THE PALESTINIAN GENOCIDE UNDER THE EYES OF THE ICJ AND THE ICC

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INTRODUCTION

What is a genocide? Can the same situation be judged in different manners? Both the International Court of Justice (hereinafter the ICJ) and the International Criminal Court (hereinafter the ICC) have publicly announced their commitment to end the impunity of those who do not stand by their obligations. The attacks committed by Hamas in October of 2023 against the Israeli population aggravated the ongoing offensive against the Palestinian inhabitants, where the situation is devastating, with no precedents as grave as today's. The simultaneous case treatment of the Palestinian conflict in the ICC and the ICJ reflects the similarities, relationship and perspectives that can be recognised depending on which bench the judge is sitting.

The atrocities committed by Israeli authorities have created a response and a firm condemnation by many states, yet the international community has not been able to put an end to the breaches of international law, nor has the support to the Israeli military attack ceased. Why has not there been more robust opposition to these acts? Why is it that the international courts have not been able to punish the acts? The willingness of action of the international community has always been construed and limited by state sovereignty, and thus, it is intrinsically linked to national interests and politics. Nevertheless, there is a growing global awareness and a powerful movement among civil society that highlights the international community's vigilance. People around the world are increasingly active in advocating for Palestinian rights, putting pressure on their national governments and international organisations to take meaningful action. This societal engagement reflects a collective demand for accountability and justice, transcending political barriers. Will this pressure be reflected on the judicial proceedings? Is there a court for Palestine?

The Palestinian people have been forcibly removed from their towns and villages for the past 75 years, but this ethnic cleansing has now evolved into a widespread genocide. This paper will try to demonstrate that what the Israeli soldiers are doing in the Gaza Strip at the moment is nothing but a textbook example of genocide. First, it will shortly address the historical background of both courts. After that, the procedural analysis of the ICJ and the ICC will give insight into how each of them functions, and more importantly, which barriers and obstacles Palestine faces before them. Finally, the last sections of the paper will support the position that there is a genocide taking place in Gaza, concluding with critical reflexions about the current scene.

1. THE EMERGENCE OF INTERNATIONAL JUDICIAL BODIES AND HISTORICAL BACKGROUNDS

Throughout history there has been a balancing exercise between the interests of individuals and the community as a consequence of the continuous efforts in international law to overcome the conventional frameworks of bilateralism and give way to the formulation and pursuit of common (public) interest. This evolution can be summoned as a shift from bilateralism towards multilateral community interests, where the reciprocal legal relations based on State sovereignty and their *domainée reservée* have been progressively succeeded by a 'consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognised and sanctioned by international law as a matter of concern to all States'[1]. The historical and political momentums of both births of the ICJ and the ICC have reflected such urgent commitment to better protect those values in their respective Statutes, yet in quite different manners[2].

1.1. ICJ: PICJ AND THE ANNEX OF THE ICJ STATUTE

The ICJ Statute relied on its previous precedent, specifically the Statute of the Permanent Court of International Justice (PCIJ)[3]. Despite being the brainchild of the League of Nations, the PCIJ was not included into the League itself, as contrary to the ICJ's position within the legal order. The Statute of the PICJ was of a voluntary character for League of Nations member states, requiring them to explicitly consent to the court's jurisdiction[4]. Thus, each member could decide if it could be tried or not. The new international court was not created until 1946, and the ICJ Statute's structural link to the UN Charter[5] was a significant novelty, as this new judiciary body was integrated into the United Nations as an annex, with its Statute[6] serving as a crucial component of the UN Charter[7].

[1] Kaul, H., & Chaitidou, E., "Balancing individual and community interests: Reflections on the International Criminal Court", *Oxford University Press,* 2011, 975.
[2] *Ibid.*
[3] League of Nations, *Statute of the Permanent Court of International Justice*,16 December 1920.
[4] Cançado Trindade A.A., "Statute of the International Court of Justice", accessed on (2024/06/10) from the website of the United Nations Audiovisual Library of International Law pages 1-2.
[5] United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945.
[6] United Nations, *Statute of the International Court of Justice*, 18 April 1946.
[7] Cançado Trindade, *supra* note 4.

Thus, this novelty entailed an advancement for global engagement as the United Nations Charter itself has the ICJ Statute attached to it. The link between the ICJ and the UN is strengthened by the Article 92 of the Charter, recognising that *'the International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter"*[8].

1.2. ICC: ICTY, ICTR AND THE ROME STATUTE

Despite the atrocities that took place during World War II, there was no agreement to establish a permanent, standing court with such features for these types of breaches until 1998, when it was agreed that punishing the officials that committed those breaches leads to greater enforcement of international (criminal) law. Hence, there was finally a preference to prosecute those individuals rather than to indict a state as a whole in view of the failures of previous efforts that resulted insufficient in avoiding world scale conflicts. There was a moral aspect of reaching peace through justice.

The first little steps towards these aims were taken with the Treaty of Versailles and Kaiser Wilhelm II's guilt for '*supreme offence*' against peace — but turned out unsuccessful as he fled to exile to the Netherlands. The Treaty of Versailles actually did foresee the possible prosecution of the Kaiser for Germany, as there was a provision to prosecute an individual for the crime of aggression. Adding to that, it also had a war guilt clause declaring the German state to be criminally responsible for starting WWI, so that the treaty at that time comprised negative consequences for both individual and state decisions. It could be said that this was one of the first glances of concurrence between individual and state responsibility.

In the aftermath of WWII, the Nuremberg and Tokyo Tribunals were set up to prosecute Axis officials. These two tribunals were entrusted with jurisdiction over crimes against peace: aggression, crimes against humanity, and war crimes, and furthermore, both could also issue 'declarations of criminality' against officials[9].

[8] *Supra* note 6, Article 92.
[9] Critical perspectives view these as victorious state impositions because they were established and controlled by the Allied powers, who unilaterally set the terms and conducted the trials to prosecute Axis leaders for war crimes, thus reflecting the victors' dominance and justice.

As opposed to the ICJ's *modus operandi* and judicial mandate, the *criminal tribunals* tried a number of high-ranking officials and military commanders as individuals, thus, states such as Japan or Germany were not held responsible for international crimes.

The legal landmarks of the Nuremberg and Tokyo Tribunals were followed by two other fundamental contributions to the prosecution and punishment of international criminal crimes: the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) *ad hoc* tribunals. The Security Council passed resolutions to create distinct tribunals over crimes in former Yugoslavia[10] and Rwanda[11], which were responses to specific circumstances and events (fast forward Cold War and the revitalisation of the SC and its innovative powers under Chapter VII). In one of its exercises, in the name of repairing a breach of international peace and security, the SC saw fit to establish two unprecedented international criminal tribunals.

Not without debate on whether the UN itself had the ability to legitimately create a tribunal when the Security Council itself did not have any judging powers (acting *ultra vires*), the ICJ answered positively in the *Tadic judgment* based on three different arguments. First, that the SC has a broad discretion on determining the appropriate response to a breach of peace and security; second, because Chapter VII binds even Yugoslavia, and last, it was not breaching any *jus cogens* or international customary laws in doing so[12].

These bodies made major contributions to developing international criminal law and notions such as command responsibility, classification of conflicts, treatment of evidence and the conduct of procedure. Both *ad hoc* tribunals' case law has contributed significantly to the core crimes under their jurisdiction, relevant for the future international criminal proceedings, which are at the present being unveiled again. Nevertheless, the international community revealed certain flaws in providing the necessary means to create a strong and wholly functional body: temporary character of the tribunals, accusations of bias, problems with procedure, disputes in the understanding of international law… Have these weaknesses flourished in the conflict in Gaza? Even more, have they ever disappeared? Can they be erased?

[10] On 25 May 1993, the Security Council adopted Resolution 827 (S/RES/827) without a vote; the ICTY Statute is annexed to this Resolution.
[11] On 8 November 1994, the Security Council adopted Resolution 955 (S/RES/955) to which the ICTR Statute was annexed.
[12] P*rosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.

Hence, in this exceptional situation, the only viable solution seemed to create a permanent independent international court so as to ensure the prosecution of the most grave and heinous crimes[13]. If judicial proceedings are a way to move past the conflict, then the international community should develop other more permanent mechanisms. It was in that sociopolitical context that discussions to create the ICC began, which led to the birth of the Rome Statute[14], and with that, the ICC[15].

Nowadays, the international judicial framework is leaded by two worldwide courts, which are the ICJ, and the ICC. The kind of responsibility that emanates from the breach can be classified either as state responsibility (ICJ), or to the contrary, as individual responsibility (criminal in the case of the ICC). Which is the aim that has each court been entrusted to fulfil? The response to this question can be deducted by analysing the purpose, sense and object of each of them. After the Hamas attacks in October 2023, the policies led by Israeli prime minister Benjamin Netanyahu have gained the attention of the whole globe, which has also activated the legal machinery for possible international law breaches, where our two main characters have the opportunity to shed light on the matter.

2. THE INTERNATIONAL COURT OF JUSTICE (ICJ): INTERSTATE DISPUTE RESOLUTION

The jurisdiction of the Court is defined in Article 93 of the Charter of the United Nations and in Articles 34 to 37 of the Statute of the Court.

