cases and work to the Court. Some states, including powerful states and permanent members of the Security Council, also offer inducements and harness the work of the Court in some way for their own purposes and interests ¹.

What contributed to creating a negative perception of the court as a judicial institution was the display of its judges' level of disagreement among themselves, their lack of consistency in applying substantive law, and the public involvement of some judges in a dispute over wages, which harms the coherence of the court's decisions and their legitimacy. Moreover, the conclusion of the USA there are multiple bilateral agreements with different states to ensure that these countries do not extradite American citizens who are found in these states. These agreements have effectively prevented states from cooperating in extradition cases, and weakened the court's ability to implement arrest warrants against some defendants, in addition to not Major states cooperate with the court, a number of other states do not cooperate with the court either. Between 2009 and 2010, the court issued two arrest warrants for Al-Bashir, President of Sudan. Since then, Al-Bashir has been able to travel to several states, including some of the member states of the court that All of them failed to arrest and extradite him ².

Since the ICC is an independent judicial institution, and not part of the United Nations, unlike the ICJ, it does not have an independent police force, independent enforcement agency, or prison facilities, and its detention facilities in The Hague are limited to housing incomplete trials. In these cases, the cooperation of states parties to the Rome Statute is required, but the court faces a huge challenge in securing the

¹ Kaul, H. (2011). "The International Criminal Court: Current Challenges and Perspectives". Washington university global study review

² Sterio, M. (2020). "The International Criminal Court: Current Challenges and Prospect of Future Success". Case Western Reserve Journal of International Law.

cooperation of states to implement arrest warrants, as states are in many cases reluctant to comply with the court's request to arrest and transfer suspects, especially if the person is a head of state, Or holds a powerful government position, even if that state is legally obligated to do so, for example, in 2012, the ICC issued an arrest warrant for Simone Gbagbo, the former First Lady of Côte d'Ivoire, on four counts of committing crimes against humanity, including planning murder, rape, sexual violence, and other inhumane acts, allegedly committed in the country during the post-election violence of 2010/2011 in the country, where the Côte d'Ivoire authorities arrested her, refused to transfer her to the ICC, and tried her internally in 2015 on charges of undermining state security, until the appeal Chamber at the ICC decided that the Côte d'Ivoire trial did not include the same crimes she was accused of in the ICC case, and therefore, Côte d'Ivoire was obligated to hand her over to the court for trial. However, it did not do so, and it was never possible to try her before the ICC, even though Côte d'Ivoire was a state party to the ICC, and finally at the request of the Prosecutor, in 2021 the court annulled the effect of the arrest warrant against the accused on the grounds that the evidence did not meet the requirements under the court's statute.

In addition to the lack of cooperation of states parties with the court, the challenge of withdrawing from the court's statute or not signing and ratifying it increases the difficulty of implementing the court's decisions. As the researcher mentioned previously, the first case of withdrawal from the system was the withdrawal of the USA under the administration of George Bush, who did not ratify the system after its signing, and therefore did not impose any legal obligations under it. Russia also later canceled its signature due to the court prosecutor's report after preliminary investigations into Russia's crimes in Ukraine and the Crimean Peninsula.

In the same context, the relationship between the ICC and the African Union countries is a volatile relationship, although the largest number of states parties to the court are from the African Union countries, and their relationship is fraught with tensions due to the court's repeated calls for African countries to implement the arrest warrants issued against the president, the previously mentioned Sudanese Omar al-Bashir, and the Union's criticism of the Court for biasing its decisions against Africa against the backdrop of the Court's issuance of the arrest decision, and because of these tensions; the African Union issued a resolution in 2017 calling on member states to

withdraw from the ICC Statute collectively, and the State of Burundi responded to that decision in accordance with the resolution, in order to avoid complying with the Pre-Trial Chamber's permission for the Prosecutor to investigate crimes of murder, torture, rape, enforced disappearance and persecution allegedly committed in Burundi between 2015 and 2017, so Burundi is considered the first state to officially withdraw from the statute after ratifying it as a state party, so all of these actions express a clear message that states intend not to cooperate with the ICC ¹.

Blatant opposition to the court

In addition to failures to implement arrest decisions, and withdrawal from the court system, there are countries that challenge the court and show their opposition to it publicly, as does Israel, an ally of the USA in the Middle East, as it publicly challenged the court regarding the ICC's investigation into the situation in Palestine, which opened the door for Palestine to submit complaints to the court against the Israeli forces and their crimes in Gaza, the West Bank and Jerusalem, where Israel described the court's decision to begin the investigation as a ridiculous and anti-Semitic decision, and the Israeli government said categorically that it will not cooperate with the court and will not be a party to it, as is the case with the USA. This blatant opposition aims to protect the perpetrators, and will lead to the failure of justice procedures in court ².

¹ Uma, S. (13/9/2021). State Cooperation and the Challenge to International Criminal Justice. Retrieved from: <https://thewire.in/law/state-cooperation-and-the-challenge-to-international-criminal-justice>.

² Ibid.

Chapter One: Palestinian Case Study and Ukrainian Case Study

1. Palestinian Case Study

In this chapter, the researcher will address the historical context of the Palestinian conflict, and we will analyze the political factors that affect the role of the ICC in dealing with issues related to this conflict, and we will also review the legal challenges facing the court in achieving justice in Palestinian cases, and evaluate the investigations and decisions issued by the ICC regarding the Palestinian conflict and the extent of their impact on international justice.

1.1 Historical Context of the Palestinian Conflict

The longest conflict in seven decades is the Palestinian-Israeli conflict, as this conflict is the most important conflict in the Middle East and the one that affects its stability, and the cause of the conflict is Israel's attempt to establish a state of their own in the lands of the State of Palestine, which is subject to the British Mandate.

In 1947, when Palestine was under British mandate, the UN General Assembly approved a plan to divide it into two states, Arab and Jewish, with international rule for Jerusalem, and they were given 56% of the Palestinian territories. After this decision was issued, it was rejected by the Arab countries and the Arab League in particular. On May 14, 1948, one day before the end of British rule, the founding father of Israel, David Ben-Gurion, declared the modern state of Israel and established a safe haven for Jews fleeing persecution, as he claimed, and seeking a national homeland on Palestinian lands that they cited religious ties dating back to ancient times. This was followed by a war that caused the displacement of 700,000 Palestinians and their expulsion from their homes, and they ended up in Jordan, Lebanon and Syria. In Gaza, the West Bank and East Jerusalem, the Palestinians regret this day and called it “the Nakba”. In 1967, Israel launched a preemptive strike against Egypt and Syria and launched the Six-Day War. In this year, Israel seized the West Bank and East Jerusalem. The Golan Heights from Syria, the Sinai Peninsula, and the Gaza Strip, and accordingly in 1973 Egypt and Syria attacked the Israeli positions along the Suez Canal and the Golan Heights and the Yom Kippur War began and the Egyptian and Syrian forces were able to achieve military gains and recover lands from the lands seized by the Israeli forces in 1967, but these gains were temporary, and the Israeli forces pushed both armies back within three

weeks, and in 1979 Egypt signed the first peace treaty with Israel and the Republic of Egypt returned the Sinai Peninsula, and in 1982 Israel invaded Lebanon and the fighters of the Palestine Liberation Organization led by Yasser Arafat were evacuated by sea after a siege that lasted 10 weeks, and in 1987, as a result of the military occupation of the lands of 1967 and the Israeli military repression and the Jabalia incident and the absence of a political horizon for the establishment of a stable Palestinian state, the first Intifada occurred and continued until 1993, and in this year the Israeli Prime Minister Yitzhak Rabin and PLO leader Yasser Arafat signed the Oslo Accords, which established Palestinian self-rule. In 1994, Israel signed a peace treaty with Jordan. In 2000, as a result of Ariel Sharon's visit to Al-Aqsa Mosque and the failure of the summit attended by Yasser Arafat, Israeli Prime Minister Ehud Barak and US President Bill Clinton at Camp David to reach a permanent and final peace; The Second Intifada erupted, and during this uprising, Hamas and other Palestinian national liberation movements carried out bombings in Israel, and Israel carried out tank attacks and air raids on Palestinian cities. In 2005, Israel withdrew settlers and soldiers from Gaza, and Hamas won the legislative elections in 2006. Hamas took power in Gaza in 2007 after the Palestinian division that occurred due to the crisis of the Palestinian Legislative Council elections. Several confrontations erupted between Palestinian groups and Israel in 2008, 2012, 2014, 2021, and 2023. Palestinian-Israeli peace efforts had stopped in 2014, and during the era of US President Donald Trump, dealing with the US administration stopped, as the Palestinian Authority cut off communication with the US administration after Trump recognized Jerusalem as the capital of Israel. As of the date of writing, which coincides with the 301st day of the continuation of the genocide crime in the Gaza Strip, the US administration under Joe Biden is seeking to secure a major deal in the Middle East that includes normalizing relations between Israel and the Kingdom of Saudi Arabia, and the establishment of an independent Palestinian state on the lands of 1967¹.

The most important Israeli-Palestinian issue is the two-state solution, which would create a Palestinian state on the lands seized in 1967. Most countries consider the Jewish settlements built on the lands occupied by Israel in 1967 illegal under Security Council Resolution 2334 of 2016, which condemns the Israeli settlements and includes

¹ Reuters. (15/5/2024).what is the history of the Israel-Palestinian conflict. Retrieved from: <https://www.reuters.com/world/middle-east/what-is-history-israel-palestinian-conflict-2024-05-14/> .

that Israeli actions violate international humanitarian laws and are aimed at changing the demographic composition of the population, including the construction and expansion of settlements, the transfer of Israeli settlers, the confiscation of land, the demolition of homes and the displacement of Palestinian civilians¹. However, Israel opposes this and cites historical and biblical links to these lands. The ongoing settlement expansion remains one of the most controversial issues between Israel, the Palestinians and the international community. The Palestinians demand that East Jerusalem, which includes the sites of the Old City that are holy to Muslims, Jews and Christians alike, be the capital of their future state. In contrast, Israel insists that all of Jerusalem must remain its “eternal and indivisible” capital, and former US President Donald Trump recognized Jerusalem as the capital of Israel. In 2018, without specifying the extent of its jurisdiction in the city, and moving the US embassy there².

In addition, about 5.6 million Palestinian refugees, most of them descendants of those who fled in 1948, live today in Jordan, Lebanon, Syria, the West Bank and the Gaza Strip. According to the Palestinian Foreign Ministry, about half of these refugees remain stateless, and many live in overcrowded camps³.

1.2 Political Factors Influencing the Role of the ICC in the Palestinian Case

Political factors play a vital role in determining the effectiveness and impact of the ICC in achieving justice at the international level. Although the court was established to promote justice away from political pressures, the reality shows that international interactions and pressures from major countries and strategic interests often affect its work. In this chapter, we will review the political factors affecting the role of the ICC, and examine how these factors affect its ability to carry out its tasks effectively.

On 3/3/2021, the Office of the Prosecutor of the ICC decided to open an investigation into the Palestinian situation, as this investigation covers crimes within the jurisdiction of the court that were committed 13/6/2014. Thus, the Palestinian situation

¹ Resolution 2334 issued by the United Nations Security Council on December 23, 2016, which states: “Urging the Council to put an end to Israeli settlements in the Palestinian territories, and the resolution calls on Israel to stop settlements in the West Bank, including East Jerusalem, and the illegality of Israel’s establishment of settlements in the territory occupied since 1967.”

² Bar-Tal, 1990, Israeli-Palestinian conflict: a cognitive analysis.

³ Ibid.

was transferred from the preliminary study to the investigation stage¹. In this chapter, we will address the political factors that influenced the investigation into the Palestinian case.

Palestine began its first attempts 22/12/2009, when Palestine submitted its first declaration in accordance with the Rome Statute of the ICC. After submitting a request, the then-Prosecutor Luis Moreno opened a preliminary examination into the Palestinian case, but he announced on April 3, 2012 that he could not move to the investigation stage due to the problem of the lack of clarity regarding Palestine's status as a state under international law².

In ongoing attempts by the Palestinian Authority to initiate an investigation at the ICC, Prosecutor Fatou Bensouda began a second preliminary examination into the "Situation in Palestine," which lasted from 2015 to 2019. During this period, Palestinian human rights organizations and victims' lawyers submitted numerous files supporting the investigation. However, the Palestinian leadership did not seriously activate its membership in the court until 2018, when it referred the "Situation in Palestine" to the court, in response to former US President Donald Trump's decision to recognize Jerusalem as the capital of Israel and move his country's embassy there. The referral included a request for the court to investigate crimes committed since June 2014, as well as ongoing crimes that may be committed in the future. On 20/12/2019, the Prosecutor announced the end of the preliminary examination, noting that war crimes had been or were still being committed in the West Bank and Gaza, and that some files would be admissible based on the court's statute. However, the Prosecutor decided not to initiate an investigation herself, and requested the Court's Pre-Trial Chamber I **Confirming her territorial jurisdiction in the "Situation in Palestine,"** which includes the West Bank, including East Jerusalem, and the Gaza Strip, the Prosecutor is believed to have taken this step to gain the Court's support amid political pressures that have affected her decision to initiate an investigation, as she stressed that the **issue of**

¹ Prosecutor, International Criminal Court, "Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the investigation into the situation in Palestine," 3/3/2021, in: <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine&ln=Arabic>

² The Office of the Prosecutor, International Criminal Court, "Situation in Palestine", 3/4/2012, at: <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

the Court’s territorial jurisdiction in the Palestine Situation raises “Disputed and highly contentious issues.”¹.

In this regard, the Pre-Trial Chamber requested all parties to submit written submissions on the issue of territorial jurisdiction, and allowed the submission of statements from friends of the court, including specialists and relevant parties. In the end, they concluded that the Chamber obtained 43 submissions from friends of the court, including states, specialists, research centers, Palestinian human rights institutions, and others, and they were approved for investigation. In addition, the Chamber received ten submissions from victims’ lawyers, and one submission from the “State of Palestine.”².

Israel refused to submit written submissions to the Court, and confirmed through the Attorney General that Palestine is not a state and does not meet the conditions of sovereignty, so it cannot grant its territorial jurisdiction to the Court. The Attorney General avoided discussing war crimes, and focused on the fact that Israel can deal with Palestinian issues through multiple mechanisms, including bilateral negotiations. Despite this refusal, Israel sought to gather support from institutions, experts, and allied states, who submitted submissions supporting its position that Palestine does not meet the conditions of international sovereignty and cannot transfer its jurisdiction to the Court. In this way, Israel sought to strengthen its legal and political position while continuing to challenge the legitimacy of the Court and the process related to the “Situation in Palestine.”³.

However, on 5 February 2021, the Pre-Trial Chamber decided, by a majority of its members, that Palestine is a State Party to the Rome Statute, which gives it the right to transfer its territorial jurisdiction to the Court. This includes the Palestinian territories

¹ Office of the Prosecutor, “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction”, ICC, 20/12/2019, at: <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>

² Pre-Trial Chamber I - Situation in the state of Palestine, “Decision on Requests for Variation of the Time Limit for Submitting Observations and Issues Arising out of Amici Curiae Observations”, No. ICC-01/18, 31/3/2020, at: https://www.icc-cpi.int/CourtRecords/CR2020_01308.PDF

³ State of Israel, Office of The Attorney General, “The International Criminal Court’s lack of jurisdiction over the so-called “Situation in Palestine”, 20/12/2019, at: <https://assets.documentcloud.org/documents/6589835/Israel-AG-Brief-on-ICC-Jurisdiction-in-Palestine.pdf>

occupied by Israel since 1967¹, including the Gaza Strip, the West Bank, and East Jerusalem, and this was one of the political factors that influenced the ICC to initiate the investigation.