The ICJ is the principal judicial organ of the United Nations (Art. 1 ICJ Statute), and it may entertain two types of cases:

a) legal disputes between States submitted to it by them, the so-called contentious cases (Chapter II ICJ Statute) and
b) requests for advisory opinions on legal questions referred to it by United Nations organs and specialised agencies, which are the advisory proceedings that result in advisory opinions (Chapter IV ICJ Statute).

[13] Kaul and Chaitidou, supra note 1, pages 976-979.
[14] *Rome Statute of the International Criminal Court (last amended 2010)*, International Criminal Court, 17 July 1998.
[15] For more information on the relationship between the ICTY and the ICC see Drumbl, M., “Looking up, down and across: the ICTY’s place in the international legal order”, *Social Science Research Network*, 2003.

As far as the conflict and problematic of Palestine is concerned, the Court has made various contributions that have shed light on the matter, in special, the *Construction of a Wall* Advisory Opinion (2004)[16]. In this landmark opinion, the ICJ addressed the legality of Israel's construction of a barrier/wall in the West Bank. The court concluded that the construction of the wall was contrary to international law and called for it to be dismantled, while also emphasising the illegality of Israeli settlements in the occupied territories. Nevertheless, as analysing and considering thoroughly the effects and consequences of the ICJ literature in the Palestinian conflict throughout the years would be too extensive, this paper will focus only on the contentious case-adjudicating function of the Court.

2.1. JURISDICTION IN CONTENTIOUS CASES

2.1.1. JURISDICTION *RATIONAE PERSONAE*[17]

Article 34, paragraph 1, of the Statute provides that "[o]nly States may be parties in cases before the Court". Since its creation and beginnings, the ICJ's (and its predecessor, the PCIJ) authority has been subject to a significant *rationale* personae limitation: only States are permitted to file disputed matters to it[18]. Consequently, statehood is a *conditio sine qua non* for effective ICJ jurisdiction and peaceful unfolding of international disputes. Without any doubt, this is an element that has been extensively debated in the Palestinian case[19].

Based on this distinction, States entitled to appear before the Court may fall into one of these categories:

I) *States Members of the United Nations.* Article 35, paragraph 1, of the Statute provides that *the Court shall be open to the States parties to the Statute*. Under Article 93, paragraph 1, of the Charter of the United Nations, *"[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice".* This is the status of Israel since its admission on 11 May 1949.

[16] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 8 July of 2004, ICJ Reports 2004.
[17] *C.I.J. Annuaire-I.C.J. Yearbook 2018-2019,* pages 65-72.
[18] Cançado Trindade, supra note 4, page 9.
[19] Whitman, Charles F., "Palestine's Statehood and Ability to Litigate in the International Court of Justice", *California Western International Law Journal,* 2013, 44(1), Article 4, page 76.

II) *States, not members of the United Nations, parties to the Statute.* Article 93, paragraph 2, of the Charter of the United Nations provides that States which are not members of the United Nations may become parties to the Statute of the Court on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council[20]. There is doubt that the General Assembly would approve of Palestine's admission to the ICJ, but there is less certainty regarding the US using its veto authority to prevent the SC from receiving a favourable recommendation[21].

III) *States, not parties to the Statute, to which the Court may be open*. Under the terms of Article 35, paragraph 2, of the Statute (see also Rules, Art. 26, para. 1 (c), and Art. 41), the Court is also open to other States not parties to its Statute. This Article provides that the relevant conditions shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

The conditions applicable in such instances are currently set out in Resolution 9 (1946) adopted on 15 October 1946 by the Security Council, which stipulates that, in order to have access to the Court, a State not party to the Statute:

1) *must previously have deposited in the Registry of the Court a declaration by which it accepts the Court's jurisdiction*
2) *in accordance with the Charter of the United Nations and subject to the conditions of the Statute and Rules of Court, and*
3) *undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.*

It is under these conditions that Palestine filed its particular declaration on 4 July 2018, which states that *"it accepts with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes (1961), to which the State of Palestine acceded on 22 March*

[20] Pitta, M., "Statehood and Recognition: the Case of Palestine", *CEI international affairs, Universitat de Barcelona,* 2018, vol 6, page 32.

[21] It is important to highlight that a debate exists about whether the admission to the ICJ Statute is a procedural matter. If it is, then the affirmative vote by nine members of the SC would allow Palestine to join the ICJ Statute. If it is not, therefore all the permanent members can exert their veto power. Obviously, US is a supporter of the second interpretation, and this is a huge obstacle for Palestinian chances to enter the ICJ.

2018". The implications this declaration may or not potentially have will be addressed later in this theoretical framework.

2.1.2. JURISDICTION *RATIONAE MATERIAE*[22]

The States to whom the Court is open in contentious cases have to ratify the Court's jurisdiction, thus, the manner that a matter can be brought before the Court depends on how this consent is stated:

1) Special agreement: this provision is applied to the litigation of already existing disputes.

First, the Statute's Article 36.1. states that "*all cases which the parties refer to it*" fall under the Court's jurisdiction. As a result, the parties consent to the court's jurisdiction for the duration of the case and to submit an ongoing dispute to the court.

2) Treaties and conventions

Article 36.1. of the Statute also provides that the Court's jurisdiction comprises *"all matters specially provided for… in treaties and conventions in force",* which is also referred to as a 'compromissory clause'. Considering the several multilateral treaties and conventions in force, couldn't this be applied to the matter in question?

3) Declarations recognising the jurisdiction of the Court as compulsory

The third way in which a State may recognise the Court's jurisdiction is laid out in Article 36.2., provided that the State declares the jurisdiction of the Court as compulsory, in relation to any other State accepting the same obligations concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; or (d) the nature or extent of the reparation to be made for the breach of an international obligation.

It is obvious that one of the main central elements of the provisions is statehood, which is linked directly to consent, sovereignty and participation, which translates into the ability to litigate in the international courts. This is a rather unpleasant scenario for the Palestinian State, but even so, not a dead end.

[22] *Supra* note 17*, pages 72-75.*

2.2. PALESTINE'S IMPOSSIBILITIES or OBSTACLES FOR LITIGATION: NON-UN MEMBER STATE

What is the current situation for Palestine if it wants to bring Israel policies and its atrocities before the ICJ? Then why is it that proceedings have been instituted by South Africa and not by Palestine itself?

The question of Palestinian statehood has been debated by the international community for many years, specially after its admission as a member state to the United Nations Educational, Scientific, and Cultural Organisation (UNESCO)[23] and the UN General Assembly's recognition of Palestine as a "[*n]on-member State Observer"*[24]. How could, then, bring a dispute to the ICJ?[25] As a non-UN Member State, Palestine has three avenues to get a case before the ICJ:

1) First, Palestine could join the ICJ Statute without becoming a UN Member State.[26]

As stated before, it is possible to become a member to the ICJ Statute for a non-UN Member state if it meets[27] the criteria determined in each case by the General Assembly and acquires the recommendation of the Security Council. Joining the ICJ Statute would still serve a purpose to Palestine, even if UN membership is unattainable[28], as it would allow Palestine to litigate in the ICJ. Palestine currently has little prospect of gaining full membership in the UN due to the US veto. As a result, it must find alternative avenues to file a complaint against Israel before the ICJ without being given full UN membership.

2) Second, Palestine could bring a proceeding before the ICJ pursuant to Article 35(2) of the ICJ Statute[29].

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[23] On October 31, 2011, UNESCO admitted Palestine as a Member State. Press Release, General Assembly Grants Palestine Non-Member Observer State Status at UN, U.N. Press Release GA/11317 (Nov. 29, 2012).
[24] On November 29, 2012, the GA voted to accord Palestine the status of "Non-Member Observer State.Status of Palestine in the United Nations, G.A. Res. 67/19, T 2, U.N. Doc. A/RES/67/19 (Nov. 29, 2012).
[25] Whitman, Charles F., *supra note 19*, page 76.
[26] UN Charter, *supra* note 5, article 93.2. (allowing a state that is not a UN member to become a party to the ICJ statute under certain conditions).
[27] *Ibid.* This is reflected in Article 35(1) of the ICJ Statute. ICJ Statute, *supra* note 14, art. 34, para. 1 ("The Court shall be open to the states parties to the present statute.").
[28] UN Charter Article 93 and ICJ Statute Article 35(1) work together allowing States that are not parties to the UN to become a State party to the ICJ Statute.
[29] ICJ Statute, *supra* note 6, article 35.2.

Even if Palestine would not get the membership in the UN nor in the ICJ Statute, it could still bring a case before the ICJ under the ICJ Statute Article 35(2),[30] which allows the SC to lay down special treaty provisions that prescribe conditions under which the ICJ shall be open to other states[31].

These requirements are defined by the SC Resolution 9 (1946), which were previously explained and mentioned in the previous section. Opting for this way would be less problematic in terms of statehood, as there has not been a previous determination on statehood by the GA and the SC under article 35(2), to the contrary of article 93 of the UN Charter. But there are certain jurisdictional challenges with this alternative as well.

a) The unique jurisdictional problems under art 35(2)

The simplest way for Palestine to appear before the ICJ is through Article 35(2) of the ICJ Statute. The jurisdictional requirements outlined in ICJ Article 35(2) in relation to S.C. Res. 9 (1946) could, nevertheless, provide Palestine with considerable obstacles.

Indeed, Palestine finds it challenging to predict in advance whether the ICJ would have jurisdiction over a dispute because it is not a signatory to the ICJ Statute[32]. Furthermore, Palestine would have no other options if the opposing state refused to recognise it. Therefore, finding a party willing to submit to ICJ jurisdiction poses the biggest difficulty, even if the ICJ were to recognise its jurisdiction over a case presented by Palestine. The Article 36 of the ICJ Statute encourages mutual consent, what means that states cannot be compelled to accept ICJ jurisdiction[33]. Would Israel ever accept a case against Palestine before The Court?

Therefore, in contrast to States parties to the ICJ, which declare their acceptance of the court's compulsory jurisdiction under ICJ Statute Article 36(2), those States could choose not to recognise Palestine's declaration if Palestine presented a case under ICJ Article 35(2). In this way, Palestine files a claim against an opposing State that may deny ICJ jurisdiction, thus depriving Palestine of any ICJ remedy, which will be the most certain outcome with Israel.

[30] *Ibid.*
[31] *Ibid.*
[32] Pitta, *supra* note 20, page 33.
[33] Whitman, *supra* note 19, pages 96-98.

b) Whether a treaty can provide an avenue to the ICJ via 35(2).

As part of the internationalisation strategy pursued by Palestine in the last decades, many multilateral treaties that contain such clauses have been signed by Palestine[34].

Article 35(2) limits the SC's authority to set requirements for admitting states that are not members of the UN "*to the special provisions contained in treaties in force*"[35]. This is because article 35(2) of the ICJ is based on the idea that a SC resolution shall not override pre-existing jurisdictional bases established by a treaty instrument.

For that reason, the ICJ has ruled that Article IX of the 1948 Genocide Convention, which grants its mandatory jurisdiction, is not covered by ICJ Article 35(2) because that provision solely pertains to agreements made before the ICJ Statute was created[36]. Therefore, only treaties that came into effect prior to October 24, 1945, "may be considered as 'treaties in force' within the meaning of Art. 35(2)"[37]. Nevertheless, this treaty has been a key player in the strategy of bringing Israel before The Court, as it has other ways for prosecution.

In this sense, the biggest barrier to Palestine's ICJ adjudication is finding a party willing to consent to ICJ jurisdiction. Additionally, States cannot be forced to accept ICJ jurisdiction because Article 36 of the ICJ Statute promotes mutual consent.

3) Third, a treaty may have a provision that gives the ICJ jurisdiction to settle disputes between State Parties to the treaty[38].

The Genocide Convention provides: *"that Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall*

[34] Pitta, *supra* note 20, page 33.
[35] ICJ Statute, supra note 9, art. 35, para. 2.
[36] *Legality of Use of Force (Serbia and Montenegro v. Belgium and nine other states)*, Judgment of 15 December 2004, ICJ Reports, 2004, pages 113-114.
[37] Palestine was a party to several treaties before 1945, however, under Palestine Mandate article 12: "Britain was responsible for Palestine's foreign relations and treaty making authority." The Palestine Mandate art. 12, July 24, 1922, 22 L.N.T.S. 354.
[38] While this avenue can provide access to the ICJ, the dispute must come within the specific subject of the treaty. See ICJ Statute, *supra* note 6, article 36.1.

be submitted to the International Court of Justice at the request of any of the parties to the dispute"[39]*.*

Regardless of the course of action it takes, each of these requires the mutual consent of the opposing State for The Court to have jurisdiction for any contentious case. In sum, even if there are avenues for Palestine to take Israel to Court without full UN membership, this approach appears unlikely for two primary reasons. First, the requirement for a SC recommendation, and adding to that, the necessity of consent of the respective state. Hence, if Palestine can't bring the case before it, who can?

2.3. THE RIGHT OF STANDING BEFORE THE ICJ

In a series of publications that eventually became the Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA")[40], the International Law Commission further studied the circumstances under which standing may be obtained to allege responsibility before an international court[41]. This was meant to ensure that "*every internationally wrongful act of a State entails the international responsibility of that State."* In practice, these Articles established two types of legal standing:

(i) standing derived from injury (Article 42) and

(ii) standing derived from common interests (Article 48).

The right of the "injured State" to claim State culpability is outlined in Article 42. When an obligation is breached in a way that fundamentally alters the circumstances of all other States to which the obligation is owed, the status of the "injured State" is granted not only to the State to which the obligation is owed individually, but also to a group of States or the international community at large[42].

The idea underlying Articles 42 and 48 is that a state should be able to claim responsibility without first having to ascertain the kind (material or moral) or extent of harm sustained. Instead, standing

[39] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (hereinafter Genocide Convention), article 9.

[40] Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, hereinafter ARSIWA, (2001).

[41] Pok Yin Stephenson C., "On Obligations Erga Omnes Partes" *Georgetown Journal of International Law*, 2020*, 5*2 (2), pages 485-493.

[42] Kawano M., "Standing of a State in the Contentious Proceedings of the International Court of Justice", *Japanese Yearbook of International Law*, 2012, vol 55, p 218.

is based only on whether an obligation in breach is owed to the claimant state (for instance, South Africa). In order to start proceedings as a State other than the injured one, the Applicant has to demonstrate the existence of its own rights or interests in the application of the relevant rules in the alleged violation of international rules[43].

Once the standing in the contentious proceedings has been decided and recognised, each State is given the capacity to invoke international responsibility as the negative consequence of alleged violations of international legal rules. Two fundamental concepts that need to be taken into account in this particular situation are the unique nature of the Genocide Convention, and adding to that, the ICJ's understanding on the *locus standi*.

Consequently, any member of the international community may have standing in contentious proceedings before the ICJ based on its legal rights or interests to invoke the responsibility of the State violating those rules, as they have been developed to protect the common interests of the international community as a whole or of the community established by a treaty. It has the right to use the legal system to make sure that the duties that were disregarded are followed or implemented.

2.3.1. SOUTH AFRICA'S STANDING

How is it that South Africa has been able to bring Israel before the Court? The "standing in the ICJ's contentious proceedings is known as the state's ability to use the ICJ as a weapon against other states in order to claim international responsibility for alleged breaches of international law by those other states"[44].

Broadly construed, standing or locus standi is '*the requirement that a State seeking to enforce the law establishes a sufficient link between itself and the legal rule that forms the subject matter of the enforcement action*'[45]. Thus, South Africa needs to show the link between the breach of the prohibition of genocide set by the Genocide Convention and how this affects to it (which already has). There have been many other cases before the ICJ where it explained how this right has to be understood.

[43] *Ibid,* page 218.
[44] *Ibid,* page 209.
[45] On standing generally, see G. Gaja, 'Standing: International Court of Justice (ICJ)', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2018).

Both the controversial processes that involved *Nuclear Arms Race (2016)* and *South West Africa (1966)* were components of a bigger conflict. The applicants of the cases before the ICJ were aware that their actions were motivated by something greater than their self-interest as state — the fight against racism and the fight against nuclear weapons. When political mechanisms failed to provide the desired results, the petitioners resorted to the ICJ in both cases, but the Court disappointed them both times[46]. The same kind of public interest can be inferred from the *Genocide Convention*.

In the *Nuclear Arms Race,* the Court concluded negatively, primarily because it determined that it lacked jurisdiction to hear the case. [47]The case aimed to hold these nations accountable for allegedly perpetuating the nuclear arms race instead of working towards disarmament, but The Court reasoned that not all respondent states — namely India, Pakistan, and the United Kingdom — had accepted its compulsory jurisdiction under the relevant legal instruments. Consequently, the Court emphasised the necessity of consent by the states involved for it to exercise jurisdiction.

Long before that the Court dealt with similar issues. It held in the *South West Africa Case* that Ethiopia and Liberia did not have a legal right or standing to bring the case, as they could not demonstrate a specific legal interest directly affected by South Africa's conduct. Although the concept of *erga omnes* obligations was acknowledged, the court did not find it applicable in this instance. The judges emphasized that the mandate system's obligations did not automatically grant individual states the right to enforce these obligations on behalf of the international community.

In 1966 dissenting opinion of Judge Jessup argued that, while there is indeed *"no generally established actio popularis, or right resident in any member of a community to take legal action in vindication of a public interest in international law … international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest"[48].*

[46] Venzke, I., "Public interests in the International Court of Justice — A comparison between Nuclear Arms Race (2016) and South West Africa (1966)", *AJIL Unbound*, 2017, *111,* page 68.
[47] The dispute in the nuclear arms race case was brought by the Marshall Islands against nine nuclear-armed states—India, Pakistan, the United Kingdom, the United States, Russia, China, France, Israel, and North Korea. The Marshall Islands argued that these states were failing to fulfil their obligations under international law to negotiate in good faith towards nuclear disarmament, as mandated by *the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* and customary international law.
[48] South West Africa, (Ethiopia v. South Africa; Liberia v. South Africa) 1966 ICJ Reports 6 (July 18) [hereinafter South West Africa]. Dissenting Opinion of Judge Jessup, page 325, paragraphs 387–389.

In response to the disappointment from the decision in 1966, the Court adopted the idea of *erga omnes* obligations in *Barcelona Traction* (1970). The ICJ acknowledged that there is a crucial difference between a State's obligations to the international community and its obligations to another State[49]. The Court's *dictum*, which is widely considered to be reflected in Article 48(1)(b) of the ARSIWA, stated as follows:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide [50].