Among the main political factors that hinder the investigation in the ICC is the possibility of the Court being suspended by the UN Security Council, and in the event that an investigation is opened by the Prosecutor of the Court into the violations that occurred on the territory of the State of Palestine, including the crime of settlement, especially after we know the extent of the strong American support that the occupying state enjoys, which arose primarily in the transfer of the American embassy to East Jerusalem in recognition of Israeli sovereignty over it, and the extent of the great hostility that the USA has towards the court, which it has expressed on several occasions, threatening the court with imposing sanctions on it, and since the USA is a permanent member of the UN Security Council, this is considered a basic and primary factor facing the court².

In addition to that, the position of the USA on Israeli settlement in the occupied territories, which was explicitly expressed by former Secretary of State Mike Pompeo, who considered that Israeli settlements in the West Bank are not illegal³.

This shows that American foreign policy contradicts the legal position of the ICC towards the crime of settlement, as foreign policy supports and funds settlement and does not consider it a crime or a violation of the law, while the ICC, according to the Rome Statute, considers settlement a war crime, but taking into consideration the American position towards the settlement issue, increased its fears of raising this issue for investigation.

Political factors include Israel's refusal to cooperate and join the ICC, as senior Israeli officials are involved in cases of violations, such as Prime Minister Benjamin Netanyahu, who considered the court politicized and anti-Semitic, which constitutes a

¹ International Criminal Court, "ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request regarding territorial jurisdiction over Palestine," 02/05/2021, at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1566&ln=Arabic>

² Florian Maussion, "les Etats-unis menacent la cour pénale internationale des sanctions," LesEchos, 10 septembre 2018, "accessed April 6, 2021". <https://bit.ly/3vguMYL>.

³ Andrew Harnik, "Washington ne considère plus les colonies israéliennes comme étant contraires au droit international," Le monde, 18 novembre 2019.

major obstacle to the Prosecutor in investigating and prosecuting those involved in violations of international humanitarian law in Palestine¹.

As for the issue of immunity, although the Rome Statute does not recognize it as an excuse for not being held accountable for international crimes, it remains a real challenge in achieving justice, especially in cases where politics and law overlap. For example, the Belgian judiciary refused to try former Prime Minister Ariel Sharon because of his immunity during his term in office. In addition, there are many countries that are dominant in the international community and permanent members of the UN Security Council that are not members of the ICC. This is one of the political factors that affect the role of the Criminal Court in achieving justice².

Also, the ICC failed to arrest former Sudanese President Omar al-Bashir, who was accused of committing war crimes, crimes against humanity and genocide in Darfur, despite issuing two arrest warrants for him in 2009 and 2010. The refusal of many countries, especially in Africa, to arrest him because of his immunity contributed to this failure. Among these countries is the Kingdom of Morocco, which al-Bashir visited in July 2016, and refrained from arresting him despite the ICC's request to do so³.

In conclusion, this chapter shows that political factors play a major role in influencing the effectiveness of the ICC and its ability to achieve international justice. Although the court was established with the aim of achieving justice away from political pressures, the reality shows that strategic interests and pressures from major countries significantly affect its work. The examples we have discussed, such as Israel's refusal to cooperate with the court and pressure from the US, highlight how politics can hinder the court's efforts to achieve justice. Cases such as the court's inability to arrest Omar al-Bashir show that political immunities and reservations constitute serious political obstacles that affect the court's ability to perform its tasks effectively.

¹ Valentina Azarov, "Palestine in Court? The Unexpected Implications of Litigation before the ICC," Palestinian Policy Network, April 1, 2015, <https://al-shabaka.org/briefs. nbsp;>

² Sameh Khalil Al-Wadiyya, *International Responsibility for Israeli War Crimes*, 1st ed. (Al-Zaytouna Center for Studies, 2009), p. 159.

³ International Criminal Court, Pre-Trial Chamber II, Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Al Bashir*, Request to the Kingdom of Morocco for the Arrest and Surrender of Omar Hassan Al Bashir, 4 August 2016, Document No. ICC-02/05-01/09, p. 4.

1.3 Legal Challenges Facing the ICC in Palestine

The ICC is one of the most prominent international bodies responsible for prosecuting serious crimes such as genocide, war crimes, and crimes against humanity. However, when it comes to cases in conflict areas such as Palestine, the court faces a number of major challenges. These challenges include legal and political issues that affect its ability to carry out its tasks effectively. For example, there are difficulties related to international recognition, jurisdiction, and cooperation between states and parties concerned.

The Rome Statute, which regulates the work of the ICC, contains some articles that may limit its ability to hold perpetrators of international crimes accountable, such as the crime of settlement, which is considered an ongoing war crime against the Palestinians. This crime results from a settlement policy carried out by the occupation government, which seeks to expand control over the occupied territories and annex them in any future negotiations to resolve the conflict. Among the articles that **may affect the effectiveness of the court are those that link the work of the court to the Security Council as a political body**. This link makes the ICC vulnerable to **political influences by the major powers and their allies, especially the permanent members of the Security Council**.

Some articles in the Rome Statute include provisions that affect the ability of the ICC to exercise its work effectively to achieve international justice. For example, Article 13/c allows the Security Council to refer cases of international crimes to the Court, while Article 16 gives the Council the ability to suspend the work of the Court for up to twelve months, with the possibility of renewing this suspension. In addition, the Court cannot begin investigations or prosecute crimes for one year if the Security Council requests it, and the Council can renew this request under the same conditions¹.

In addition, Article 13/b states that the Court can investigate the crimes mentioned in Article 5 only if the Security Council refers them to the Prosecutor, based on Chapter VII of the UN Charter, and there must be evidence of the commission of crimes².

¹ Article 13/c of the Rome Statute.

² Article 13/b of the Rome Statute.

Therefore, due to these materials that pose a challenge to the ICC, there were strong disagreements with the countries participating in the discussions of the Rome Statute of the ICC, and there was strong pressure from some countries, especially those with a long record of violating the rules of international humanitarian law, such as the US and Israel, to create a judicial system that is consistent with their national interests and serves their future goals, and these countries succeeded in introducing texts and rules into the Rome Statute that are consistent with their ambitions and in line with their goals.

This is what David Scheffer, head of the American delegation to the Rome Conference, indicated during his speech before the Senate Foreign Relations Committee on 23/7/1998, where he stated that among the goals we achieved in the Statute of the Court were the following¹:

- A system that achieves integration between national jurisdiction and international jurisdiction.
- Preserving the role of the UN Security Council, even this confirms the influence of this council in intervening to stop the procedures of the Court.

In addition, many countries that did not join the ICC provided unconvincing justifications for their refusal to join, such as Israel, which refused to sign the court's statute **for purely political reasons**. The court's statute stipulated that the transfer of the occupying state's citizens to the occupied territories is considered a war crime, which gives the court the authority to prosecute its perpetrators. **This text was one of the main reasons that made Israel refuse to join the court**².

It can be said that the statute of the ICC is the result of compromises between the various ideological and political viewpoints of the countries that participated in the Rome Conference. This balance between different interests affected the effectiveness of

¹ Baria Al-Qudsi, "The International Criminal Court: Its Nature and Jurisdiction, and the Position of the United States of America and Israel on It," Damascus University Journal of Legal and Economic Sciences (Volume 20, Issue 2, 2004), p. 141.

² Position Paper of the Attorney General: Everything the International Criminal Court in The Hague Should Not Be, The Israeli Information Center for Human Rights in the Occupied Territories, March 2020 (accessed March 11, 2021) p. 14, <https://bit.ly/3wwjyzx>

the court, as the statute was designed to reflect multiple demands and visions, which led to the existence of many shortcomings, gaps and challenges in it.

In the Palestinian case, the ICC faces another challenge in addressing the issue of Israeli settlements in the occupied territories as a war crime, which falls under the jurisdiction of the ICC. One of the most prominent of these challenges is **the principle of complementarity, which gives priority to the Israeli national judiciary over the ICC**. This means that Israel can escape punishment if Israeli courts conduct investigations or trials, even if those investigations are ineffective¹.

In fact, when Israel faces pressure, whether from Israeli civil society, such as human rights organizations, or from major countries or international human rights organizations, it often conducts investigations that may last for years, despite strong evidence of the involvement of its citizens in violations. Sometimes these investigations are merely formalities aimed at protecting the individuals involved from criminal responsibility. **The Goldstone Report confirmed that the Israeli judiciary does not adhere to international standards in dealing with cases related to Palestinian rights, which further complicates the efforts of the ICC to achieve justice**².

What confirms this practical picture of the Israeli judiciary is that the Palestinians are often denied justice even before the Israeli Supreme Court. Thus, the situation becomes more evident when the violations are part of a declared policy of the Israeli government, such as building settlements in the West Bank or bombing civilians in the Gaza Strip. In such cases, it seems that the Palestinians have no choice but to resort to the ICC, hoping to prevent the continuation of these violations and achieve justice for them, even if it is after a long time³.

One of the most significant challenges facing the ICC in the case of Palestine is the issue of temporal jurisdiction. The court can only consider international crimes committed against Palestinians and on the territory of the State of Palestine starting

¹ Report prepared by the Fact-Finding Mission on the 2014 Israeli aggression on the Gaza Strip, a mission formed by the United Nations Human Rights Council and headed by South African judge Richard Goldstone.

² Sharon Weill, "Ce que change l'adhésion de la Palestine à la cour pénale internationale," *Orientxxi*, 15 janvier 2015, "accessed April 6, 2021". <https://bit.ly/3fE5pcP>.

³ Position Paper of the Attorney General, *op. cit.*, p. 14.

from 13 June 2014, based on the declaration submitted by Palestine on 1 January 2015. This temporal limitation constitutes a major obstacle to the trial of Israeli officials responsible for the crime of settlement, as it does not include crimes committed before this date¹.

It can be said that the temporal limitation of the ICC protects Israeli officials responsible for war crimes related to the construction of settlements in the occupied territories, which is a war crime and is fateful for the Palestinian people as it could affect the establishment of the State of Palestine. This limitation covers the period from June 2014, the date on which the court's jurisdiction to investigate crimes in Palestine began, but it does not include the period prior to June 1967, when Israel began occupying the West Bank and East Jerusalem.

1.4 Analysis of ICC Investigations and Decisions in the Palestinian Case

1. ICC Decisions on Palestine

On 20/5/2024, the Pre-Trial Chamber I of the ICC submitted requests for arrest warrants in relation to Palestine against Yahya Sinwar, Ismail Haniyeh, Mohammed Diab Ibrahim Al-Masri (Al-Daif) on their reasonable grounds to hold the Chairman of Hamas, the Supreme Commander of the Military Wing of Hamas, and the Head of the Political Bureau of Hamas criminally responsible for crimes against humanity committed in the territory of "Israel" and Palestine from at least 7/10/2023, for allegedly committing:

1. Genocide, contrary to Article 7(1) of the Rome Statute.
2. Willful killing, contrary to Article 7(1)(A) as a crime against humanity, and a war crime, contrary to Article 8(2)(c)(i).
3. Rape and other forms of sexual violence, contrary to Articles 7(1)(C) and 8(2)(E)(VI) in the context of captivity.
4. Torture, contrary to Articles 7(1)(C), 8(2)(C)(1) in the context of captivity.
5. Other inhumane acts in the context of captivity contrary to Article 7(1).

¹ This is confirmed by the second paragraph of Article 11 of the Rome Statute, which states the following: "If a State becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under paragraph (3) of Article.

6. Cruel treatment as a war crime contrary to Article 8(2)(C)(1).
7. Outrages upon personal dignity as a war crime, contrary to Article 8(2)(C)(2).

The Office of the Prosecutor argues that the crimes alleged in these requests were committed in the context of an armed conflict between Palestine and Israel and a non-international armed conflict between Israel and Hamas, alleging that Hamas committed these crimes as part of a widespread and systematic attack against the civilian population of Israel, and the Office has assessed that some of these crimes are ongoing to the date of these requests. The Office believes that there are reasonable grounds to believe that Sinwar, Deif and Haniyeh bear criminal responsibility for the killing of hundreds of civilians in attacks committed by Israel, in particular its military wing, the “al-Qassam Brigades”, on 7/10/2023 and the taking of at least 245 hostages¹.

The Court conducted investigations and interviews with victims, survivors, former hostages, and eyewitnesses at six main attack sites, and also based on evidence from television recordings, photographs, audio-visual materials, and expert testimonies. The Office of the Prosecutor considers that the aforementioned individuals planned and incited the commission of the crimes on 7 October, and have been charged as accomplices in these crimes pursuant to Articles 25 and 28 of the Rome Statute².

The Prosecutor himself has visited the attack sites to witness the physical and psychological devastation caused, and has stressed that these acts require accountability. The Prosecutor’s Office also argues that there are reasonable grounds to believe that the hostages who were taken were held in inhumane conditions, and some were subjected to sexual violence, including rape, based on visual medical records, documents and interviews with victims and survivors. The Office continues to investigate reports of sexual violence committed on October 7. The Prosecutor has also requested the Pre-Trial Chamber of the Court to issue arrest warrants on the Israeli side against Israeli Prime Minister Benjamin Netanyahu and Israeli Defense Minister Yoav Galant for their responsibility for war crimes and crimes against humanity committed on the territory of the State of Palestine in the Gaza Strip from at least 28/10/2023, for:

¹ ICC Official site.(20/5/2024). Statement by ICC Prosecutor Karim Khan: Requests for Arrest Warrants in the State of Palestine. Retrieved from: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state?lang=Arabic>

² Ibid. ICC Official site.(20/5/2024). Statement by ICC Prosecutor Karim Khan: Requests for Arrest Warrants in the State of Palestine.

Starvation of civilians as a method of warfare, in violation of article 8(2)(b)(xxv) of the Rome Statute

- 1) Willfully causing great suffering and serious injury to health, in violation of article 2(8)(3) or treatment Cruel, contrary to Article 8(2)(C)(1).
- 2) Willful killing, contrary to Articles 8(2)(A)(1) and 8(2)(C)(1).
- 3) Intentionally directing attacks against a civilian population, contrary to Articles 8(2)(B)(1) and 8(2)(E)(1).
- 4) Extermination and/or willful killing, contrary to Articles 7(1)(B) and 7(1)(A), including death by starvation.
- 5) Persecution, contrary to Article 7(1)(C).
- 6) Other inhumane acts, contrary to Article 7(1)¹.

In the same dispute, which are, on the Office's claim, ongoing crimes to the date of the request, based on interview and eyewitness evidence, visual and audio materials, satellite imagery, and statements by the Defendant Group, which demonstrate Israel's deliberate and systematic deprivation of the civilian population in all areas of Gaza of the materials of human survival after Israel imposed a complete blockade on Gaza, which included the complete closure of its three border crossings since 28 October, for extended periods, the imposition of arbitrary restrictions on the transfer of humanitarian supplies, including food and medicine, the cutting of the cross-border water pipelines from Israel to Gaza, the primary source of clean water, and the cutting of the electricity supply to this day, in addition to other attacks against civilians, including attacks against those lining up for food, the obstruction of access for humanitarian agencies, and the attacks and killing of aid workers, his Office argues that these acts were committed as part of a joint plan to use starvation as a method of warfare, with other acts of violence against civilians as a means to:

- 1) Eliminate Hamas.
- 2) Ensure the return of hostages held by Hamas.
- 3) Collectively punish civilians who's they see them as a threat to Israel.