Therefore, when the ICJ observed in *Barcelona Traction* that certain human rights obligations are obligations *erga omnes*, insofar as "all States can be held to have a legal interest in their protection,"[51] it was not clear whether it intended to overturn its finding in *South West* Africa or, if not, how these two seemingly incompatible positions could be reconciled[52].

Later on, the case of *East Timor (Portugal v. Australia* 1995) demonstrated the limitations of the Court's jurisdiction being established by the *erga omnes* character of the obligations, as it was not a *carte blanche* to use so as to expand the Court's jurisdiction without restraints. Portugal brought the case against Australia, challenging a treaty between Australia and Indonesia regarding the exploitation of resources in the Timor Gap, an area between Australia and East Timor, then under Indonesian occupation.
In this instance, the ICJ recognised the right of the people of East Timor to self-determination as an *erga omnes* obligation, meaning it is a right owed to the international community as a whole. However, the court ultimately ruled that it could not adjudicate the case because Indonesia, a key party to the dispute, had not consented to the court's jurisdiction and was not present in the proceedings.

[49] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970, page 32, paragraph 33.
[50] *Ibid,* page 32, paragraphs 33–34.
[51] *Ibid,* page 33, paragraph 35.
[52] Pok Yin Stephenson, *supra* note 41, pages 470-471.

In conclusion, The Court cannot reverse the connection it has now endorsed between the status of a primary obligation as *erga omnes* and the right of standing to institute proceedings for its enforcement[53]. Nevertheless, it is important to clarify that the practical application of obligations *erga omnes* partes relates only to standing— which is an aspect of admissibility. Furthermore, obligations *erga omnes* partes do not relate to jurisdiction[54] [55]. As the Court has explained, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'[56].

More recently, the arguments in the Armed Activities in the Congo (*New Application*[57]) also that the Parties' permission was always required for the Court to exercise its jurisdiction[58]. Thus, it enforced the idea that in the proceedings of the ICJ, the essential requirement to satisfy the principle of the jurisdiction is the consent of the Parties. While acknowledging the creation of such *erga omnes* regulations, the ICJ has also underlined the significance of the idea that the consent of the relevant State forms the basis of its jurisdiction. As a result, the consent of the Israeli State becomes again a central element [59].

2.3.2. THE GENOCIDE CONVENTION: *ERGA OMNES* OBLIGATIONS

Beyond its roots in treaty law, genocide is *"undeniably considered part of customary international law," [60]* The ICJ's *Reservations to the Genocide Convention Advisory Opinion*[61] serves as the foundation for this decision. "T*he principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation*"[62] .Thus, it has obtained a unique recognition which makes it a landmark in the international legal order.

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[53] Urs, P., "Obligations *erga omnes* and the question of standing before the International Court of Justice", *Leiden Journal of International Law*, 2021, *34*(2), pages 524–525.
[54] The difference between standing and jurisdiction has been acknowledged in a series of ICJ cases. In Armed Activities on Territory of Congo (New Application, 2002) (Democratic Republic of Congo v. Rwanda), Judgment, 2006 I.C.J 6, at 64 (Feb. 3).
[55] Application of Convention on Prevention and Punishment of Crime of Genocide (Croatia v. Serbia), Preliminary Objections, 2008 I.C.J. 412, at 120 (Nov. 18).
[56] East Timor (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 90, page 102, paragraph 29.
[57] The Democratic Republic of the Congo contends that Uganda's military actions constituted acts of aggression, illegal occupation, and various human rights abuses within Congolese territory.
[58] *New Application, supra* note 54, pages 31-32, paragraph 64.
[59] Urs, *supra* note 53, page 525.
[60] Judgment, *Akayesu* (ICTR 96^4-T), Trial Chamber I, 2 September 1998, paragraph 495.
[61] *'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide'*, Advisory Opinion, ICJ Reports 28 May 1951.
[62] *Ibid, at* 23.

As it has been shown by the cases on which The Court had to decide, a new form of international dispute surfaced in evolving structure of the legal society, where the importance of safeguarding community interests has become more and more important. The common *raison d'étre* for these kinds of notions is a response to the necessity for special rules that protect the common interests of the international community, which has made significant efforts to punish the crime of genocide. In this regard, the role of the Genocide Convention establishing the common interests of the community should be noted[63]. The concept of responsibilities *erga omnes* has been established as the cornerstone of the international framework, and this has led to the introduction of a hierarchy based on the strength of these rules, where the ICJ's rulings have served as model and guideline. This is clearly stated in the *Reservations* Advisory Opinion:

> "In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'etre of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties"*[64]*.

The ICJ also discussed the nature of the obligations under the Genocide Convention in the case of *the Application of the Genocide Convention* (Bosnia and Herzegovina v. Serbia and Montenegro)[65] and determined that the rights and obligations enshrined by the Convention are rights and obligation*s erga omnes* [66]*.*

The conception that states have a legal interest in ensuring compliance with human rights obligations thus requires a particular point of view. It requires to set aside the traditional conception of states as self-interested sovereign actors and to imagine them as entities having a collective duty to safeguard the wellbeing of humanity as a whole. More recently, The Gambia in its institution in 2019 in (*The Gambia v. Myanmar*) did so explicitly on the basis of 'the *erga omnes*

[63] Sachariew K., "State Responsibility for Multilateral Treaty Violation: Identifying the 'Injured State' and Its Legal Status", 1988*, Netherlands International Law Review*, Vol. 35 (1988).
[64] *Reservations*, *supra* note 61, at 23.
[65] *Judgment, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice (Genocide Case or Judgment),* 26 February 2007.
[66] *The Genocide Case*, *supra* note 65, at 616, para. 31.

and *erga omnes partes* character of the obligations that are owed under the Genocide Convention'[67]. Accordingly, The Gambia sought

> *to establish Myanmar's responsibility for violations of the Genocide Convention, to hold it fully accountable under international law for its genocidal acts against the Rohingya group, and to have recourse to th[e] Court to ensure the fullest possible protection for those who remain at grave risk from future acts of genocide[68].*

One statement to remark is that *'any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party'[69].*

Thus, it is clear that States conclude multilateral treaties not only to secure for themselves concrete mutual advantages, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations which are of the essence of the agreement, the reason why South Africa has been able to act "on behalf" of Palestine. Therefore, the interdependence of international relations frequently results in States having a vital interest in the maintenance of certain rules and principles[70].

Maybe it should be questioned whether and to what extent the procedure of the ICJ, which was basically designed with a bilateral conception, effectively functions in disputes relating to newly emerging international legal disputes that involve many actors. Can an allegation of genocide be merely bilateral, or does it have an intrinsic multilateral sense?

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[67] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), The Gambia's Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, paragraph 15.
[68] *Ibid*.
[69] *Ibid,* paragraph 41.
[70] Pok Yin Stephenson, *supra* note 41, pages 479-480.

3. THE INTERNATIONAL CRIMINAL COURT (THE ICC)

3.1. ROME STATUTE

Established in 1998 by the Rome Statute, the ICC is an independent international organisation. Unlike other international judicial bodies, its nature is distinct. While the UN Charter recognises the ICJ as part of the UN structure, the ICC's operational and organisational framework is based on the contributions made by state parties to the 1998 Rome Statute[71]. Contrary to the *ad hoc* tribunals that were founded by the Security Council, the ICC is not a UN Security Council product, so it can not directly appeals for its support, and the relationship between these two has not been easy (still, important countries like the USA, China and Russia are not parties thereto)[72]. So, in principle, it is not bound or influenced by the UN dynamics (or it should not be).

With a long history of upholding international criminal law, the ICC is tightly linked to the global politics that gave rise to the establishment of the ICTR and the ICTY. Since national legal systems and institutions might not always be adequate, the permanent presence of the ICC helps in the recognition of victims and international crimes by the international community.

It is widely agreed that the Rome Statute codifies current international customary law[73]. The whole international community has been impacted by the crimes of war, crime against humanity, and specially genocide, which have horrified the humankind. As a result, the genocide prohibition is now one of *jus cogens* character, and each State and individual is required by *erga omnes* obligations to punish those who commit them, and more importantly, to not commit them [74] (illustrated in section 3.3.2.).

Unfortunately, the Rome Statute is not regarded as customary reflection for some big international actors. For instance, the U.S. delegation suggested at the 1997 preparatory conference for the establishment of a international criminal court that "[t]he policies favouring prosecution of

[71] Soraya, N., Muhammad, A., & Ladiqi, S., "ICC jurisdiction: Against Israeli war and humanitarian crimes targeting Palestinian civilians 2023", *Jurnal Media Hukum*, 2024, *31*(1), page 63.
[72] Post, H. H. G., "The state of the International Criminal Court, of Special Tribunals and of International Criminal Law: A Concise review", *Netherlands International Law Review*, 2022, *69*(3), page 373.
[73] Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on Defence request for leave to file a ''no case to answer'' motion', *Ntaganda* (ICC-01/04-02/06-2026), Appeals Chamber, 05 September 2017, at 35.
[74] Yang, L. "On the Principle of Complementarity in the Rome Statute of the International Criminal Court", *Chinese Journal of International Law*, 2005, *4*(1), page 125.

international offenders must be balanced against the need to close 'a door on the conflict of a past era' and 'to encourage the surrender or reincorporation of armed dissident groups,' and thereby facilitate the transition to democracy"[75]. More specifically, the US and other participants "voiced concern that the ICC could hamper efforts to halt human rights violations and to restore peace and democracy in places like Haiti and South Africa"[76] during the Rome Statute discussions[77]. Unfortunately, this position is still clearly supported by the United States' government, which is being the main supporting power to Israel.

3.2. NOTION OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The Rome Statute established a state-based system for its functioning, even if its main purpose is to find individuals guilty of criminal acts[78]. This scenario reflects again how the international legal order revolves around statehood in most scenarios.

Apart from the main aim of prosecuting the most grave crimes, it is also possible that some states wanted to use the ICC's authority to shift the balance of power between states by transferring interstate disputes from diplomacy to mandatory adjudication[79]. This possibility would in fact be quite beneficial for the weaker states, but in practice, the clash of powers is still ruling in the ICC 'objective' proceedings[80].

Exceptionally, international criminal law is different from most international law as it creates obligations on individuals, rather than focusing on the state. It is based on the principle that States are ultimately a construction of individuals, who contribute and control operations, constituting its functioning organs. The need for 'organs' is a metaphor for needing people to make decisions and to implement them; the moment there is a need for human action, there is a potential for

[75] Scharf M., "The Amnesty Exception to the Jurisdiction of the International Criminal Court", Cornell *International Law Journal*, 1999, 507.
[76] See Scharf M., "Justice Versus Peace, reprinted in The United States and the International Criminal Court: National Security", 2000, in Sarah B. Sewall & Carl Kaysen eds.).
[77] Benoliel, D., & Perry, R., "Israel, Palestine, and the ICC", Michigan *Journal of International Law*, 2010, *32*(1), page 122.
[78] *Ibid,* page 78.
[79] Morris, M., "High crimes and misconceptions: the ICC and Non-Party states", *Law And Contemporary Problems*, 2001, *64*(1), pages 25-26.
[80] The ICC has received a variety of criticism, the most significant one being the 'African problem'. On these matters, see e.g. Iommi, L. G., "Whose justice? The ICC 'Africa problem", *International Relations*, 2019 *34*(1), 105–129; Geng, Z., "An exploration of selective justice in the International Criminal Court", *SHS Web of Conferences*, 2023, *178*, 02019; Guilfoyle, D., "Lacking conviction: Is the International Criminal court broken? An organisational failure analysis", *Melbourne Journal of International Law,* 2019, 20(2), 401–452; Ainley, K., "The International Criminal Court on trial", *Cambridge Review of International Affairs*, 2011, *24*(3), 309–333.

those to commit wrongful acts that might embody international crimes. Thus, there is an unavoidable link between the act of a state and the decision-making of the individual, which has to be determined by the standards of state attribution and individual responsibility. In fact, this interaction is reflected throughout the whole paper.

The crimes under ICC jurisdiction are frequently carried out by governments or at least with their consent. In this sense, criminal charges may be brought against individuals who conduct war crimes as well as those who direct, encourage, or permit them. This concept holds that the command has ultimate accountability[81].

It is unlikely that a government that supports (even if not publicly, but through its acts) crimes against humanity, war crimes, or genocide would allow one of its citizens to be prosecuted for their involvement. The issue with an international criminal court that can only try cases with the approval of the defendant's country of nationality is that the governments that are least likely to allow an international court jurisdiction over their citizens are also the ones that are most likely to be connected to significant international grave crimes[82]. This is the case for Israeli authorities and soldiers, as they are acting under state orders, contributing to a decades long Israeli policies against the Palestinians. It is hardly ever conceivable that the destruction and offensive of such magnitudes could ever be carried out by a single individual without any state involvement.

Given that proceedings before the ICC would inevitably contain accusations of crimes against humanity, war crimes, or genocide, the subject matter of an ICC case involving an interstate conflict will probably be significant and delicate in the eyes of the participating states. In many cases, the probability of military intervention and participation definitely intensifies the cases' delicate character. States are therefore particularly hesitant to submit this kind of issues for resolution by a third party[83]. As mentioned before, the U.S. and Israel today object to being state parties to the Rome Statute, fearing the prosecution of their state leaders for the atrocities they have committed and still continue to.

[81] Soraya, Muhammad, & Ladiqi, *supra* note 71, page 64.
[82] Morris, *supra* note 79, page 27.
[83] *Ibid,* page 25.

3.3. PALESTINE'S RATIFICATION

The Rome Statute raises a number of essential but often disregarded legal problems about its nature and character, namely who is bound by it, to what degree, and with what legal foundation. According to Article 12(1)(2) of the Statute, states agree to grant the Court jurisdiction by becoming parties thereto if one of two "jurisdictional pre-conditions" is satisfied[84].

> *Article 12 of the Rome Statute is worded as follows : "Preconditions to the exercise of jurisdiction"*
>
> 1. *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
>
> 2. *In the case of article 13, Paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
>   - *(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
>   - *(b) The State of which the person accused of the crime is a national.*
>
> 3. *If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.*

A) STATEHOOD

In order to apply those regulations to the people who are subject to them, states must first provide their consent. Thus, paradoxically, individual compliance with the Rome Statute is conditional upon the relevant governments' consent. The Rome Statute, in fact, needs to be read in line with surrounding principles of international law; it is not and cannot be a stand-alone document[85]. Therefore, individuals criminal responsibility will only be addressed if there has been a prior state approval, which also entails a risk for the state itself.

In its current form, The Rome Statute cannot be ratified by any entity other than states that have been recognised by the UN[86].The first component is the presence of an organised community in

[84] De Souza Dias, T. "The Nature of the Rome Statute and the Place of International Law before the International Criminal Court", *Journal of International Criminal Justice*, 2019, *17*(3), pages 507–508.
[85] De Souza Dias, *supra* note 84, pages 515-516.
[86] Benoliel & Perry, *supra* note 77, page 79.

a specific region that exercises considerable or exclusive self-governing power; this is now handled by the Palestinian Authority. Israel has never formally recognised the existence of a Palestinian state, and neither its membership to the UN nor its adoption of the Partition Resolution—as stipulated by General Assembly Resolution 181(II) of November 29, 1947—implied such state recognition.

This is what happened first in 2009. Following the Israeli-Palestinian conflict in Gaza in January, the Palestinian Minister of Justice sent a declaration to the ICC recognising its jurisdiction in accordance with Article 12(3) of the ICC Statute. The Palestinian declaration dated January 21, 2009, is worded as follows:

> *"The Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of crimes committed on the territory of Palestine since Jul 1, 2002".*

After careful deliberation, Luis Moreno Ocampo, the prosecutor at the time, declared in April 2012 that he would not pursue an investigation. He came to the conclusion that only "states" may accept the Court's jurisdiction under the Statute[87]. Nonetheless, if an entity satisfies specific structural requirements, it may be classified as a "state" for the purposes of international law even if other states do not recognise it as such, according to the declaratory theory of statehood. Therefore, recognition is only a declaration of an already-existing truth or fact. That is the reason why some academics suggested a function approach so as to recognise the declaration as valid.

> "Following actually a 'functional approach' ultimately called for by the World Court in its 1949 *Opinion in the Reparation for Injuries case*, modern international law conceives the State under the form of a variable geometry shape, whose outline depends on the subject at issue, and it relegates it to the rank of general 'notion' whose interpretation depends 'on the economy and the aims of the provisions' within which it finds itself (...). The boundaries of the concept of the State are nonetheless in movement, its 'perimeter' is not an intangible and physically marked limit. International law apprehends the State as an entity that it can itself reshape (as witnesses by the use of conventional definitions of the State or the

[87] Kontorovich, E., "Israel/Palestine -- the ICC's uncharted territory", *Journal of International Criminal Justice*, 2013, *11*(5), page 981.

jurisprudential formula whereby international or foreign courts decide that such an entity 'must be considered as an emanation of the State), and the latter is, in contemporary international law, increasingly understood differently depending on the norm being applied"[88].

Against other opinions, the rationale employed in *Construction of a Wall,* not to let a State unilaterally block ICC action, could be used to support that The Palestinian Declaration of 21 January 2009, accepting the ICC's jurisdiction was actually effective[89].

Nevertheless, this reading of the declaration is was not needed anymore because Palestine's later strategy in 2012 resulted successful. Aside from the symbolic importance of the *status* change, it was well known that one of the purposes and practical implications of the "*non-member observer*"[90] status was to support Palestinian efforts to bring Israeli actions before the ICC.

Following Palestine's unsuccessful 2009 effort to submit an Article 12(3) declaration, the UN General Assembly designated Palestine as a "non-member observer state" in late 2012. Thus, Palestine was able to file a legitimate article 12(3) declaration on January 1, 2015, as a result of which the OTP opened a preliminary examination on January 16 of the same year[91]. The State of Palestine became a party to the Rome Statute on January 2, 2015, when it submitted to the UN Secretary-General its instrument of accession. On April 1, 2015, the Rome Statute became operative for the State of Palestine.

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[88] *Construction of a Wall, supra* note 16.