¹ Ibid.

These have had severe and widely known effects, confirmed by numerous witnesses after the Office of the Prosecutor interviewed them, including local and international doctors. These effects included drought and malnutrition, and the increasing number of Palestinian deaths, including infants and women. Famine in Gaza appeared with the warning of the UN Secretary-General that more than 1.1 million people in Gaza are facing catastrophic hunger, the highest number ever recorded anywhere and at any time as a result of a disaster caused only by humans. The Office of the Prosecutor accuses Netanyahu and Galant of bearing the greatest responsibility for their participation in committing these crimes, in accordance with Articles 25 and 28 of the Rome Statute.

The Prosecutor of the court returned and stressed Israel's right to defend its population like all states, but this right does not exempt Israel from its commitment to international humanitarian law, regardless of military objectives, and that the Israeli methods it adopted to achieve these objectives by deliberately starving, causing death and harming the health of civilians are criminal methods¹.

Palestine had accepted the jurisdiction of the ICC over the alleged crimes committed in the occupied Palestinian territories since 13/6/2014 after its accession to the Rome Statute and its deposit of the instruments of accession with the Secretary-General of the UN. The Rome Statute entered into force in Palestine on 1/4/2015. Palestine referred the matter on 22/5/2018, pursuant to Articles 13 (A) and 14 of the Rome Statute, and specifically requested the Prosecutor to investigate, in accordance with the Court's temporal jurisdiction, past, current and future crimes falling within the Court's jurisdiction, and occurring throughout Palestine².

1.5 Analysis of Criminal Decisions and Investigations in Palestine

According to the statement of the Prosecutor General Karim Khan, the ICC conducted investigations and interviews with Israeli survivors. Karim Khan himself went to the sites of the October 7 attacks to verify the location of the event, obtain evidence, and inspect the destruction that occurred. He proved that the actions that occurred require accountability and the intervention of the court. He proved this in his

¹ Ibid.

² ICC Official cite. Information for Victims Palestine. (N.D). Information for Victims Palestine. Retrieved from: <https://www.icc-cpi.int/sites/default/files/2023-06/2022-05-victims-info-palestine-ara.pdf>

own visit, while in the investigation of the Israeli crimes in the Gaza Strip and the Palestinian side, the Office of the Prosecutor was satisfied with obtaining evidence of the crimes committed through visual images, satellite images, and interviews with doctors. He did not organize any visits to the sites of destruction, either personally, as he did with Israel, or by sending any of the investigation and fact-finding committees. Here, the double standards of the Prosecutor of the ICC appear in dealing with the Palestinian and Israeli cases, despite the difference in the extent of destruction and damage between the Gaza Strip and what was caused by October 7. Karim Khan could have organized a visit to the sites of destruction in Gaza, as he did in Israel, or sent someone to represent him in that from investigation and fact-finding committees, but he did not do so and was satisfied with visiting the Israeli sites only. This could be due to the US response to the Attorney General's requests to issue arrest warrants against both Galant and Netanyahu, which the US described and considered a wrong decision, as US Secretary of State Anthony Blinken announced that he would work with US lawmakers to discuss imposing sanctions on the ICC after Karim Khan revealed his efforts to issue arrest warrants against senior Israeli officials against this decision, which he described as a mistake. The decision was put to a vote as part of a campaign led by Republicans, despite the US's support in a judicial precedent for the court's arrest warrant issued against Russian President Vladimir Putin regarding the war in Ukraine. As for its decision against Israel, the US State Department supported legislation to address the decisions of the ICC for its interference through its judicial system in the affairs of countries with legitimate and democratic independence. Blinken acknowledged that there is no parity between Israel and Hamas, which reflects US opposition to the decision of court. The court's opinions on the Israeli issue also go back to the fact that the US has already submitted at least two previous measures to impose sanctions on the court in Congress after it intensified investigations into Israel's handling of the aggression on Gaza, and the draft resolution that In May 2024, Republican Representative Chip Troy introduced a bill targeting ICC officials involved in the case to bar them from entering the US and from conducting any real estate transactions inside the country unless it drops its cases against persons protected by the US and its allies. He is supported by 37 lawmakers in the House of representatives led by Republicans, unlike Democrats who support the court's decisions and consider these

measures to undermine the credibility of the ICC, and some left-wing Democrats have expressed their support for the court's actions¹.

The position of the US State Department and the Republican-led House of Representatives on the ICC decisions regarding Israel and Ukraine and the difference in their performance in both cases explains the reason for this conflict and the reason for the weakness of the measures towards Israel in Palestine and Russia in Ukraine, especially in the unipolar system of the US and its efforts to undermine and condemn anything Russia does and support its ally in the Middle East, "Israel". These measures increase the double standards of the ICC and weaken its performance towards Israel's crimes committed in Palestine. It appears in the statements of the ICC and the Prosecutor General Karim Khan, despite his efforts to issue arrest warrants, that it continues to emphasize Israel's right to defend itself and its denial of this right to the Palestinians, despite it being the state under occupation and their legitimate right to self-determination in UN Resolution 2535/B issued in 1969, in which the UN recognized the right of the Palestinians to self-determination and not to deprive them of any of their inalienable rights. This is also what was guaranteed by the UN Charter, the Universal Declaration of Human Rights, and the General Assembly resolution 2649/25 on the year 1970, which also confirmed the right of these peoples to struggle to regain this right by any possible means, and its confirmation of guaranteeing these means for armed struggle in its resolution 3070 until liberation is achieved in 1973. However, the ICC did not prove or confirm any of these rights in its statements and decisions, unlike what it did with Israel².

As for the delay in the response of the ICC in starting to exercise its jurisdiction over violations in the occupied Palestinian territories after Palestine joined the Rome Statute in 2015 to 2018 and starting the investigation that was opened in 2021, the reason for this is Israel's questioning of the court's territorial jurisdiction over Palestine on the pretext that Palestine is not a sovereign state, as the former Prosecutor Fatou Bensouda intended to open an investigation related to referring Israeli criminals under the item of war crimes between 2014-2015, the years of Palestine's accession to the

¹ Cabral, Sam. (22/5/2024). Washington mulls sanctions on international court over arrest warrants against Israeli officials. Retrieved from: <https://www.bbc.com/arabic/articles/cv227mg0j73o>

² JLAC. (N.D). The International Criminal Court and Palestine. Retrieved from: <https://tinyurl.com/4uzc5r52>

Rome Statute and the entry into force of the treaty. As a result of Israel's objection and questioning of this territorial jurisdiction to confirm its position that the court has legal jurisdiction over the areas of the West Bank, the Gaza Strip and East Jerusalem to be able to open the investigation, it was expected that the response would come within a period not exceeding 120 days since the end of 2019, in the hope that the court would begin investigating the files of Israeli criminals at the beginning of 2020, but it witnessed successive extensions by the court is indicative of the complex course of the investigation, and the court's preliminary chamber had also invited Israel to submit its observations on 12/28/2020, but Israel preferred not to respond directly legally and continued to question and direct political accusations at the court and its public prosecutor. Then, on 2/5/2021, the decision of the preliminary chamber of the arbitrators was issued regarding its jurisdiction to consider the crimes committed to confirm its jurisdiction over the Palestinian territories occupied in 1967, meaning that the subject of the court's territorial jurisdiction is beyond doubt and has become a legal and official decision. Accordingly, the investigation procedures began in the files brought before the court, including the Israeli crimes committed during the three-time repeated aggression on the Gaza Strip and the prisoners' and settlement files since 2014, that is, since Palestine joined the charter and not retroactively according to the law, and according to it, the ICC only prosecutes cases in which the local authorities clearly fail to ensure accountability. Accordingly, any examination of the Israeli judicial system regarding violations of the rights of Palestinians is within the jurisdiction of the International criminal court. especially after the Palestinians submitted a request to the Prosecutor in 2015 to investigate violations of the Rome Statute in the occupied Palestinian territories in 2014¹.

Thus, the delay in starting the investigation into the Palestinian case referred to the International Criminal Court explains the court wasting years in deciding on issues of jurisdiction and legal authority instead of starting the investigation due to the opposition of Israel and America to this, and their insistence on the lack of jurisdiction of the court.

¹ Ibid.

2. Ukrainian Case Study

2.1 Historical Context of the Ukrainian Conflict

1. Ukraine's Independence from the Soviet Union

Many cultures and religions entered Europe through Ukrainian lands, and these lands were the cradle of Ukrainians, Poles, Jews, Tatars, Belarusians, Gypsies, Russians, Bulgarians, Greeks, Armenians and Germans. Under the influence of Christianity, the ancestors of Ukrainians began to search for their place in Europe in the Middle Ages, and the state of Rus was born, which developed into Ukrainian lands in the eleventh century, and about 100,000 citizens lived in it in its main city called "Kiev". The princes of Rus were the first to confront the Mongol invasion of Europe, which reduced the possibility of the nobility in building the state¹.

The Ukrainian lands fell under the rule of neighboring countries such as Poland and Lithuania, and merged into the Commonwealth Kingdom, which lasted from the sixteenth to the eighteenth century, and included the lands of Ukraine, Poland, Lithuania, Latvia, Belarus and Western Russia. At that time, the phenomenon of free chivalry developed in Ukraine, and what is known as the Cossacks appeared in the European arena, meaning "free men" from the Turkish language, and they were able to establish their own state called "Hetmans" and participated in almost all major wars in the region either as an independent military force or as mercenaries, as they had their own self-rule and military traditions. During this period, the Crimean Tatars developed on their land and in their state, the "Crimean Khanate", and united in a single alliance with the Cossacks to enter into bloody battles that led to the non-existence of the Crimean state, at the same time that the Polish-Lithuanian Commonwealth was divided, and the Hetmanates lost their independence with the contribution of the Russian Empire².

From the end of the 18th century until the 20th century, the Ukrainian lands were part of the Austro-Hungarian Empire and the Russian Empire. At that time, the Ukrainians participated in the Napoleonic Wars and fought for their civil and political

¹ Ukraine ua, Ukraine: history and origins. (N.D).Retrieved from: <https://ukraine.ua/ar/explore/origins-history-of-ukraine/>

² Ibid.

rights, began to build railway companies and hospitals, and increased development in science, technology, language and culture¹.

Similar to the chaos of World War I, Ukraine tried to build its own nation-state in the years 1917-1921, and alongside the Poles they were able to defeat the Russian Bolshevik forces near Warsaw. Then the Soviet Union reoccupied Ukraine and it continued under the authority of the totalitarian regime, and as part of the communist Soviet Union until 1991 under harsh occupation conditions, Soviet military interventions and the Chernobyl disaster.

Ukraine entered World War II once during Hitler's attack and occupation, and the expulsion of the Nazis, and a total of 8 million Ukrainians died between 1939-1945 and began to recover its cities from the Soviet Union in the late 1980s, shortly before the collapse of the Soviets, and in battles against the Nazis in Poland, the Soviet Union, Canada, France, the USA, and Czechoslovakia after the war and during it until the overthrow of the totalitarian communist regime and the achievement of independence in 1991, for Ukraine to declare its independence to build a free, democratic, sovereign state within internationally recognized borders, and the referendum for the first presidential elections was held on 11/12/1991, and more than 90% of the Ukrainian people supported independence, and they elected the Speaker of Parliament "Leonardo Ivchuk", and on the 21st of the same month the leaders of Russia, Belarus and Ukraine met, and the Soviet Union was dissolved, and the Commonwealth of Independent States was officially formed, and in 2019 Ukraine incorporated European and Euro-Atlantic integration into its constitution, More than 40 million people now live on Ukrainian territory until 2014 and Russia's illegal occupation of Crimea and sending its troops through Donbass in eastern Ukraine².

2. Russia annexed Crimea in 2014

Crimea became a colony of the Russian Empire in the late 18th century as a result of Russian victories in the First and Second Wars with the Ottoman Empire in 1768 and 1774. After two defeats of the Ottoman Empire by Russia, it was forced to recognize the independence of Crimea. This land witnessed the mass displacement and expulsion of

¹ Ibid.

² Ibid.

Tatars, Turks and Muslims, and the demolition and conversion of most mosques and Islamic monuments. Then General J. Potemkin, co-ruler of the German Empire of Russia, began a massive resettlement of ethnic Russians. The Russian authorities attracted colonists from the Balkans and southern Germany to Crimea. In 1944, the last remnants of the Greek population of Crimea were deported by the Soviet authorities. Between 1917-1933, half of the Crimean Tatars were killed or deported. In May 1944, the entire Tatar minority was suppressed and deported by the Soviet authorities to Central Asia. Although they were legally rehabilitated in 1967, and allowed to return to their homeland since 1991, they were not restored to their jobs or compensated for any of the losses in life and property¹.

In October 1921, the Crimean SSR was declared a unit of the Russian Soviet Federative Socialist Republic. In 1922, Crimea was incorporated into the Soviet Union until its dissolution in 1991. Less than a year after Joseph Stalin's death, in 1954, the Presidium of the Supreme Soviet of the USSR issued a decree transferring the Crimean region from the Russian Federative Socialist Republic to the Ukrainian SSR. Official communist propaganda described the transfer as a symbolic fraternal gesture on the occasion of the 300th anniversary of Ukraine's accession to the Russian Empire. The decree was issued by the Presidium, not a federal law or constitutional amendment passed by the full Soviet, and its legal basis is questionable. The transfer was said to have been motivated by the need to bring in a large workforce and irrigation water from Ukraine. However, the decree clearly violated Articles 14 and 18 of Stalin's then-current Soviet Constitution, which required a formal agreement between the Soviet Socialist Republics for any change in its borders, and the transfer decision had deprived the Crimean population of the right to give refusal or approval, and was clearly illegal, unconstitutional and illegitimate, and in the All-Ukrainian referendum in 1991 Ukraine was again elevated to the status of an autonomous republic².

In 1992 the Supreme Soviet of Crimea without the consent of the Ukrainian authorities changed the official name of the territory to the Republic of Crimea. In May of the same year, the Crimean Parliament declared and approved its first constitution under pressure from Kiev, and its name was changed to Crimea, considering it part of

¹ Ibid.

² Ibid.

Ukraine. Its declaration of independence was canceled by the Ukrainian Parliament. In 1993, the Crimean Parliament established the position of President of Crimea. In 1995, the Ukrainian Parliament canceled the Crimean Constitution, dismissed its President, and abolished his position, accusing him of promoting Crimea's secession from Ukraine and its integration with the Soviet Union.

Since 1991, Moscow has secretly controlled the actions of Russian separatists in Crimea, maintained a large unit of its civilian agents and military intelligence, prepared the Russian emergency plan to annex the peninsula, and regularly unified it for two decades ¹.

The decision to annex Crimea was taken in 2008 after the Bucharest summit, at which NATO promised Ukraine and Georgia future membership in the solution. Ukraine's increasing financial dependence on Russia, and the expanded cooperation between the industrial and military complexes, reduced the need for annexation. But the situation changed suddenly in February 2014, when President Yanukovich and a group of senior Ukrainian officials closely linked to the Russian security services fled in fear for their lives. This power vacuum and confusion in Kiev gave the Kremlin the perfect opportunity to implement the events of the emergency plan to annex Crimea, which was implemented well on the military side, but poorly on the political side. Clashes broke out between pro-Russian and Ukrainian demonstrators in front of the parliament building, with pro-Russian demonstrators demanding secession from Ukraine and asking for help from Moscow. On February 27, armed individuals seized government buildings in Crimea, including the Supreme Council headquarters. On February 28, 2014, Russian forces began to seize the strategically important Kupistamus, closed all land, sea and air communications of Crimea with the rest of Ukraine, seized all Crimean ports and airports, radio and television stations, confiscated all army stocks of weapons and ammunition, and protected illegal actions by Russian separatists ².