[89] Pellet, A., "The effects of Palestine's recognition of the International Criminal Court's jurisdiction", In T.M.C. Asser Press eBooks, 2003, at paragraph 33.

a) *Ratione materiae, the Goldstone Report allows to reasonably believe that crimes that could fall under the Court's jurisdiction may have been committed during the "Operation Cast Lead"[89];*
b) *Ratione temporis, by retrospectively recognising the jurisdiction of the ICC for actions posterior to 1st July 2002 (the date on which the Rome Statute came into force), the Declaration complies with the terms of Article 11[89];*
c) *Ratione loci (and as a result ratione personae), it extends the jurisdiction of the Court to crimes committed on the territory of Palestine, upon which only the Palestinian Authority has territorial sovereignty (and to the persons having committed them) in accordance with the provisions of Article 12, Paragraph 2(b), which provides for the Court's jurisdiction over a State "on the territory of which the conduct in question occurred" ; and*
d) *"Ratione conventionis", these mechanisms can be set into motion in pursuance of the statement made by a relevant Palestinian authority[89] on 21 January 2009.*

[90] UN Document A/RES/67/19, 29 November 2012. Only the Holy See currently shares the status, though in the past a number of other nations, such as Switzerland and Spain have had it.

[91] Wharton, S. and Grey, R., "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law,* 2019*,* 56, page 31.

B) ACTIVE NATIONALITY AND TERRITORY

The two most established grounds of prescriptive and adjudicative jurisdiction that originally belonged to states parties to the Statute under customary international law—territoriality and active nationality— are reflected in Article 12(2)(a)-(b)[92].

The Court may only have jurisdiction if the conduct takes place on Palestinian territory because Israel is not a state party. Thus, active nationality has to be dismissed for this instance. However, Palestine's territorial borders are notably ill-defined, even if it is recognised as a state[93]. The ICC can only prosecute Israel for actions that take place "on the territory" of the state of Palestine, as stated in Article 12 of the Statute. Therefore, establishing whether the area where crimes have been committed is Palestinian territory is necessary before exercising jurisdiction.[94] The main obstacle to ICC jurisdiction is that the mere fact of Israeli occupation does not mean the territory falls under Palestinian sovereignty. Determining the borders of Palestine—even for jurisdictional purposes—would go against the *Monetary Gold* concept since, as a non-member state, Israel's borders would likewise be determined[95].

The thing is that the procedures and structure of the ICC are intended to make it easier to determine an individual's culpability rather than the frontiers of a country. Hence, The ICJ would be naturally more suited to handle border delineation, but again, this would be possible only if both parties agree to its authority[96].

3.4. PRINCIPLE OF COMPLEMENTARITY

The complementarity principle (Article 17 ICC Statute), which serves as the fundamental foundation for the whole ICC system, provided the answer to the important dilemma of how international and national authorities relate to one another.

Paragraph 10 of the preamble of the Rome Statute emphasises that *"... the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions";*

[92] De Souza Dias, *supra* note 84, pages 516-517.
[93] Kontorovich, *supra* note 87, page 980.
[94] Art. 12(2)(a) ICC Statute, *supra* note 14.
[95] Kontorovich, *supra* note 87, page 979.
[96] *Ibid,* page 984.

and Article 1 of the Rome Statute provides that *''an International Criminal Court is hereby established."* It will function as a permanent institution that is supplemental to national criminal systems, based on the complementarity principle, with the authority to exercise its jurisdiction against individuals for the most serious crimes of international significance[97].

The ICC flips the hierarchy of power by giving local courts that operate with sincerity and good faith precedence over international tribunals such as the ICTR and ICTY[98], as their statutes read that "the International Tribunal shall have primacy over national courts"[99].

As the ICC's legal basis is an international treaty and many countries were involved in its drafting, the Court, on the one hand, has jurisdiction over the most prominent international crimes but, on the other, its power is limited by complementarity, i.e. the national jurisdiction comes first and ICC's jurisdiction second. States Parties express their wish to create a permanent court *"to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".*[100] Thus, the main goal for complementarity is to maintain State sovereignty, while keeping the international community as a safeguard for the most heinous acts[101].Then a question arises: to what extent is keeping state sovereignty beneficial or compatible with the aim of the Rome Statute? Where should the limit be drawn? Why should individual prosecution be limited by state sovereignty? It is under the concept of state sovereignty where the killing of an estimated 800,000 Rwandans took place in a few months[102]. This was not a 'failure' of the international community, but a result of international relations in which the great powers only act when it is in their interest to do so[103].

For the procedure, in the event that the ICC receives an allegation of one of the crimes specified in the Statute, it will allow the States having jurisdiction to resolve the matter by bringing legal action against it and punishing the perpetrators. In order to motivate the States to use their national criminal jurisdiction, the ICC prioritised national judicial sovereignty. However, in violation of the States' wishes, the ICC may also exercise its own jurisdiction over the crime if the relevant

[97] Yang, *supra* note 74, pages 121-122.
[98] Article 17 Rome Statute, *supra* note 14.
[99] Article 9(2) of the Statute of the ICTY and Article 8 of the ICTR Statute, *supra* notes 10-11.
[100] Paragraph 5, Preamble of the Rome Statute, *supra* note 14.
[101] Yang, *supra* note 74, page 121.
[102] Russi, L., "Cynicism and Guilt in International Law after Rwanda", *Global Jurist*, 2013, *13*, page 72.
[103] *Ibid,* page 73.

State refuses to cooperate, is unable to or unwilling to do so. So, in practice, only the willing and able States' judicial sovereignty is respected under the complementarity principle[104].

“Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed” [105]. Because of this, the Court's authority will only be used in extraordinary circumstances— that is, when national authorities are unable or unwilling to pursue legitimate procedures[106].

So, the ICC cannot exercise its jurisdiction over the crimes unless the State in question is unable or unwilling to look into or prosecute the crimes.[107] Since complementarity is evaluated case-by-case, states and the ICC must work together to make sure that every instance of atrocity is examined. In order to apply criminal law, national and international courts must collaborate and be complementary to one another. However, the Court's recent practice makes a substantial addition to the understanding of the complementarity principle[108].

In line with the *kompetent kompetenz* principle, which holds that the ICC is the judge of its own jurisdiction, the ICC shall define its jurisdiction and the constraints placed on its exercise of authority, based on its interpretation of the Statute's provisions. Articles 18 and 19 of the Statute outline the precise terms under which the ICC would execute this broad principle of international dispute resolution (*Preliminary rulings regarding admissibility and Challenges to the jurisdiction of the Court or the admissibility of a case)*. But the issue is not only related to the matter of jurisdiction, but also to the *inability* or *unwillingness* of the State that has to carry out the proceedings. It is a clash between a sovereign State and an international judicial organisation. Strictly speaking, it is a dispute of public international law, not international criminal law[109].

[104] Yang, *supra* note 74, page 126.
[105] Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (Decision on the admissibility of the case under Article 19(1) of the Statute) ICC-02/04-01/05-377, Pre-Trial Chamber II (10 March 2009) paragraph 34.
[106] Benoliel & Perry, *supra* note 77, pages 123-124; Russi, *supra* note 102, page 73.
[107] Article 17 Rome Statute, *supra* note 14.
[108] Hansen, T.O., “A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity”, *Melbourne Journal of International Law*, 2012, Vol. 13 (2), page 218.
[109] Yang, *supra* note 74, page 131.

The Court has repeatedly stated that a two-fold test must be used to determine admissibility, with any evaluation of unwillingness or incapacity occurring only after it is established that there is real investigative or prosecutorial activity in the state in question[110].

For criminal acts that may constitute crimes [within the ICC's jurisdiction] and which relate to the information provided in the application of the case, the concerned state has one month to notify the ICC "that it is investigating or has investigated its nationals or others within its jurisdiction," as well as to request a deferral in the ICC Prosecutor's investigation[111].

For example, the Pre-Trial Chamber II found in the *Muthaura Case* that “it is not enough for a state having jurisdiction over the offences to simply say that an investigation is underway; there has to be "concrete evidence of such steps" with relation to the suspects mentioned by the Court. Thus, the Chamber set evidence thresholds for the national authorities[112]. Early on in this matter, the ICC prosecutor established a criterion known as the *"same person/ same conduct*" criteria, which states that national investigations into a case must involve the same suspect and the same behaviour in order to declare it inadmissible. Markus Benzing, for example, states that the ‘[m]ere inaction of a state in the face of crimes having been or being committed thus leads to the admissibility of situations and cases before the ICC’.[113]

The Appeals Chamber in the *Muthaura Appeal* made it clear that *"a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible"* in its assessment of Pre-Trial Chamber II's decision[114]. The Appeals Chamber went on to say that in order for the State to meet its obligation, it must present the Court with proof that demonstrates it is looking into the matter, with sufficient level of detail and probative value. Merely stating that investigations are continuing is not thus meeting the required criteria[115].