The operation took three weeks due to the proximity of strategic sites in Crimea, and the failure of Ukrainian military personnel in Crimea to give orders to resist. Consequently, all 190 military facilities and most of the weapons were surrendered to the invaders. About 200,000 Ukrainian military personnel surrendered without firing a

¹ Ibid.

² Ibid.

single shot. Crimean police either failed to act or cooperated with Russian special forces and separatists. Subsequently, most Russians in Crimea no longer wanted to be a national minority in Ukraine, were forced to learn to use another official language, and expected a better standard of living. On 17/3/2014, Crimea declared its independence and asked to join the Russian Federation, and the Sevastopol City Council asked to accept the port separately as a federal city. Then in March 2014, a treaty was signed on the integration of Crimea and Sevastopol into Moscow, and in just five days the Constitutional Law on the admission of the Republic of Crimea to the Russian Federation, and the creation of new constituent entities within the Russian Federation (the Republic of Crimea and Sevastopol) was quickly passed by the Russian Federal Assembly, and entered into force on 13/4/2014. Russia unilaterally abandoned the agreements on the deployment of the Russian Black Sea Fleet in the territory of Ukraine, and accordingly the Russian Federation paid \$ 530 million annually for the bases, wrote off about \$ 100,000 of Ukrainian debt, and the Russian government stopped its discount on the price of natural and imported gas ¹.

3. The Full-Scale Russian Invasion of Ukraine in 2022

In April 2014, separatists and pro-Russian forces took control of the Donbas region in eastern Ukraine. In the midst of this tense atmosphere, Ukrainian elections were held, in which the Western Ukrainian Petroshenko won, saying that he would seek to strengthen relations with the Russian Federation and restore peace in eastern Ukraine. This was followed by the downing of Flight MH17 on its way to Kuala Lumpur, which led to the death of all 298 people on board. Investigators later found that the weapon used to bring it down was a Russian weapon, which Moscow denied, despite the consensus of investigators that the missile was launched from an area controlled by Moscow loyalists in eastern Ukraine. As tensions between the two neighbors escalated, the West began to move to support Ukraine and issue sanctions against Russian and Ukrainian companies, individuals involved in the annexation of Crimea, and the armed separatist movement in Donbas. Then, in 2017, a partnership agreement was signed between the European Union and Ukraine, opening up free trade and the exchange of

¹ For a revealing account of the conflict within the Bolshevik Party, see *On the Current Situation in the Ukraine*, Serhii Mazlakh and Vasyl' Shakhrai, as ed. by Peter J. Potychnyj, with an intro. by Michael M. Luther (Ann Arbor, MI: Univ. of Michigan Press, 1970).

goods and services, in addition to exempt Ukrainians from visa requirements to enter the EU countries¹.

In July 2019, Ukrainian actor Volodymyr Zelensky won the presidency of Ukraine, and months after taking office, he appealed to US President Joe Biden to support his accession to NATO. In November 2021, satellite images showed Russian forces massing on the Ukrainian border, raising fears of a possible invasion. Zelensky announced that Russia had massed 100,000 soldiers on the border, and moved a number of tanks and heavy equipment; which hastened the meeting between US President Biden and his Russian counterpart Putin, in which Putin called on NATO to end its expansion in the east, while Biden threatened to impose economic sanctions on Russia if it invaded Ukraine².

In January 2022, Biden promised to act decisively if Russia ventured into Ukraine. In return, on the 17th of the same month, Moscow moved its forces towards northern Ukraine under the pretext of conducting military maneuvers with Belarus. The most important point was on 24/2/2022, when Putin gave the signal to start a military operation in Ukraine and called on Ukrainian soldiers to lay down their weapons. Since the beginning of the invasion, Russian forces have taken control of several areas in the south, and expanded their control to the east, despite American pressure. Field developments accelerated, prompting Kiev to recognize the advance of Russian forces and their control over several cities in the Donbass region. In May 2022, Moscow announced its complete control over the city of Mariupol, which has military and economic importance, and the city of Lyman, the center of railway activity in the Donbass region and Svodonetsk. Zelensky announced Russia's control over 20% of Ukrainian territory, including the Donbass and Svodonetsk regions. In light of this progress, the Ukrainian president announced his quest to form an army to reclaim the south of the country.

After about a month of fighting between Russia and Ukraine, the Russian Wagner Group took control of the outskirts of the Ukrainian city of Bakhmut, and NATO began to come under pressure due to the slowdown in arms deliveries to Ukraine. The latest

¹ Al-Jazeera. Russian-Ukrainian war. A confrontation that has been defused for two decades and reignited by the Ukrainian-Western rapprochement. (20/2/2023). Retrieved from: <https://rb.gy/rljt5s>

² Ibid.

tally by the US Joint Chiefs of Staff revealed that the number of victims of the war since its outbreak in February 2022 until December of the same year reached 240,000 Russian and Ukrainian dead, 40,000 of whom were Ukrainian civilians, in addition to the displacement of millions of Ukrainians to neighboring countries ¹.

2.2 Political Factors Influencing the Role of the ICC in the Ukrainian Case

The Russian war against Ukraine was considered illegal and unjustified, and the General Assembly described it as aggression, but Russia still adheres to its right to legitimate self-defense, considering that Ukraine's accession to NATO threatens its security and peace². In light of the various international reactions to the Russian-Ukrainian war, and the responses of international institutions, the UN, and the ICC, the question arises about the political factors that affect these responses, especially the role of the ICC in this war, which is explained in this section.

Several aspects of international law apply to the Russian-Ukrainian war, but the most important principles and laws are: the principle of prohibiting the use of force and the law of resort to war. According to contemporary international law, international conflicts are governed by the law of resort to war *jus ad bellum*, which regulates the possibility of a state resorting to the use of force legitimately and the extent of the legitimacy of starting a war. The second law is the law of war *jus in bello* or international humanitarian law, which regulates how to act in the event of war, regardless of its legitimacy, and these two branches apply to the Russian-Ukrainian war³.

The United Nations Charter also regulates and clearly states in Article 2/4 the prohibition of the use of force or the threat thereof, and exempts from this prohibition the Security Council's mandate under Chapter VII of the Charter, and the natural right of states to legitimate self-defense in Article 51 thereof, meaning that the basis of these articles in the Charter is the prohibition of the use of force, and the exception is the permissibility of its use in certain cases, and with certain controls⁴. Despite these

¹ Ibid.

² Alikibi, Salwa. (2023). The impact of the Russian-Ukrainian war on the interpretation and development of the rules of international law. *International Journal of Jurisprudence, Judiciary and Legislation*.

³ Abu Al-Wafa, Ahmad. (2004). *Mediator in Public International Law*. Dar Al-Nahda .

⁴ Alikibi, Salwa. (2023). Ibid.

international efforts, armed conflicts are still not free of the commission of war crimes, despite the international community's efforts to prevent their occurrence. International criminal law seeks to pursue the accountability of their perpetrators and impose appropriate punishment on them, but it is still an effort marred by shortcomings, for reasons related to the inadequacy of mechanisms to address these crimes, especially at the level of the International Criminal Court, and other reasons related to international politics¹.

The International Criminal Court is supposed to contribute to the expansion and stabilization of the principle of individual criminal responsibility, but in reality, the ICC's response to the conflict and response, as in the role of the ICC, any conflict is governed and restricted by Security Council resolutions, as stipulated in Article 13 of the Rome Statute of the ICC, the Court may exercise its jurisdiction with respect to the crime referred to in Article 5 in accordance with the provisions of this Statute², in the following cases:

- a) If a State Party refers to the Prosecutor in accordance with Article 14 a situation in which one or more of these crimes appears to have been committed.
- b) If the Security Council, acting under Chapter VII of the Charter of the UN, refers a situation to the Prosecutor in which one or more of these crimes appears to be anticipated.
- c) If the Prosecutor has begun to investigate one of these crimes, in accordance with Article 15³.

Accordingly, we find that the Security Council has the authority to refer a case to the ICC, and in view of the violations of human rights law and international humanitarian law occurring in Ukraine, and the Russian armed forces committing war crimes in Ukraine, the Security Council must, in this case, intervene in what is happening against Ukraine, but the powers and competencies of the Security Council

¹ Sayish Abd El , Malik, (2020). The hopes of the International Criminal Court: An Orientalist Study in the Light of the Obstacles it Faces, Academic Journal of Legal Research

²Article 51.

Crimes within the jurisdiction of the CourtThe jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression

³ Rome Statute of the International Criminal Court

have opened the way for the permanent member states of the Security Council to impose their hegemony and control over or prevent referral decisions, which justifies the Security Council's failure to intervene to resolve the Ukrainian crisis, which leads to undermining the International Criminal Court in resolving the conflict ¹.

Accordingly, we can explain that the Security Council has become a political rather than a legal body to support the interests of the permanent member states, as many armed conflicts have witnessed serious violations of the laws of war, and the Security Council has been unable to take action regarding them, and this is clearly evident in the selectivity of the resolutions issued by it and the double standards regarding them.

In major international crises, international efforts to contain or stop any conflict are always put in front of a dead end due to the conflicting interests of the five permanent member states that have the right to veto. Whenever Moscow and Beijing put a resolution to a vote, Washington, Paris and London veto it, or vice versa. This is what appeared in the Ukrainian crisis, which the Security Council failed to address or put an end to over two years since the outbreak of its war on 2/24/2022². Currently, due to this political action that would prevent any draft resolution presented to the Security Council against Russia due to its invasion of Ukraine, it will fall due to Russia's right to veto, and this brings us back to the point of undermining the role of the International Criminal Court in carrying out its role and exercising its jurisdiction under Article 5 of the Rome Statute of the ICC in accordance with the rules for referring cases to it.

This was implemented on the ground on 2/25/2022 when Russia used its veto powers to hold Russia accountable for its aggression against Ukraine, protect civilians, including children, and call for facilitating the provision of rapid, safe and unhindered aid to those in need, despite the support of France, the USA and Britain and voting in favor of the resolution ³.

¹ Eril Dvid. (2010). La repression penale internationale: L'avenir de la cour penale internationale

² SkyNews Arabiya. (27/10/2023). Gaza and before it Ukraine. "Veto war" in the Security Council. Retrieved from: <https://rb.gy/5s9yb8>

³ US Mission to the UN. (25/2/2022). Joint statement following a vote on UN security council resolution on russia's aggression toward Ukraine. Retrieved from: https://usun.usmission.gov/joint-statement-following-a-vote-on-a-un-security-council-resolution-on-russias-aggression-toward-ukraine/?_ga=2.45064676.1322139675.1726398193-303421326.1726398193

Issuing such a resolution by the Security Council to hold Russia accountable would in turn automatically activate the role of the International Criminal Court in individual accountability for war crimes committed in Ukraine, but the Russian veto prevented this.

Another expected political problem is between the ICC and the governments of countries, and the connection of these governments is fundamental to the jurisdiction of the court. In order for Russia to submit to the court, there must be effective criminal justice, but the problem here is the authority of the ICC over countries that are not parties to the Rome Statute, based on the principle of the relative effect of treaties, which will lead to the role of the court taking on another political dimension¹. In this regard, ICC is an international body or body established by virtue of an international treaty, which reduces the integration of the comprehensiveness of its system to establish the rules of criminal justice in Ukraine, especially in light of its reliance on international cooperation in arresting and extraditing criminals. This mechanism constitutes an obstacle to countries that refuse to cooperate, such as Russia, which refuses to cooperate with the court on the pretext of its violation of the principle of non-interference in the internal affairs of countries².

The Russian government severely restricted freedom of the press, closed down NGOs as “foreign agents,” suppressed political opposition, attempted to assassinate political opponents, and even turned the national legal system into a mechanism for persecution at a time when European countries were hoping for Russia to move closer to the European model, especially after Russia joined the Council of Europe in 1996, which Europe considered a positive indicator of Russia’s intention to adhere to basic European values, most of which are subject to the ICC system, human rights, democracy, and the rule of international law. However, Russia did not do this, and it led to the emergence of a dual-law state in Russia that deals differently with basic issues and what it calls political issues. Russia did not show a willingness to abandon politically sensitive issues of international law, and the Russian Constitutional Court imposed new restrictions on citing sources of international law, justifying this by the

¹ Yousef Hassan Youssef. (2010). International Criminal Law. Markaz al-Kitāb al-Akādīmī

² Ahmed M., & Amer Q. (2016). The effectiveness of the international criminal justice system between international variables and the requirements of maintaining international peace and security. Journal of Law and Human Sciences, 9(4), 84-103. <https://www.asjp.cerist.dz/en/article/44352>

superiority of the Russian Constitution¹, which brings us back to the point of undermining the role of the criminal court in this regard, as an international body for the enforcement and application of international law.

Media reports indicate that the military operation in Ukraine was not the will of the Russian people, despite the partial public support for it, but the decision to attack was taken by the President alone, which makes it difficult to predict how the decision on the method of war in Russia will be made in relation to the ICC, and whether responsibility for any crimes committed in Ukraine can be extended to the state leadership, as the political system and the course of events in Russia justify that the increasing seizure and the rule of international law, and the failure to cooperate with the ICC or take it into account before making the decision to go to war weakened, and even prevented it from performing its role for which it was created in any way, and this weak level of procedures in Russia towards the Ukrainian situation². The Pre-Trial Chamber of court issued two arrest warrants against Vladimir Putin and Ms. Maria Alexeyevna Lvova-Belova on 17/3/2023, considering Putin responsible for the war crime of illegal deportation and illegal transfer of population from the occupied territories of Ukraine to the Russian Federation, on legal grounds believing that Putin bears individual criminal responsibility for the aforementioned crimes:

- a) For having committed the acts directly, jointly with others and/or through others, in accordance with article 25(3)(A) of the Rome Statute.
- b) Failing to exercise proper control over civilian and military subordinates who committed or permitted the acts to be committed, and who were under his effective authority and control pursuant to superior responsibility in article 38(B) of the Rome Statute.

Recognizing the continuing conduct addressed in the case, the Pre-Trial Chamber considered that it would be in the interests of justice to publicly disclose the existence of the arrest warrants, the names of the suspects, and the crimes for which the warrants were issued, but that despite these orders and procedures, the military operation in

¹ Mälksoo, L. (2021). International Law and the 2020 Amendments to the Russian Constitution. *American Journal of International Law*, 115(1), 78–93. doi:10.1017/ajil.2020.87.

² Nuotio, kimmo. (2022). The war in Ukraine, the evolution in international criminal law and crumbling of the rule of law in russia. Unpublished study.

Ukraine and the crimes committed in violation of the Rome Statute continue as of the date of writing¹.

2.3 Legal Challenges Facing the International Criminal Court in Ukraine

1. Judicial Immunity

There is no doubt that the establishment of the ICC had an impact in strengthening the recognition of the idea of individual international criminal responsibility for crimes, until limiting the court's responsibility to individuals without including states according to its system, which was politicized as the researcher mentioned in the previous requirement through the nature of its relationship and its connection with the Security Council and the nature of international relations, posed a challenge to ICC in carrying out its role as a body to prosecute war criminals. Given the role of the Security Council in referring to the court, despite the fact that the majority of states did not support granting the Security Council this broad authority over the court, and their desire to emphasize the independence of the court and avoid turning it into a mere political body affiliated with the Security Council, which leads to the permanent member states with the right to veto enjoying the obstruction of the court's basic mission in achieving justice, in addition to that, the Rome Statute had granted the states parties to it and the prosecutor of the court the authority to refer, provided that the Council acts in this regard under Chapter VII related to the arrangements taken in the event of a threat to international peace and security or a breach thereof, or the occurrence of aggression, which are cases that give the Security Council broad powers under Article 39² of the Charter, and accordingly, The referral is issued by the Security Council through a resolution in accordance with the procedures stipulated in the Charter³, except that some countries and non-governmental organizations criticized the Security Council's granting of the referral authority to the ICC, justifying this by saying that the Security Council's enjoyment of this authority affects the independence and impartiality of the court, which

¹ ICC Official website. (17/3/2023). Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. Retrieved from: [Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/situation-in-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova)

² Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

³ Luc cote: Justice penale internationale ivers un resserrement des regles du jen. (2006)

will affect its role in achieving international criminal justice, and may also undermine the administrations of the countries concerned and their sovereignty, since the scope of the Security Council's authority enjoys the referral authority regardless of the place where the crime was committed, or the nationality of the perpetrators, whether it was committed in the territory of a state party to the Statute of the Court, or not a party. In this case, the territorial jurisdiction of the ICC extends to the territory of states that are not parties to the Statute, regardless of whether that state accepts the jurisdiction of the court, as happened in the Darfur case, which was referred to the ICC, despite the fact that Sudan is not a party to the Statute, based on Chapter VII of the Charter of the United Nations, considering that the referral falls within the measures taken under Article 41¹ to maintain international peace and security. As for the subject of the referral, it should be limited to the crimes mentioned in Article 5 of the Statute, which are war crimes. The crimes of genocide, crimes against humanity, and the crime of aggression, as agreed upon in their definition, and therefore the Security Council does not have the right to refer, for example, cases related to the crimes of terrorism, illegal immigration, money laundering or piracy, despite their indisputable seriousness, as Article 16 of the Statute of the Court stipulates: "No investigation or prosecution may be initiated or proceeded with under this Statute for a period of 12 months upon the request of the Security Council to the Court, as included in a resolution issued by the Security Council under Chapter VII of the Charter of the UN, and the Council may renew this request under the same conditions, which is done by voting procedures on the resolution, which gives Russia the ability to cancel any resolution of the Security Council to prosecute Russian perpetrators of war crimes in Ukraine by using the veto power, which constitutes a legal challenge to the ICC in carrying out its work from the ground up, which leads to negative and dangerous results, most notably the politicization of the Court and making it a mere body affiliated with the Security Council, and hinders its work by introducing it into the labyrinths of the policy of

¹ Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

selective justice that experience and reality have proven that the Security Council has resorted and continues to resort to in dealing with some international issues ¹.

This power possessed by the Security Council can obstruct the work of the court and prevent it from taking action in a timely manner, and can contribute to the loss of documents and evidence, which allows perpetrators to remain outside any judicial prosecution by the court, such as Putin and Lvova, which has serious repercussions on the UN' operations in maintaining international peace and security, which leads to its neutralization and the court from its lofty goals and purposes under various pretexts. Russia has sought to employ this power with extreme deception to protect its nationals from any judicial prosecution that falls within the jurisdiction of the court, as the court's abstention for a period of 12 months from initiating any investigation and prosecution procedures in the event that a case is raised involving current or former officials or employees, or those affiliated with a state contributing to the work of the UN, or its permission to renew this request that denies the conditions for a new period of 12 months, despite its obligation on the member states of the UN to cooperate with the ICC if they decide to proceed with such investigations and trials, which makes this procedure similar to the right of veto enjoyed by the permanent members of the Security Council, which is used to protect the strategic interests of these countries, which makes the logic of selection and the justice of the strongest impose themselves in the reality of countries governed by specific political and economic balances².

Sovereignty in its new concept in the set of powers exercised by the state within the limits of the provisions of international law has become restricted in the face of the international community in bringing perpetrators of crimes to international justice, especially when violating international humanitarian law and human rights by committing international crimes. The view of state sovereignty has changed because sovereignty alone cannot solve problems. International and regional organizations must deal with the new international variables, or bear their responsibility on behalf of the state that is investigating the performance of its duties in this area. Sovereignty, its protection and adherence to it cannot be a pretext for totalitarian regimes such as Russia

¹ Drazen Dukic. (2007). transitional justice and the ICC in the interest of justice.

² Bajak Basil Youssef. (2008). The arrest warrant of the Sudanese president is an example of the seriousness of politicizing and linking the measures of the International Criminal Court to Security Council resolutions. Center for Arab Unity Studies.

to commit international crimes and waste human rights. However, the mere thought of prosecuting them judicially is not possible at the present time, as there are heads of state accused of committing international crimes, but those regimes have not been overthrown or brought to justice, as is the case with Russian President Vladimir Putin, who is accused of crimes of forced transfer and war crimes, despite the announcement of the issuance of an arrest warrant against Putin by the Prosecutor General of the ICC¹.

2. Selective justice and financial challenges

International criminal law represents the ideal means of resolving disputes by relying on judicial bodies to resolve armed conflicts by prosecuting individuals who have committed criminal crimes without extending it to peoples or groups, which is supposed to lead to reducing the phenomenon of impunity in the present and eliminating it in the future, but the prosecution in criminal law lacks the quality of neutrality and fixed integrity, arbitrariness in claims, and a non-objective reading of the provisions of the statutes, as evidenced by the insistence of the Prosecutor of the ICC to investigate African cases without others, which casts doubt on the legitimacy of the court and reduces its credibility, and some consider it conclusive evidence that international justice is a double standard and a political tool used by major countries such as Russia to serve their interests by intimidating small countries, as in the case of Ukraine for Russia, as the ICC requires huge financial resources in the case of Russia and Ukraine, as international justice in general and criminal justice in particular require huge financial resources, as the budget of the ICC for Yugoslavia in 2003 amounted to about 245 million Dollars, while the budget of the Court for Rwanda amounted to 187 million dollars, and these astronomical amounts were deducted from the UN, which will certainly affect the performance of the organization, and assuming that the financial resources are available, the UN will prefer to use them in development and relief programs, since the return produced by these courts was modest or meager, and did not directly lead to the trial and conviction of criminals, and kept the political situation of these countries unstable, which is what is expected to happen in the complexity of the current Ukrainian-Russian situation².

¹ Si Ali, Ahmed. (2008). Criminal responsibility for crimes resulting from the aggression on Gaza. Al-Fikr Journal

² Skilbeck, Rupert. "Funding Justice: The Price of War Crimes Trials." Human Rights Brief 15, no. 3 (2008): 6-10.

The Office of the Prosecutor is facing difficult financial constraints in its increasing workload, which prompted the Prosecutor to request additional budget support when announcing the investigation into the Ukraine situation. The ICC's preliminary examination into the situation in Ukraine ended in December 2020, when former Prosecutor Fatou Bensouda declared that there were reasonable grounds to believe that a range of war crimes and crimes against humanity falling within the Court's jurisdiction had occurred in Crimea and eastern Ukraine and had reached the required threshold of danger. However, she left the decision on authorizing an investigation into the situation to her successor, Karim Khan, justifying her decision on the grounds that the Office of the Prosecutor did not have sufficient resources to conduct additional investigations. Despite the French Foreign Ministry's announcement that it would provide 500 million euros in additional funding to the Court if necessary, the Court still faces the potential challenge of states that have offered financial assistance not fulfilling their promises, which will slow down the Office of the Prosecutor's operations in investigating individuals from the Russian Federation. The biggest challenge for the Court in most cases is the lack of a police force or any authority to arrest, so any decision or call for an investigation by the Office of the Prosecutor may be taken against leaders such as Russia, which has Nuclear weapons would be difficult to enforce ¹.

3. The Duration of the Procedures

Another challenge for the criminal court is that it requires a lot of time, so its lawsuit faces difficulty:

1. Carrying out the investigation and inquiry process, as well as bringing witnesses; due to the lack of security in the Russian-Ukrainian conflict zone, especially since it is an armed conflict, and its continuation will lead to making it a long-term conflict controlled by armed groups or weak central authorities, which makes movement difficult, and makes investigators need permanent security guards

¹ Leroy spencer. (22/5/2023). The challenges that the ICC prosecutor may face in presenting charges on the crime of aggression in Russian-Ukraine situation. Retrieved from: <https://sierralii.gov.sl/articles/2023-05-22/leroy/the-challenges-that-the-icc-prosecutor-may-face-in-presenting-charges-on-the-crime-of-aggression-in-the-russia-ukraine-situation->

2. Delay in issuing arrest or attendance orders, and the issuance of arrest or attendance orders takes a relatively long period of time, which negatively affects the criminal lawsuit and causes it to be prolonged
3. Russia's reluctance to cooperate with the criminal court and its failure to respond to requests to arrest or hand over the accused or provide information and documents in its possession¹.

This criminal reality encourages an increasing reliance on selective justice that requires going beyond repression, because it is difficult to achieve a number of objective factors, such as the difficulty of collecting evidence, the financial cost, the long time, and the uncertain results. The work of investigation committees provides the opportunity for perpetrators to repent and reconcile with themselves and the other party, by confessing to the acts committed, which are often crimes that are difficult to prove, so that the panel of judges can convict the accused and issue a suspended sentence, and each party's version of events can be analyzed².

4. The Court's Jurisdiction and Mechanism of Action

The ICC also faces a challenge in bringing charges regarding the crime of aggression committed by Russia by violating the territorial integrity of Ukraine, in light of the Russian Federation's failure to join the Rome Statute, and it is not within the jurisdiction of the Prosecutor of the Court to charge it with committing any crime of aggression. It appears that the crime of Russian aggression against Ukraine cannot be heard by the Court due to the statute of limitations. However, despite this, the ICC has confirmed its ability to exercise its jurisdiction over the territory of Ukraine, and thus automatically over the actions of Putin and the Russian forces, even though Russia is not a signatory, based on the basis of Ukraine's acceptance in 2014 of the Court's jurisdiction following the occupation of Crimea and the outbreak of Russia's proxy war in eastern Ukraine, with a time frame that includes alleged crimes committed as of 20/2/2014, which enables the Court to exercise its jurisdiction over any acts of

¹ Sunge . Loyal , Ten principles for recociling truth commissions and criminal prosecution , pp 1072 – 1092 ,
in *The legal regime of the International Criminal Court*, Doris. José, Grasser. Hans, Bassiouni. Cherif, Leiden –

Boston, Martinus Nijhoff Publishers, 2009, pp 1 – 1119

² Sunge . Loyal , Ten principles for recociling truth commissions and criminal prosecution, Ibid

genocide, crimes against humanity, or war crimes committed within Ukrainian territory as of 2014, and its jurisdiction includes the forced displacement of the Ukrainian people in Russia to neighboring countries, despite Russia's withdrawal of its signature from the Rome Statute, the court has jurisdiction to prosecute any individuals, including Russian citizens, for allegedly committing crimes within its jurisdiction on Ukrainian territory. However, the jurisdictional restrictions applicable to the crime of aggression will make the scope of the International Criminal Court remain limited to war crimes, crimes against humanity and genocide, and will not extend to the crime of aggression. Accordingly, the Office of the Prosecutor will face restrictions in investigating the crime of aggression of the Russian Federation, which has not cooperated with the Office of the Prosecutor's calls to initiate an investigation, based on the principle of state cooperation, which makes indicting the Russian Federation for the crime of aggression against Ukraine ineffective¹.

However, in 2010, after a number of years, the necessary ratifications were obtained to include the crime of aggression and activate the court's jurisdiction over it. However, exercising jurisdiction over it requires either a referral by the Security Council to obstruct the right of Russian veto, or the nationality of the suspect and the state against which the aggression occurred to be a party to the court according to Article 15 of the Rome Statute, which states: "In relation to a State not party to the Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by its nationals or on its territory." These legal restrictions on jurisdiction pose a challenge to the Office of the Prosecutor in prosecuting the crime of aggression against Russia, which has sufficient power not to be a party to the Rome Statute, and its position that enables it to paralyze the Security Council by using the veto².

Because the amendments to the crime of aggression to the Rome Statute include a special judicial system insisted upon by the five permanent members of the Security Council, any crime of aggression committed by a non-state party as a victim or aggressor is excluded from the jurisdiction of the court, except in the case of a referral from the Security Council. Accordingly, Ukraine's ratification of the Statute of the

¹ Leroy spencer. (22/5/2023). The challenges that the ICC prosecutor may face in presenting charges on the crime of aggression in Russian-Ukraine situation. Ibid.

² Kampala Review Conference Amendments to the Rome Statute

Court and the amendments to the crime of aggression will not change anything in the absence of regime changes in Russia that could condemn Putin.

5. Russia's non-cooperation with the court

The Russian Federation also shows, by not being a party to the Rome Statute, sufficient intention not to cooperate with the requests, decisions and orders of the ICC or the Prosecutor, or its agents. In the current situation between Russia and Ukraine, it will be impossible for the court to try the leader of the Russian Federation, and Russia will not be willing to hand over its senior military leaders who are leading the aggression against Ukraine to stand before the Prosecutor's Office, or to any form of investigation, hearing, or trial. The essence of this challenge can be found in the fact that the Russian Federation does not cooperate with the ICC or its agents¹.

6. The complexity of the Russian-Ukrainian situation

Another challenge facing the Prosecutor General's Office in conducting an investigation into violations of international humanitarian law and human rights law in the situation between Russia and Ukraine is that criminal investigations are conducted by collecting and examining evidence, interrogating persons under investigation, victims, and witnesses, finding evidence of innocence or guilt. The Prosecutor General's Office must investigate the circumstances of both incrimination and exoneration, request assistance from international organizations and states, and send investigators to crime scenes to collect evidence, while being careful not to create any danger to victims and witnesses. In the Russian-Ukrainian situation, the Prosecutor General's Office faces the challenge of not making progress in investigating the situation because in the case of Russia and Ukraine it has to deal with those who are already dealing with individual crime scenes, which are very complex, and new crimes are committed every day of the war. It has to know who is doing this work, where and how, before it can proceed with its information. The criminal also has to determine the weapons used by both sides in the war, their capabilities, the type of ammunition they use, and the damage they can do. Experts also have to start by analyzing ballistics to determine the source of indirect fires causing damage, fatalities and statistics, identifying units involved in the fighting, uniforms, insignia, and equipment, there is a

¹ Leroy spencer. (22/5/2023). The challenges that the ICC prosecutor may face in presenting charges on the crime of aggression in Russian-Ukraine situation. Ibid.

case to be made for finding lists of people in units, sorting through the chain of command to identify individual actors involved in the violence and attacks, field commanders giving tactical orders, officers in charge of artillery batteries, missiles, pilots, staff officers, generals running the campaign, identifying the political leaders who made it all happen in the first place, and who individually are keeping it going. It will be difficult to identify and succeed in all of this because the Russian authorities have not yet recognized the jurisdiction of the ICC and will therefore not cooperate with any request or invitation to investigate. Given the uncertainty about the next stages of the war, and the Russian outcome in Ukraine, it is important that any evidence that is in Ukraine now be transferred, managed at the ICC in The Hague, and sent there for protection and to be available for prosecution in the event that the war ends well for Ukraine¹.