The inability criteria is clearly provided in Article 17(3) in a more objective way: “In order to determine inability in a particular case, the Court shall consider whether, due to a total or

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[110] See Prosecutor v Lubanga (Decision on the Prosecutor’s Application for a Warrant of Arrest) (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006), paragraphs 30-23 (‘Lubanga Arrest Warrant’).
[111] Benoliel, & Perry, *supra* note 77, page 124.
[112] Muthaura Pre-Trial (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) paragraph 60.
[113] Broomhall B., “International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law”, *Oxford University Press*, 2003, page 91.
[114] Muthaura Appeal (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [61]; Ruto Appeal (ICC, Appeals Chamber, Case No ICC-01/09-01/11 -307, 30 August 2011) paragraph 62.
[115] *Ibid.*

substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

The reasoning behind article 17 may be that the national decision was made for the purpose of shielding the person from criminal responsibility for crimes under ICC scope. Therefore, when determining whether a State is unwilling, the ICC has to judge on the intention of a State behind its trial procedure[116].

To put it another way, for example, the issue in Kenya was not that there was nothing investigated at all when the Court denied the admissibility challenge, but rather that the true goal of the steps taken in the investigation was to win the admissibility challenge rather than to hold people accountable for the violence that occurred after the election. In these scenarios, the reluctance from national procedures is usually an effort to "shield the person concerned from criminal responsibility"[117].

After meeting the criteria, then the State's whole legal system will be examined by the ICC, and for certain states, this process might be seen as putting the state itself under trial, rather than the individual himself. A decision of this nature would be detrimental to the State's reputation and harm it politically, legally, diplomatically, and economically[118], so it can have a big impact.

An international court with even the slightest chance of success will be highly respected and powerful. If a court of such kind decided that a state's actions or policies were illegal, the political fallout would be enormous and would not be comparable to the fallout from a national court. Hence, the ruling would have a very different political consequence and carry significant authority if the ICC declared an official act to be a crime[119]. The deterrent effect this may have though is quite weak, as Israel does not seem to be very concerned about its reputation anymore.

Thus, Israel will have to prove that it has started its own national proceedings regarding the crimes that Benjamin Netanyahu and Yoav Gallant have been accused of if it wants to keep the ICC out

[116] *Yang, supra note 74, page 123.*
[117] Hansen, *supra* note 108, pages 232-233.
[118] Yang, *supra* note 74, page 132.
[119] Morris, *supra* note 79, page 30.

of the matter. With all due respect, the possibility of Israel conducting a serious trial that meets all the requirements can't be foreseen, even less sustained.

3.5. ICC PROCEEDINGS

On 17 November 2023, the Office of the Prosecutor (hereinafter OTP) received a referral of the Situation in the State of Palestine, from the following five States Parties: South Africa, Bangladesh, Bolivia (Plurinational State of), Comoros, and Djibouti. In receiving the referral, the Office confirmed that it is presently conducting an investigation into the Situation in the State of Palestine. This investigation, commenced on 3 March 2021, encompasses conduct that may amount to Rome Statute crimes committed since 13 June 2014 in Gaza and the West Bank, including East Jerusalem. It is ongoing and extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023[120].

According to the information provided by the ICC[121], its functioning is divided into six different parts: preliminary examinations, investigations, Pre-trial stage, Trial stage, Appeals stage, and Enforcement stage. Each of them presents various barriers when the actor involved is Palestine, and this part will discuss the most troublesome ones procedurally speaking.

1. PRELIMINARY EXAMINATIONS

The first task for the OTP is to determine whether there is sufficient evidence of crimes of sufficient gravity falling within the ICC's jurisdiction, whether there are genuine national proceedings, and whether opening an investigation would serve the interests of justice and of the victims.

Preliminary examinations are referred to as "one of the Office's three core activities" by OTP at the ICC, along with investigating and prosecuting crimes under the Court's jurisdiction[122]. If the requirements are not met for initiating an investigation, or if the situation or crimes are not under the ICC's jurisdiction, the ICC's Prosecution cannot investigate.

[120] https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine

[121] https://www.icc-cpi.int/about/how-the-courtworks#:~:text=First%2C%20the%20crime%20of%20genocide,conditions%20of%20life%20calculated%20to

[122] ICC-OTP, OTP Strategic Plan: 2016-2018, 'PE Policy Paper', 16 November 2015, at paragraph 55.

In the early days of the ICC there was not much information available to the public about OTP's work within preliminary examinations and because of this, the importance of this pre-investigative procedure was not well understood outside the Court.
The OTP clarified in a paper dated September 2003 that the Prosecutor must always conduct a preliminary inquiry before moving further with an investigation. For that, The OTP released a definitive *Policy Paper on Preliminary Examinations*[123] in November 2013, which defines the independence, impartiality, and objectivity that the OTP must follow while conducting its functions[124].

These days, the mere decision to open a preliminary examination can have a significant impact. The research conducted by some academics demonstrates that the OTP is highly active during the preliminary phase, even though it does not have full investigatory powers. Adding to that, it also renders rulings on legal matters fundamental to the operation of the ICC, such as jurisdictional disputes and definitions of crimes that the Court's judges have not yet had a chance to interpret[125].

Gaining a comprehensive picture of the OTP's preliminary examination procedure is therefore essential to figure out several debates concerning the Court's legitimacy, and most importantly, its impartiality, efficiency, transparency, and independence.[126] In its September 2018 decision on that matter, Pre-Trial Chamber I stated that: *"*the preliminary examination is the pre-investigative assessment through which the Prosecutor analyses the seriousness of the information 'received' or 'made available' to it against the factors set out in article 53(1)(a)-(c) of the Statute*"*[127]*.*

Preliminary examinations can be explained as the "pre-investigative phase" of the OTP's work. It is, more precisely, the filtering that the Prosecutor does in order to determine whether or not there is a "reasonable basis to proceed to an investigation" by taking into account the elements specified in article 53(1) of the Rome Statute, which include:

[123] *Ibid,* paragraph 77.
[124] *Ibid* paragraphs 25-33.
[125] Wharton, and Grey, *supra* note 91, pages 2-3.
[126] As Stahn notes, preliminary examinations "have a key role to play in relation to the legitimacy and perception of justice", in Stahn C., "Damned If You Do, Damned If You Don't, Challenges and Critiques of Preliminary Examinations at the ICC", *Journal of International Criminal Justice,* 2017, 15, page 415.
[127] ICC, Request Under Regulation 46(3) of the Regulations of the Court, "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", pre–Trial Chamber I, 6 September 2018, ICC-RoC46(3)-01/18-37 at paragraph 82.

1. whether the information available provides a reasonable basis to believe that a crime within the ICC's jurisdiction has been or is being committed;

2. whether the potential cases would be admissible before the ICC; it has to determine if Article 17 of the ICC Statute would permit the case to be admitted[128]. This second criteria entails assessing the elusive concept of "gravity" in addition to the well-known norm of determining whether the national courts are actually unable or unwilling to continue, "particularly whether proceedings are conducted with the intent to bring to justice the alleged perpetrators within a reasonable time frame"[129] . Furthermore, if a case "is not of sufficient gravity to justify further action by the Court," it cannot be admitted before the ICC[130].

3. and whether an investigation would not serve the interests of justice.

These criteria — particularly the ones pertaining to "gravity" and "interests of justice"[131] — allow for a great deal of discretionary judgement, although a contested one, as demonstrated by recent ICC practice[132]. It has previously been reported that the ICC has had trouble evaluating the prosecutor's use of discretion in a few very politicised international cases[133].

In conclusion, even if the OTP has "limited powers at its disposal" during the preliminary examination phase, it still has a lot of room to collect evidence for the legal process. Nowadays, the OTP has fully put its powers into practice: it actively seeks for information rather than taking a passive position by sending missions to the pertinent states, interacting with local stakeholders and judicial actors and confirming the information it has received[134].

[128] Article 53(1)(b) Rome Statute, *supra* note 14.
[129] '*PE Policy Paper', supra* note 122, paragraph 172.
[130] Article 17(1)(a)-(c) Rome Statute, *supra* note 14.
[131] Article 53(1)(c) Rome Statute, *supra* note 14.
[132] Benoliel & Perry, *supra* note 77, page 116.
[133] *Ibid,* page 125.
[134] Wharton and Grey, *supra* note 91, pages 18-19.

2. INVESTIGATIONS

After gathering evidence and identifying a suspect, the Prosecution requests ICC judges to issue:

a) an arrest warrant: the ICC relies on countries to make arrests and transfer suspects to the ICC; or
b) a summons to appear: suspects appear voluntarily (if not, an arrest warrant may be issued).

When investigating, the Prosecutor must collect and disclose both incriminating and exonerating evidence so that the defendant is considered innocent until proven guilty, thus the burden of proof lies with the Prosecutor. This is the investigation phase in which the Palestinian case is now since October 7 and the OTP has speeded up investigations.

Although Israel is not a state party to the ICC, The Prosecutor would have the authority to demand Israel to judge anybody accountable for the genocide offence. Furthermore, in the event that Israel chooses to disregard or refuses to comply with the OTP's request, the ICC, the Palestinian Authority, and a bunch of other states would possess ample moral standing to suggest that ICC member states could detain and prosecute Israeli "war criminals" if they step into their territory[135]. However, this hypothetical situation would hardly result satisfactory, as there is little chance that Israeli authorities will leave their territory and fly to a state where they could be arrested for genocide charges.

It is challenging for the ICC to issue arrest warrants for Israeli military personnel implicated in offences against Palestinian civilians. This also poses a challenge to the ICC's authority to conduct investigations, as Israel consistently makes use of its status as a non-party state to the ICC, confining the scope of the ICC's authority to the concept of state sovereignty[136].