2.4 Analysis of ICC Investigations and Decisions in the Ukrainian case

1. International Criminal Court Decisions in the Ukrainian Situation

On 2/2/2024, the Prosecutor of the ICC, Karim Khan, submitted requests to the Second Pre-Trial Chamber of the court for arrest warrants in the context of the situation in Ukraine. Then, on March 17, the Chamber issued two arrest warrants against:

1. Vladimir Putin, President of the Russian Federation.
2. Maria Levova-Belova, Commissioner for Children's Rights at the Office of the Russian Federation.

The Chamber confirmed that there are reasonable grounds to believe that President Putin and Levova-Belova bear criminal responsibility for the illegal deportation and transfer of Ukrainian children from the occupied territories of Ukraine to the Russian Federation, in violation of Articles 8(2)(A)(7) and 8(2)(B) of the Rome Statute, and the protection of children under the Fourth Geneva Convention. The Court confirms that the deportations were carried out in the context of the acts of aggression committed by Russian forces against the integrity and territorial integrity of Ukraine, which began in 2014. Karim Khan also carried out a number of visits to Ukraine, in particular to the foster homes from which the Ukrainian children were taken, to demand

¹ Ibid.

and stress the Security Council The need to investigate the alleged unlawful deportation of children from Ukraine, making it a priority for the Commission ¹.

The Court also issued two additional arrest warrants, two years after opening the investigation into the situation in Ukraine, for Sergei Kobylash, Commander of the Long-Range Aviation of the Judicial Force, and Viktor Silokov, Commander of the Black Sea Fleet, as the Court believes there are reasonable grounds to believe that they are responsible for the war crimes of:

1. Directing attacks against civilian objects, Article 8(2)(B)(II) of the Rome Statute
2. Causing excessive incidental harm to civilians or damage to civilian objects, Article 8(2)(B)(IV).
3. Crime of inhumane acts, Article 7(1).

The Office of the Prosecutor confirmed that these acts were carried out in the context of the actions committed by the Russian military forces against the sovereignty and territorial integrity of Ukraine beginning in 2014².

2. Analysis of the decisions and investigations of the International Criminal Court in the Ukrainian case

We see in the decisions of the ICC regarding the Ukrainian case and the Russian war on Ukraine that when the court identified the criminals and perpetrators of war crimes, it went into the details of the officials and leaders. It did not limit its accusations to the presidency of the state or the prime minister, but rather it went into the army's staff and departments, as the accusations reached the leaders of the air force and the leaders of the navy, in addition to directing the accusation of committing war crimes as well to those responsible for humanitarian files, such as Belova, the Commissioner for Children's Rights in the Russian Federation. That is, the court examined the Ukrainian case more closely than those it would direct the accusations against, and its decisions

¹ ICC official site. (17/3/2023). Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova. Retrieved from: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>

² ICC official site. (5/3/2024). Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in Ukraine. Retrieved from: <https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine>

were more comprehensive in different aspects than its decisions in the Israeli case, for example, the court also dealt with Russia in the Ukrainian case as an occupation, and described its actions and war as an occupation of Ukrainian lands, and confirmed in its decisions its illegality. The court continued to emphasize Ukraine's sovereignty, unlike what it did with Palestine, as the content of its decisions regarding Israel did not include any recognition that Israel is an occupying force, or any confirmation of Palestine's sovereignty or its right to self-determination. In the Ukrainian case, the ICC dealt with the case more objectively and professionally and asked the UN to prioritize the case. The course of the procedures since the beginning of referring Ukraine to the criminal case was quick and consistent with the normal course of the criminal procedures, starting with the referral, then the investigation, then issuing decisions and directing charges, unlike the criminal court's treatment of the Palestinian case, in which it wasted many years proving its legal jurisdiction over the case before starting the investigation. The last thing it reached, despite all this time taken in the procedures, was a request to issue arrest warrants, not the issuance itself. We do not know how much time it will take to do this, or if it will be done in the first place under the American pressure and Israeli power and the political factors affecting the work of the court, which the researcher had explained in the previous sections.

Chapter Two: Another Overview of the International Criminal Court

1. Another Overview of the International Criminal Court

1.1 How Does the ICC Work

After the most heinous international crimes against humanity were committed in World War II, the world began to realize the importance of international criminal justice, and this idea became necessary in the international community, as it aims to hold accountable those responsible for these criminal acts, as a result, a group of mixed and permanent international courts were established.

These efforts resulted in the establishment of a court with international criminal jurisdiction, aiming to fill the gaps suffered by previous courts, which were limited to investigating and holding accountable crimes that occurred in specific places and times, as the ICC was established by an international agreement to be able to try the perpetrators of the most serious international crimes. Thus, this court represents an important step towards achieving international criminal justice, which has always been the hope of every victim. After the negotiations that took place in Rome in 1998, especially in the Statute of the ICC, the federal efforts for human rights focused on establishing an international judicial structure that is distinguished by independence and impartiality, as its goal is to protect the victim.

As the countries that ratified the Rome Statute cooperate with ICC to achieve international justice, as its system entered into force in 2002 to become a court of utmost importance that tries individuals who commit crimes that fall within its jurisdiction, which we will talk about later¹.

The ICC was defined according to the content of Article 1 of the Rome Statute, which states that the Court is: a permanent body with the power to exercise its jurisdiction over persons who have committed the crimes referred to in Article 5 of the Rome Statute. This Court is the one that has national criminal jurisdiction, and its

¹ Report of the International Criminal Court Programme, The International Criminal Court and Sudan: Access to Justice and the Rights of Victims, No. 2/441, March 2006, p. 7.

jurisdiction and method of operation are subject to the provisions of the statute that established it¹.

The ICC is distinguished from other courts by its jurisdiction to hold accountable and punish persons who commit crimes classified as the most serious crimes in the international community. Therefore, the Statute of the ICC includes mentioning the jurisdiction of the court according to the type of crime, the place and time of its commission, and the person who committed it. Therefore, the Rome Statute of the court emphasized in its content the most serious crimes that raise concern for the international community and that must not go unpunished. Accordingly, the various international crimes in which the court has jurisdiction were identified, and we find the most important of them is the crime of genocide, which originally overlaps with crimes against humanity, in addition to the crime of war and aggression according to Article 5 of the Statute².

Considering Articles 12 and 13 of the Rome Statute, we see two ways to refer the case to the ICC: the first is general and automatic jurisdiction, and the second is non-automatic jurisdiction. The automatic general jurisdiction of the court is in the case of referral by the Security Council, where this intervention is within the jurisdiction of the court, and according to Chapter VII of the Charter of the UN, the jurisdiction of the ICC is general, regardless of the location of the crime or the nationality of the accused³.

The non-automatic jurisdiction of the court is in the event that the public prosecutor initiates the investigation on his own initiative or the referral is made by a state party to the Rome Statute regarding a crime committed in the territory of a state that is not a party to the Rome Statute. In this case, the court is not able to initiate the investigation due to the presence of a state that is not a member of the Rome Statute. In order to accept jurisdiction, there must be leniency between the states parties to the

¹ Hamed Sayed Mohamed Hamed, A Brief Explanation and Commentary on the Charter of the International Criminal Court According to the Latest Amendments, National Center for Legal Publications, 1st ed., Egypt, 2016, p. 17.

² Alaa Ezzat Abdel Mohsen, The Jurisdiction of the International Criminal Court, Dar Al Nahda, Cairo, 2008, p. 53

³ Dhari Khalil Morsi, The International Criminal Court, The Dominance of Law or the Law of Dominance, Exhibitions Establishment, Egypt, 2007, p. 57.

Rome Statute in order to complete the investigation into the crimes and hold the perpetrators accountable¹.

The Court also enjoyed several data and characteristics in order to achieve international justice, and these characteristics were granted to it through the Rome Statute, such as the principle of complementary jurisdiction for national courts, so that the jurisdiction of the court extends to include member states and exercises the jurisdiction of international criminal courts in complementarity, with priority given to the jurisdiction of national courts².

The ICC is distinguished by the fact that it does not interfere or shed light on crimes that are not within its jurisdiction, and the ICC does not apply penalties that are not included in the Rome Statute. It has also been given the right to apply individual criminal responsibility to anyone who contributed to committing one of the crimes included in its statute, regardless of his status or legal position³.

The Statute of ICC also gives the right to try a person again for the same crime so as not to create a conflict between the jurisdiction of the court and the jurisdiction of the national judiciary and the protection of human rights⁴, emphasizing that no official capacity, amnesty system or immunities shall be taken into account, whoever commits crimes that fall within the jurisdiction of the ICC shall be held accountable⁵. In addition, the court is distinguished by its ability to conduct investigations even after some time has passed since the crime was committed, meaning that the crime committed does not expire due to the statute of limitations⁶.

With these features, the ICC enjoys many characteristics that the Statute of the Court has granted it in order to achieve international justice, and despite the presence of advantages and characteristics of this court, there must be obstacles that hinder the court from achieving international justice.

¹ Article 86 of the Statute of the International Criminal Court.

² Aisha Saadi, Principles of the International Criminal Court, Moroccan Virtual Legal University, Articles in Criminal Law, June 14, 2020, p. 1.

³ Article 22,23 of the Statute of the International Criminal Court.

⁴ Article 20 of the Statute of the International Criminal Court.

⁵ Dhari Khalil Morsi, The International Criminal Court, The Dominance of Law or the Law of Dominance, previous reference, p. 209

⁶ Article 29 of the Statute of the International Criminal Court.

The obstacles that hinder the ICC from achieving justice are diverse, including internal obstacles related to the Statute of the Court and external obstacles that affect the effectiveness of the Court.

1. Internal obstacles in the ICC

The internal obstacles in the ICC are formed in terms of its complementary, substantive and temporal jurisdiction, with regard to complementary jurisdiction when comparing Article 1 of the Statute with Article 17 thereof, we find that there is a contradiction regarding the jurisdiction that was given to national courts with priority over serious crimes that occur in the international community and which are originally within the jurisdiction of the ICC¹, in addition to that the Security Council works with the authority it possesses in working on investigation and prosecution on the principle of complementarity, which hinders the Court if the Security Council is resorted to².

As for the subject matter jurisdiction, we find that the statute of the court referred in its draft to other crimes, such as crimes of terrorism, crimes committed against UN employees, and illicit trafficking in psychotropic substances and narcotics, but in the end a small group of crimes were approved, which explains to us the preference of some political and personal considerations over the interests of the international community. In addition, we find that the statute of the court opened the door to the states parties to the possibility of adding other crimes, but this authorization is subject to a set of conditions, which leads to limiting the effectiveness of the court³.

2. External Obstacles to the ICC

The ICC faces many external challenges that hinder its ability to achieve justice. The most prominent of these challenges is the issue of national sovereignty, as some countries refuse to cooperate with the court under the pretext of protecting their sovereignty. In addition, the court is exposed to political pressure from powerful countries, which may affect its decisions⁴.

¹ Ali Khalaf Al-Shar'a, *The Principle of Complementarity in the International Criminal Court*, Dar Al-Hamed for Publishing and Distribution, Jordan, 2012, p. 107

² Article 16 of the Statute of the International Criminal Court

³ Article 121,123 of the Statute of the International Criminal Court.

⁴ International Criminal Court, *Latest Developments*, Secretariat of the Asian-African Legal Consultative Organization, p. 29

The ICC also suffers from a lack of financial and human resources, which negatively affects its efficiency. Some countries do not recognize the authority of the court, which further complicates matters, while the unstable security situation in the countries concerned may be an obstacle to investigations¹.

In order for the ICC to achieve justice and overcome and confront these obstacles, it uses many methods and mechanisms. We will mention the most important of these methods, which are criminal accountability, which is the main pillar, and the second is redressing the rights of victims.

- **Criminal Accountability**

Criminal accountability is considered the basic criterion for embodying the rule of law. In the Rome Statute, criminal accountability is a duty imposed by international law on states, and any breach of its obligations requires the intervention of the international community and the advancement of international judicial institutions through the principle of complementarity. In the event of a failure of the national judiciary, Article 17 of the Rome Statute is implemented, whether this failure is due to unwillingness or inability.

The Security Council also has a significant contribution to embodying criminal accountability against persons who committed the crimes stipulated in Article 5 of the Rome Statute. This also gives a strong impetus to achieving justice.

- **Redressing the Rights of Victims**

The statute of the ICC seeks and embodies the legal framework for protecting the rights of victims, unlike what happens with special courts. The Rome Statute has established the right of the victim to claim compensation in all its forms, and this has a role in achieving international justice.

At the end of our discussion of the role of the ICC in achieving international justice, we find that it plays an important role in holding accountable serious crimes that threaten peace and security in the world. Despite the challenges it faces, the court remains committed to applying the principles of justice and working to provide them to

¹ Ibid

victims through its pursuit of accountability. The court contributes to promoting a culture of accountability and works to prevent the recurrence of atrocities from crimes. The support of the international community and cooperation between states are two essential elements to ensure the success of the court in achieving justice.

1.2 Previous Studies on the International Criminal Court and Political Influences (Judicial Cases)

- **The case of Abdel Rahman**

Ali Abdel Rahman, known as “Ali Kushayb”, the alleged leader of the Janjaweed militia in Sudan, was issued two arrest warrants by the ICC on 27/7/2007 and 11/7/2020 on suspicion of committing 31 counts of war crimes and crimes against humanity allegedly committed in Darfur, Sudan. Abdel Rahman was transferred to the custody of the ICC after he voluntarily surrendered to the court in the Central African Republic, and appeared before the court for the first time on 15/7/2020 for crimes committed between August 2003 and at least April 2004 in Darfur, Sudan. In 2021, Pre-Trial Chamber II confirmed all charges of war crimes and crimes against humanity against Abdul Rahman, and referred him to trial.

The case is still ongoing and its trial opened before the Trial Chamber in April 2022. 56 witnesses attended to present the case and the prosecution. The defense’s request to acquit the accused of four out of 31 charges was rejected. The court sessions were adjourned on 12/7/2024, and the closing statements in the trial are scheduled to be delivered on 11 and 13 December 2024¹.

Abdul Rahman was charged with 31 counts, including: Intentionally directing attacks against civilians, looting, destruction of property, destruction of enemy property, outrages upon personal dignity, rape, torture, cruel treatment, attempted willful killing², outright murder, war crimes and crimes against humanity³.

¹ ICC. (N.D). Abd-Al-Rahman Case: The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (ICC-02/05-01/20). Retrieved from: <https://www.icc-cpi.int/darfur/abd-al-rahman>

² ICC pdfs. (April/20022). Questions and Answers: Situation in Darfur, Sudan The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"). Retrieved from: <https://www.icc-cpi.int/sites/default/files/2022-04/20220405-abd-al-rahman-faq-eng.pdf>

³ UN Official site. (5/4/2022). Criminal Court begins trial of Ali Kushayb on charges of war crimes and crimes against humanity in Darfur. Retrieved from: <https://news.un.org/ar/story/2022/04/1098182>

The fact that Abdul Rahman's case has reached this stage, and that it is close to being issued by the government, is an indication of the court's ability to succeed in it, and its success in proving the charges against Abdul Rahman and proving its jurisdiction over them, and prosecuting the perpetrator. However, the missing part in this case is international cooperation and cooperation with the court, arresting the perpetrator, as the success of the case, reaching this stage, is due to the criminal voluntarily surrendering himself to the court after issuing arrest warrants against him and charging him. Despite this, Abdul Rahman's case is an important example of the court's success in performing its role, exercising its judicial jurisdiction over crimes falling within its jurisdiction.

- **The case of Omar al-Bashir**

On 4 March 2009, the Pre-Trial Chamber of the ICC issued an arrest warrant for Sudanese President Omar al-Bashir, based on charges of war crimes and crimes against humanity within the jurisdiction of the Court. These charges include: genocide, rape and other atrocities of murder, rape, torture and forcible transfer of population as part of a widespread and systematic campaign of barbarity against the civilian population of Darfur during the civil war between North and South Sudan¹, this case was referred to the ICC through the Security Council in 2005, in the international accusations against Al-Bashir, which took place between 2003-2008, considering that the conflict in Darfur was a bloody conflict, which is still ongoing, and has claimed the lives of more than 500 thousand people. The charges against Al-Bashir relate to human rights violations committed by Al-Bashir's security forces, including the Sudanese army and the Janjaweed militia allied with it, as well as the police and intelligence, where the court believes that there are reasonable grounds to believe that Omar Al-Bashir played a fundamental role in organizing these groups and agencies, and the court also concluded that there are reasonable grounds to believe that Al-Bashir acted with a specific intent to destroy part of three Sudanese tribes, namely the Fur, Masalit, and Zaghawa ethnic groups.

The report of the Public Prosecutor against Al-Bashir in 2007 stated that the aforementioned crimes were committed by mobilizing the entire state apparatus, and the

¹ Human rights watch. (4/3/2009). ICC Decision on Omar al-Bashir Arrest Warrant. Retrieved from: <https://www.hrw.org/ar/news/2009/03/04/235728>

Sudanese government tolerated the officials responsible for these crimes, and even actively supported and protected them. In 2008, the prosecution presented its evidence to the first pre-trial chamber, requesting that it issue an arrest warrant against Omar Al-Bashir, to face 10 charges including genocide, war crimes, and crimes against humanity, to argue the public prosecution that Al-Bashir ordered the Sudanese armed forces, working with the Janjaweed militia, to attack hundreds of villages inhabited mostly by the Fur, Masalit, and Zaghawa groups, and to force 2.5 million people to be displaced and live in camps, and to be subjected to mental and physical harm, which constitutes the crime of genocide, according to Article 6 (b) of the Rome Statute, and subject them to living conditions intended to destroy them.

Then in 2009, the Pre-Trial Chamber I issued an arrest warrant for Al-Bashir to face 5 counts of crimes against humanity and war crimes for subjecting the Sudanese government in various parts of Darfur to:

1. Hundreds of thousands of civilians, mostly Masalit, Fur and Zaghawa groups, to forced transfers.
2. Thousands of civilian women, mostly from the aforementioned groups, to acts of rape.
3. Civilians, mostly from the aforementioned ethnic groups, to acts of torture.

In accordance with Articles 7(1)(a), (b), (d), (f) and (g) of the Rome Statute, and by a majority vote, the Pre-Trial Chamber refused to issue arrest warrants in relation to the charges of genocide due to a legal error. As a suitable solution, the Appeals Chamber decided to return this matter to the Pre-Trial Chamber to make a new decision using the correct standard of evidence. It then returned and issued a second arrest warrant for Al-Bashir, including the charge of genocide in its three forms: extermination (by killing, causing serious harm to mind or body, and intentionally inflicting conditions of life calculated to bring about actual death), as the Court concluded That there are reasonable grounds to believe that Omar al-Bashir acted with specific intent to destroy, in part, the Fur, Masalit and Zaghawa ethnic groups¹.

¹ ICC pdfs. (N.D). Twenty-third report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Council resolution 1593 (2005). Retrieved from: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/23-otp-rep-UNSC-darfur_ARA.pdf

Despite the issuance of arrest warrants against Omar al-Bashir since 2009 and 2010, he remains free, and the case is still pending in the pre-trial stage, as the court does not try individuals unless they are present in the courtroom¹. The Rome Statute states that all states parties to the court are obligated under international law to arrest al-Bashir if he enters their countries. However, during his presidency, al-Bashir visited the Central African Republic, Uganda, Kenya, Egypt, Jordan and other countries extensively throughout Africa without being arrested in any of them, and in none of these countries did he face arrest².

2. Comparative Analysis

1.2 Comparison of Political Factors in Palestine and Ukraine

In the first chapter of the study, the researcher provided an explanation and analysis of the political factors affecting the role of the ICC in the two cases of Palestine and Ukraine in terms of international influence, the role of the parties to the conflict themselves, and regional and international pressures on the court. Despite the difference in the nature of the conflict in the two cases, there are many factors that were similar between the two cases, considering that the same institution is the cornerstone in both cases and in this study. In this chapter, the researcher provides a comparison between these factors in terms of similarity and difference and the reasons for this similarity or difference in the two cases.

One of the political factors that influenced the immediate start of the investigation into the Palestinian case after the Palestinian Authority referred the Israeli crimes committed in the occupied Palestinian territories since 2014 was Israel's opposition to the court exercising its jurisdiction over the occupied Palestinian territories. The court took a long time to prove this through the written memoranda it requested from the parties, but Israel did not cooperate in this either, as it is not a party to the court and completely opposes its intervention and exercise of its role in its crimes committed. This political factor was influential in the period and time that the court took not only to start the investigation but also to prove its jurisdiction, which led to the court's slow implementation of its procedures and its arrival at any actual and applicable results or

¹ ICC-02105-01109.

² Human rights watch. (4/3/2009). ICC Decision on Omar al-Bashir Arrest Warrant (Ibid).

decisions on the ground with regard to Palestine and the Israeli perpetrators of crimes, unlike what happened in the Ukrainian case, where the reason behind Ukraine's acceptance of joining the Rome Statute and its membership in the ICC was to open an investigation into the Russian crimes committed on Ukrainian territory. The investigation began immediately after Ukraine joined the Statute without the need to prove any territorial jurisdiction, despite Russia's non-membership in The Charter and its opposition to the court playing its role¹.

The researcher attributed the reason for this in the first chapter of the study to political factors related to international and strategic interests and the influence of major countries on the role of the court, especially the permanent members of the Security Council. Considering Israel as an ally and representative of American interests in the Middle East, the United States in the Palestinian case was pressuring the court and obstructing its efforts by threatening members of the court with arrest and revoking entry visas to the United States and adopting hostile speeches against it in the Palestinian case and its role against Israel's crimes in the occupied territories. However, its position was completely opposite when the court issued requests for arrest warrants against Putin and other Russian leaders. The court welcomed these decisions and praised the court's performance of its duty and supported its efforts.

This difference in this political factor and the American support for the criminal decisions in Ukraine against Russia and its opposition and even the prevention of it from playing its role in Israel is due to the unipolar system prevailing in the world at the present time in favor of the USA, considering Israel an ally of the USA in the Middle East, so tightening the legal noose on its practices or the international description of its policy as war crimes and in violation of international law means undermining its interests and goals, even at the legal level, which leads to a negative impact on international relations with Israel with the rest of the countries in the event that they respond to the court decisions, which means a decline in the interests of the USA in the Middle East. As for its support and its negative stance towards Russia and the criminal decisions against the Russian leadership, the court's implementation of these decisions would undermine Russia's interests and its relationship with other countries when they

¹ France24. (30/4/2024). Moscow calls Washington a 'hypocrite' for opposing the ICC investigation into Israel. Retrieved from: <https://tinyurl.com/ynmpkv6w>

respond to the court, which would enhance the unipolarity in the world, and the continued control of the US over international politics, the economy, and other interests, given that Russia is the United States' equal in the Eastern Bloc, and any rise in any of the fields means a decline or undermining of the US in it, so the US seeks to enhance its unilateralism and continue to control the performance of this legal institution in its favor and legitimize what is in its interest and prevent what is not.

We also see in both cases the refusal of the perpetrators to cooperate with the court, whether Russia or Israel, arguing that they are not parties to the Rome Statute or members of the court, and their efforts to prove that the court does not have jurisdiction over them because they are not parties, and their protest as well that the court interferes in the internal affairs of states and their protest as well that the defendants possess judicial immunity. These factors constitute a point of similarity between the two cases, and the two states cling to the argument that the practices and violations they are committing are merely an application of the right to self-defense, and should not be described as war crimes.

As for the case of referring cases to ICC through the Security Council or issuing Security Council resolutions that would condemn the perpetrators in the Ukrainian and Russian cases, the researcher found that both countries are similar in their treatment of this authority. Although Israel is not a permanent member of the Security Council, its primary supporter, the USA, always seeks, through its possession of the veto power, to abort any decision that would condemn its ally Israel. This is the same thing that Russia does as a permanent member of the Security Council. It also uses the same right against any decision in which the Council condemns Russia. It will certainly not condemn itself, and it will, like the US, use its veto power and authority as a permanent member to prevent any decision issued by the Security Council that is not in their interest. Thus, this veto power in the Security Council constitutes a major loophole in the work of the ICC and its performance of its role in holding perpetrators of international crimes accountable individually, and in the performance of the Security Council as an international body and its mission to maintain international peace and security. This is the same loophole in the two cases under consideration, the Palestinian and Ukrainian cases.

2.2 Comparison of Legal Challenges in Both Cases

Among the legal challenges facing the Palestinian and Ukrainian cases are Article 13/c of the Rome Statute, which gives the Security Council the authority to refer cases of international crimes committed to the ICC, as well as Article 16, which gives the Security Council the ability to suspend the work of the court for a period of up to 12 months, with the possibility of renewing it so that the court cannot initiate any procedure or investigation for a period of 12 months if the Security Council requests it, and the Council can tighten the request under the same conditions. This authority granted to the Security Council in the two cases in question has affected the independence of the court in its performance and procedures, and has enabled both Russia and the US, which supports and is allied with Israel, to drown out the court's efforts by pressuring it and exploiting their powers in the Security Council to gain more time and procrastinate in taking action and issuing a ruling, as both Russia and Israel, through the support of the US, seek to circumvent these powers granted to them under the UN Charter, and under the principle of immunity to use them to protect their nationality from any judicial prosecution, and the possibility of renewing requests for this period of up to 12 months enables these countries to Denying any conditions that apply judicially to perpetrators of international crimes during this period, and giving them the ability to renew it for another 12 months, so that this is very similar to the veto power that they enjoy, which they will employ, as well as the political factors in the previous requirement, to serve and protect strategic interests that enhance the powers of these countries in controlling international justice, and make this type of court work under the principle of selective justice, and imposing the justice of the strongest, to serve specific political and economic interests, which is the same point and challenge that the two cases discussed in terms of Russia and the US share in favor of Israel.

Russia and Israel also invoked the principle of sovereignty and the Court's interference in their internal affairs, and the principle of complementarity, which gives national courts priority over international courts, meaning that these countries can escape punishment under the pretext of domestic investigations and trials, albeit ineffective, and that these courts do not adhere to international standards in cases related to human rights.

The continuation of the conflict and its failure to reach a solution or a path to form a common legal challenge between the Russian and Ukrainian cases, represented by the long legal period for investigation and inquiry procedures in the conflict areas due to the lack of security in the two regions, in light of the ongoing Russian-Ukrainian war, the continued violations of international law by the occupation in the West Bank, and the Israeli aggression on the Gaza Strip. These ongoing conflicts and the situation within the spatial and judicial jurisdiction of the court make it difficult to implement the court's procedures, prolong the time period for the procedures, and delay the investigations from reaching any actual results that lead to the issuance of actual orders, or even make it difficult to implement the orders when they are issued, which prolongs the duration of the criminal lawsuit. Russia and Israel also share the fact that they are not members of the Rome Statute and their failure to commit to the necessity of cooperating with the ICC, and their reservations on this principle even if they are not members of the court, and their failure to respond to any arrest warrants or extradition orders, or to provide the necessary evidence and documents. Rather, the governments of these two countries are working to cover up and cover up their leaders and circumvent the law by not committing to international crimes or war crimes that require accountability. What these two countries are following is A legitimate right to defend oneself increases reliance on selective justice.

Despite the speed of proving jurisdiction over Ukrainian territory immediately after Ukraine joined the Rome Statute, the court still cannot exercise its jurisdiction over Russia in the crime of aggression due to the need to refer this crime through the Security Council, which Russia prevents from happening. However, what differs between the Ukrainian and Palestinian cases is that proving jurisdiction over the territories under its jurisdiction in Ukraine does not constitute a challenge in the Ukrainian case, unlike the Palestinian territories, which needed many years to prove jurisdiction over the crimes committed in the referred case. This challenge is due to the influence of political factors that the researcher explained in the previous section and the first chapters of the research.

Financial challenges were a common factor in most of the cases referred to the ICC including the two cases in Ukraine and Russia, as these cases and their investigations require huge sums of money, amounting to hundreds of millions of

dollars, as did other judicial precedents in Rwanda and Yugoslavia. The Criminal Court deducts these sums from the United Nations budget, which prefers to use these sums and employ them in humanitarian and relief programs, especially in light of the results of previous investigations that did not reach results that could be described as real, or even achieve one of the court's goals regarding these cases, or even reduce their intensity.

In the midst of writing this letter, and after a long delay by the ICC in taking any real step towards the situation in Palestine, the Criminal Court issued arrest warrants on 21-11-2024 for both parties in Palestine and Israel, in response to the dangerous escalation of the situation in the aggression on the Gaza Strip, and the continued rise in levels and escalation in the West Bank and East Jerusalem, where the first preliminary chamber of the ICC issued arrest warrants against Israeli Prime Minister Benjamin Netanyahu and former Israeli Defense Minister Galant. On the other hand, the same chamber issued an arrest warrant against Muhammad Diab Ibrahim al-Masri, known as al-Daif, and would have issued two additional arrest warrants against the heads of the political bureau of Hamas, Ismail Haniyeh and Yahya Sinwar, if they they had not died before these warrants were issued, as they were among the names that the Prosecutor of the Court had requested from the Pre-Trial Chamber to issue arrest warrants against them. Also, he had informed the chamber that it was still unclear whether Daif had been killed or was still alive.

The court did not make the crimes listed in the arrest warrants available to the public in detail, in order to protect witnesses and protect the progress of the investigations. It stated that there were other secret arrest warrants that had not yet been made public, in order to take into account the interests of the victims. The court believes that the situation in Israel and Palestine is governed by the law of international armed conflict, as both parties are parties to the Geneva Convention of 1949, while the fighting between Israel and Hamas is subject to the law of non-international armed conflict¹.

Accordingly, on 21-11-2024, the Pre-Trial Chamber I issued a unanimous decision rejecting the appeal filed by Israel under Articles 18 and 19 of the Rome Statute, and two arrest warrants against Netanyahu and Galant, including the

¹ 2023-2024 Hostilities and Escalating Violence in the oPt | Legal Updates. (2024). Diakonia international humanitarian law center

commission of crimes against humanity, and crimes from at least 28-10-2023 until at least 20-5-2024, where the Chamber found reasonable grounds to believe that Netanyahu and Galant bear criminal responsibility for the war crimes of starvation as a method of warfare, and the crimes against humanity of murder, persecution and other inhumane acts, and intentionally directing attacks against the civilian population. The Court concluded that the alleged conduct of Netanyahu and Galant related to the activities of Israeli government bodies and armed forces against the civilian population in Palestine and Gaza. The Chamber found that the alleged crimes against humanity were part of a widespread and systematic attack against the civilian population in Gaza. The Court also found that both individuals deprived the civilian population in Gaza of materials indispensable to their survival, including food, water, and supplies, Medical, pharmaceutical, fuel and electricity, at least during the period mentioned; for their role in obstructing humanitarian aid and violating international humanitarian law, in addition to their behavior in disrupting the ability of humanitarian organizations to provide food and other essential materials to the needy population in Gaza, in addition to cutting off electricity and reducing fuel supplies, which severely affected the availability of water in Gaza and the ability of hospitals to provide medical care, as the court did not find any reasonable grounds or clear and justified military need for any of the restrictions on humanitarian relief operations, and the failure to fulfill the obligations of international humanitarian law, despite warnings from the UN'S Security Council, states, governmental organizations, and civil society organizations regarding the humanitarian situation in Gaza, as the Chamber found that Netanyahu was the one who linked the cessation of basic goods and humanitarian aid to the objectives of the war, the court found that these measures were aimed at creating living conditions intended to destroy part of the civilian population in Gaza, which led to the death and punishment of civilians, including children, due to malnutrition and dehydration, and with regard to the issue of the court's jurisdiction over Israel, the court found that it was not required because the court can exercise its jurisdiction on the basis of the territorial jurisdiction of Palestine¹.

¹ ICC official site. Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant. (21/11/2024). Retrieved from: <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>. On: (25/11/2024)

In the same context, and as previously mentioned by the researcher, the first pre-trial chamber of the court unanimously issued an arrest warrant against Mr. Muhammad Diab Ibrahim al-Masri, known as al-Daif, on charges of committing crimes against humanity and war crimes on the territory of the State of Israel and Palestine as of at least 7/10/2023. The chamber withdrew the requests to issue arrest warrants against Ismail Haniyeh and Yahya Sinwar after confirming their deaths, as the chamber found reasonable grounds to believe that al-Daif, the supreme commander of the military wing of Hamas, the “al-Qassam Brigades,” is responsible for crimes against humanity, genocide, torture, rape and other forms of sexual violence, as well as crimes of murder, cruel treatment, hostage-taking, and outrages upon personal dignity. The Chamber found that there were reasonable grounds to believe that Al-Dhaif bore criminal responsibility for:

1. Committing the acts jointly and through others.
2. Ordering and inciting the commission of crimes.
3. Failing to exercise proper control over the forces under his command, and his effective control.

The Chamber found reasonable grounds to believe that senior Hamas leaders, comprising Al-Dhaif, Sinwar, and Haniyeh, had approved the implementation of the October 7 operation jointly, as part of a plan that included targeting military and civilian targets in Israel, and war crimes of intentionally directing attacks against the civilian population, and war crimes of hostage-taking, sexual violence, inhuman or degrading treatment, crimes of torture, and rape as war crimes, and crimes against humanity, where the Chamber considered that Al-Dhaif ordered or incited the commission of the aforementioned crimes, or that he was responsible as a military commander for the criminal conduct of his subordinates, and a crime against humanity¹.

Accordingly, despite the issuance of these decisions in the midst of writing this letter, and the researcher’s talk about the double standards of the ICC in dealing with the Ukrainian and Palestinian cases, this duality and the influence of political factors on the

¹ ICC official site. Situation in the State of Palestine: ICC Pre-Trial Chamber I issues warrant of arrest for Mohammed Diab Ibrahim Al-Masri (Deif). (21/11/2024). Retrieved from: <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-issues-warrant-arrest-mohammed-diab-ibrahim>. On: (25/11/2024).

court are still apparent even after the issuance of these decisions and arrest warrants. This duality appears in:

1. The Discrepancy in the Speed of Investigations and Procedures

The ICC began investigations with the necessary speed immediately after the start of the conflict and immediately after Ukraine joined the Rome Statute and ratified it. Ukraine had joined the Court's Charter in 2022 and ratified it, and the arrest warrants against Putin and Levova were issued in 2023, which is considered a quick, short, direct and immediate period in the investigation, issuing the decision and achieving the desired goal of Ukraine's accession to the court. In contrast, in the Palestinian case, the issuance of these warrants took many years after Palestine joined the Charter, despite the existence of documented allegations regarding serious Israeli violations in the occupied Palestinian territories. However, the court took more than 12 years since Palestine joined the Charter to issue arrest warrants against Israeli leaderships who are responsible for these violations, which gives the impression of an imbalance in the court's priorities. The court also worked in the Palestinian case to equate the criminal with the victim, as the court issued an arrest warrant against Muhammad al-Deif, who was charged with committing war crimes and crimes against humanity in Israel and Palestine. The court equated the leaders of the Israeli government, which is internationally supported by the economy and weapons, especially by the USA, and which carries out systematic and deliberate military operations in the Gaza Strip for declared military objectives, with the leader of a military wing of a Palestinian movement that aims to implement the right of occupied peoples to armed struggle stipulated in more than one international document resolution that the researcher explained previously. The court even claimed that he committed crimes not only in Israel, but also on Palestinian lands.

2. The Court's Selectivity in Cases Regarding the Situation in Palestine

Even after the Court took all this time to make a new decision regarding Palestine, the Court focused on certain cases at the expense of others. The Court addressed the crimes, war crimes, and crimes against humanity committed in Gaza, and issued arrest warrants for the leaders responsible for them, while ignoring the crimes committed in both the West Bank and the East Jerusalem, despite them falling under the jurisdiction

of the Court. It focused on the crimes committed in the Gaza Strip, and neglected, for example, crimes related to settlements, home demolitions, and the oppression of the residents of the West Bank and East Jerusalem, and the legitimacy of the annexation and expansion wall, as none of these charges were brought against the Israeli leaders, unlike its handling of the situation in Ukraine, which it dealt with comprehensively and quickly, as the researcher previously mentioned. The charges reached Maria Levova, the Commissioner for the Rights of the Child, which means that the arrest warrants covered all aspects of the Ukrainian case.

3. Continuing Political Pressure on the Court

Especially the USA, which issued this decision shortly after its former president, Donald Trump, won the US elections again, and is awaiting the end of the transition period to power in early 2025. The US, like Israel, does not recognize the jurisdiction of the ICC, unlike European countries that are an integral part of the Rome Statute. This exposes these countries and their relations with Washington to pressure and a major test when they comply with the ICC decision regarding Galant and Netanyahu, especially after the European Union's chief diplomat, Josep Borrell, announced that the arrest warrant is not a political decision, but rather court decisions that must be respected and implemented. Accordingly, a number of European countries, including NATO members such as France, Belgium, Turkey and the Netherlands, have pledged to support the ICC's ruling and defend its independence, Because the court's issuance of arrest warrants against Netanyahu and Galant means that 125 member states are now legally required to arrest Netanyahu if he sets foot on their territory, making him an international outcast, which will force him, as Putin did previously, to reduce his foreign travel, after the countries announced their compliance with the decision. However, the position of the US and the Republicans was completely opposite to the European position, as Republican Senator Lindsay Graham threatened that Washington could impose sanctions on countries cooperating with the ruling, and described the court's decision as shameful despite the US' previous support for its decision to issue an arrest warrant against Russian President Putin. Graham threatened the European countries that countries that support the court's reckless efforts will be on the wrong side of the United States, and he said that he has enough votes to pass legislation to punish the court next year, after the Republicans take control of the White House, the Senate, and the House of Representatives after Trump takes governance, as Graham is

expected to respond quickly and in the interest of the US and Israel, which means that American-Israeli interests will continue to converge, even after the arrest warrants are issued, and the US stands in the way of the court, and seeks to impose sanctions on it, And confronting those who cooperate with it as well, as President Trump himself did when he imposed sanctions on some ICC's officials in 2020, due to their opening of an investigation into violations by American forces in Afghanistan, until the court reversed its decision, and the US had already isolated ICC and its senior officials from the American banking system through sanctions, which will affect their European bank accounts and lead to their paralysis¹.

Thus, we conclude that US is still insisting on its position of support and standing with Israel, and confronting everything that poses a threat to its interests, even after the Court issued a decision to convict its prime minister, and its efforts to pressure the court to impose sanctions on it and on those who cooperate with it, in an attempt to overthrow the court, or cancel its decisions against Israel, which could be achieved if these pressures on the court continue.

4. The court's decision ignores fundamental issues in the Palestinian case

As previously mentioned in the research, Palestine joined the court and the court began exercising its jurisdiction over its territory in 2014, which means that crimes committed on the territories under this jurisdiction since that year fall within the jurisdiction of the court. These crimes include the continued expansion of settlements on the lands of the West Bank, the restrictions on the residents of East Jerusalem, preventing them from accessing their places of work and homes, the deliberate killing of civilians in the West Bank, the annexation and expansion wall, and other Israeli crimes that fall within the jurisdiction of the court, especially the crime of settlement, which is considered a clear war crime in international law. However, the court's decision ignored all these crimes and focused only on the crimes committed in the recent aggression on the Gaza Strip. The arrest warrants did not even include the charge of forced displacement of the population in the Gaza Strip, despite the clear evidence of its occurrence, the testimonies of civilians, and the reports of international organizations affiliated with the UN and other international organizations such as Amnesty

¹ Al Minshawi, Mohamed. (22/11/2024). US threatening messages to Europe for supporting the "criminal" decision against Israel. Retrieved from: <https://shorturl.at/k1FFo>. On: (25/11/2024).

International. The court decided to ignore all these cases and not give their files priority compared to the charges against the Russian perpetrators of crimes in Ukraine, which included the illegal deportation and forced transfer of the population and children.

Also the charges mentioned in the arrest warrants for Netanyahu and Galant contradict the circumstances of the genocide in the Gaza Strip, and the ICJ's investigation into it until it is proven and takes precautionary measures until the circumstances of the genocide are investigated after the lawsuit filed by South Africa to the ICJ. The ICC did not address the charge of genocide in the crimes of both Netanyahu and Galant, despite the circumstances of its occurrence at the ICJ. Despite the genocide occurring within the jurisdiction of the ICC and the Rome Statute, and the circumstances and evidence of the commission of these crimes, the ICC did not direct them at either Netanyahu or Galant, which also means a contradiction in ICC's selection of the cases it will cover.

Conclusion

After the researcher analyzed the response of the ICC Court to the Ukrainian and Palestinian cases, the researcher reached the following results:

1. There are indeed political factors and international pressures that affect the performance of the ICC and the course of its legal procedures
2. The court gives consideration to the factor of pressure from major powers in the world, especially the USA, whose foreign policy towards Israel conflicts with the legal position of the Court
3. The legal period for proving territorial jurisdiction over the occupied Palestinian territories was affected by the period taken by the Israeli challenge to proving jurisdiction
4. The pressure of the USA and Israel's lack of cooperation with the court hinder the court's efforts to achieve justice in the Palestinian case
5. The court shows clear double standards in its response between the Palestinian and Ukrainian cases
6. Evidence indicating double standards in the Palestinian and Ukrainian cases are:
 - a. The period of time taken to immediately initiate the investigation after Ukraine's accession to the Rome Statute and the long period of time in Palestine and the wasted years in proving territorial jurisdiction
 - b. The court was influenced by the US support for its decisions and the current unipolar world order regarding Ukraine, and the US praise for the court's performance in Ukraine, its opposition to it, and its attempt to impose sanctions on it for its decisions in favor of the Palestinian case.
 - c. The court's performance regarding the Ukrainian case included visits to the places of harm, and the prosecutor himself visited these places, which is what he did with the places of the October 7 attacks to prove their harm to Israel, while no visits were made to the places of harm to the Palestinians and it was sufficient to rely on statistics and witness testimonies.
 - d. The criminal court's response to issuing arrest warrants against both Netanyahu and Galant was delayed for more than ten years, while the court took less than one year to issue arrest warrants against the convicts in the Ukrainian case.

- e. The court's arrest warrants against Netanyahu and Galant ignored essential issues in the Palestinian case, namely the issue of settlement and expansion on the lands of 1967 and the wall case, and issues related to the West Bank and East Jerusalem, and its focus on the recent aggression on the Gaza Strip only, despite the fact that the crimes committed in these areas fall within its jurisdiction and it does not give them priority, while in the Ukrainian case, the arrest warrants covered all aspects of the Ukrainian case, which means that the court is selective in the issues it will cover in the Palestinian case.

Recommendations

At the end of this research, the researcher recommends the following:

- 1) Enhancing the transparency of the Court's work by publishing periodic reports that explain how the Court makes its decisions and the foundations on which it relies in selecting cases.
- 2) Expanding the scope of the Court's membership to include major countries that are not parties to the Rome Statute, such as the USA and Russia, and pressuring these countries to join the Charter to ensure the comprehensiveness of the Court's jurisdiction.
- 3) Strengthening the independence of the court by enacting laws that would strengthen international and legal protection for judges and prosecutors
- 4) The court should deal in a balanced manner with international cases by including investigations of parties involved in conflicts, regardless of their geographical location or political influence
- 5) The necessity for Palestinian foreign policy actors to publish periodic reports on the Palestinian situation and Israeli violations in the occupied Palestinian territories that fall within the jurisdiction of the court
- 6) Securing independent funding for the court away from political pressures from donor countries and providing sufficient human and technical resources to ensure that the court covers all aspects and cases through cooperation with other international organizations
- 7) Reviewing the referral system to the court and limiting the exploitation of the UN Security Council's right to referral and working to find more democratic referral mechanisms with broader participation from countries

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دور المحكمة الجنائية الدولية في تحقيق العدالة: دراسة مقارنة بين القضيتين الفلسطينية والأوكرانية

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ملخص

تهدف هذه الدراسة إلى تحليل العوامل السياسية المؤثرة على إجراءات التحقيق القانوني في المحكمة الجنائية الدولية، وتناول القضيتين الأوكرانية والفلسطينية أمام المحكمة الجنائية الدولية لتحديد الاعتبارات التي تستند إليها المحكمة في إجراءاتها وقراراتها بشأنهما. تمثلت مشكلة البحث في تحليل دور المحكمة الجنائية الدولية في القضيتين من خلال مقارنتهما من حيث العوامل والاعتبارات المؤثرة في أداء المحكمة تجاههما. وتكمن أهمية الدراسة في تقديم تحليل شامل ومقارن للتحديات والعوامل المؤثرة في القضيتين محل الدراسة، وإبراز أثر هذه العوامل على السلم والأمن الدوليين. اعتمد الباحث على المنهجين الوصفي والتحليلي للوصول إلى نتائج الدراسة، والتي كان من أهمها وجود عوامل سياسية مؤثرة على أداء المحكمة وإجراءاتها القانونية في ظل الهيمنة الأمريكية ونظام القطب الواحد السائد في العالم، وأن المحكمة تُظهر ازدواجية معايير واضحة في تعاملها مع القضيتين الفلسطينية والأوكرانية من حيث المدة الزمنية التي استغرقتها للرد على القضيتين، والنفوذ الأمريكي الداعم لعملها في أوكرانيا والمعارض له في فلسطين، ومن حيث شمولية مذكرات التوقيف الصادرة بحق المجرمين على الجرائم المرتكبة. وأوصى الباحث بضرورة تعزيز شفافية عمل المحكمة من خلال نشر تقارير دورية توضح طبيعة قراراتها وآليات اتخاذها للقرارات، وضرورة الضغط على الدول غير الأعضاء في المحكمة للانضمام إلى نظام روما الأساسي، وخاصة الولايات المتحدة الأمريكية وروسيا، وسن قوانين تعزز استقلالية المحكمة عن القوى الدولية.

الكلمات المفتاحية: المحكمة الجنائية الدولية، فلسطين، أوكرانيا، العوامل السياسية.