3. PRE-TRIAL STAGE

Before requesting an investigative authorisation from the Pre-Trial Chamber, the ICC Prosecutor must determine that there is a legitimate basis to move further with the investigation.[137] With the

[135] Benoliel & Perry, *supra* note 77, page 117.
[136] Soraya, Muhammad, & Ladiqi, *supra*, note 71, page 71.
[137] Article 15(3) and 53(1) Rome Statute, *supra* note 14.

exception of a restricted review by the Pre-Trial Chamber, the prosecutor is empowered to start an inquiry and prosecution under this incredibly broad discretion entirely on its own initiative and without supervision or control by any national or international body[138]. The purpose of this exclusion was to shield the prosecutor from undue political influence[139].

One of the biggest obstacles for the court is the issue of State cooperation. As a judicial institution, the ICC does not have its own police force or enforcement body, thus, it relies on cooperation with countries worldwide for support, particularly for making arrests, transferring arrested criminals to the ICC detention centre in The Hague, freezing suspects' assets, and enforcing sentences. Without any doubt, it is sceptical to think that Israel will actively provide its collaboration, and the same difficulties arise in every phase towards the last enforcement stage.

3.6. JUDGING NON-STATE PARTY NATIONALS: ISRAELI OFFICIALS

According to the treaty, even citizens of non-party states who have not otherwise given their consent to the court's jurisdiction are subject to the ICC. Due to the territorial basis (explained in section 4.3.), the court is able to exercise jurisdiction even in situations where the state of nationality of the defendant is not a party to the treaty and does not agree to it[140], which is exactly what could happen if any Israeli official ends up before the Court.

In the Al Bashir case, the ICC stated that the Statute is 'a multilateral treaty which acts as an international criminal code for the parties to it'[141] and so 'cannot impose obligations on third states without their consent'[142]. How is this reconciled with the reluctance of some states?

These problems are not solved either by the existence of *erga omnes* norms and *jus cogens* obligations: commitments impose duties on nations to stop genocide, war crimes, and crimes against humanity—crimes that fall under the ICC's subject-matter jurisdiction—as well as, in some situations, to prosecute and punish these crimes. However, they do not establish that punishment

[138] Article 15 Rome Statute, *supra* note 14.
[139] Benoliel & Perry, *supra* note 77, page 117.
[140] Morris, *supra* note 79, page 13.
[141] Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *supra* note 73.
[142] Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ('DRC Non-Cooperation Decision'), Al Bashir (ICC-02/05-01/09-195), PTC II, 9 April 2014, paragraph 26.

and prevention take place via the framework of an international criminal court (the ICC, for instance)[143].

The main missing piece of the puzzle is that Israel is not a state party to the Rome Statute, which is evident in Israel's attitude that there is no accountability for Israel's violations against Palestinian civil society and the ICC's jurisdiction has dealt with Israel's violations related to the Palestinian civilian population not very clearly. The Government of the State of Israel proudly declares that it recognises the significance—and indispensability—of an efficient tribunal court for the upholding of the rule of law and the avoidance of impunity. Even more, it was initially an active and consistent supporter of the concept of the ICC and its realisation in the form of the Rome Statute. Its representatives participated in all phases of the Statute's drafting with a keen sense of sincerity and gravity, as they bear in their hearts and minds collective, and occasionally personal, memories of the Holocaust, the greatest and most horrible crimes ever committed in human history[144].

However, Israel expressed its disappointment during the 1998 Rome Conference on the Statute's inclusion of provisions designed to further the political objectives of specific nations. For them, this regrettable behaviour may be a sign of a plan to use the Statute as a tool for political purposes[145].

The United States has also opposed to the ICC Treaty on the grounds that it would violate the law of treaties by binding non-parties and granting the court jurisdiction over the individuals of non-parties[146]. This criticism has sparked a contentious debate. The fundamental issue concerns the nature of the ICC as an international institution. The idea that the ICC is a criminal court is the foundation of the organisation's jurisdictional framework, and according to this perspective, the ICC's duty is to determine whether a person accused of a recognised international crime is guilty or innocent. From this angle, one may argue that no state, party or non-party, should be able to justifiably object to the court having jurisdiction over its nationals.

[143] Morris, *supra* note 79, page 57.
[144] Soraya, Muhammad, & Ladiqi, *supra* note 71, page 70.
[145] *Ibid, pages* 70-71.
[146] David Scheffer, U.S. Ambassador at Large for War Crimes Issues, The International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (March 26, 1999).

The challenge faced by those who drafted the Rome Treaty was creating a jurisdictional framework for the court that would be both sufficiently aggressive to enable the court to prosecute criminals and sufficiently consensual to qualify the court as an appropriate forum for resolving international disputes[147]. It may not be said that the latter has been successfully reached.

This approach's shortcoming is that there will be ICC proceedings that centre on the legality of official acts of governments in addition to those that only deal with individual guilt. In those cases, there will be instances where people are charged with official activities carried out in accordance with state policy and under state authority, even though the ICC will only identify individuals in its indictments rather than states[148]. Individuals' legal obligations and responsibilities are decided by the ICC; states in theory have no legal role in this process. The fact that an official committed a crime may potentially result in state responsibility has its weight, but in theory, the ICC does not need to make any earlier determinations about state responsibility in order to find a defendant guilty[149].

Even if Israel would be granted provisional admission, it is unlikely that it would ever participate in the ICC's proceedings, because it wants to maintain its current position of not ratifying the Statute of Rome, fearing that for example, Jewish settlers may be considered war criminals and face legal action[150]. After the lates arrest warrant issued on May 20 of 2024 against Benjamin Netanyahu and Yoav Gallant, this possibility has vanished.

4. INTERCONNECTION BETWEEN THE COURTS

States are notoriously hesitant to submit their disputes to binding third party adjudication. States may object to the idea of an international court effectively enacting international law when the contested matter relates to an unsettled area of law and fear the establishment of an authoritative precedent against their interests[151]. Publicly, no state wishes to be at risk of being condemned or declared genocidal, but they do support others implicitly by providing the necessary infrastructure.

[147] Morris, *supra* note 79, pages 15-16.
[148] *Ibid,* pages 14-15.
[149] Akande D., 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, 2003, page 637.
[150] Benoliel & Perry, *supra* note 77, pages 114-115.
[151] Morris, *supra* note 79, page 17.

Then, is the ‘fault’ to be attributed to the ‘individual’ who decided it, or to the state machinery? Or both?

For example, in the Kenyan case before the ICC, it was a well-known "secret" that a big portion of the political elite opposed the possibility of international justice—or any kind of criminal justice—being applied to those who planned the 2008 post-election violence, despite the Kenyan government's official declaration of support for ICC intervention in the nation[152]. The same scenario happens in Israel, as state authorities deny any of the charges they are being accused of, and so as to ensure their immunity, blocking every possible international intervention has proved to be effective (at least for now).

For state responsibility and ICJ proceedings, only conflicts involving states party to treaties granting them jurisdiction are subject to the contentious jurisdiction of any existing international court. The purpose of the treaties creating international courts is to provide states parties substantial ongoing control over the jurisdictional and remedial authority of the respective tribunals. The principle of the Monetary Gold decision has subsequently been further clarified. According to the ICJ's ruling in the *Nicaragua* case, each party to the dispute must consent to jurisdiction if the legal interests of the non-consenting state "would not only be affected by a decision, but would form the very subject matter of the decision"[153].

However, the primary distinction between the jurisdiction of the ICC and other international tribunals appears to be that the former's function is to settle disputes between states, while the latter focuses on determining individual's criminal responsibility. The distinctively non-consensual foundation of ICC jurisdiction might be completely justified by pointing out the differences between the ICC's missions and those of other international courts.

In fact, the jurisdictional provisions of the ICJ Statute and the ICC Treaty are diametrically opposed. The jurisdictional structures of the ICJ, which give states broad discretion over whether and when those courts will have decision-making authority, reflect states' interests in maintaining discretion over how they handle interstate disputes[154]. The legality or occurrence of that official state act—that is, the question of whether the state had the authority to take such action or

[152] Hansen, *supra* note 108, pages 230-231.
[153] *Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), 1984 I.C.J. 431 (Jurisdiction and Admissibility Judgment of November 26).
[154] Morris, *supra* note 79, page 15.

whether it did so—would "form the very subject matter of the dispute" in ICC cases in which a state's national is prosecuted for an official act that the state maintains was lawful or that the state maintains did not occur. However, the ICC would have jurisdiction over that matter under the rules of the ICC Treaty, whether or not the state whose official actions would be the subject of the adjudication gave its permission.

Another important aspect is that one side between any two states is likely to have a political advantage and a better negotiating stance over the other, which may make the bargaining unequal. In general, a state is less inclined to submit a dispute for third-party adjudication the more significant and delicate the issue of the dispute is to the state. States do occasionally decide to submit their conflicts to a third party. However, aware of the benefits and limitations of adjudication, states fiercely defend their right to choose the conditions under which they will do so[155].

5. THE CRIME OF GENOCIDE

5.1. ELEMENTS OF THE CRIME

The current definition of Genocide is set out in Article II of the Genocide Convention and in Article 6 of the Rome Statute, which is the same found in Article 4(2) of the statutes of the ICTY and Article 2(2) of the ICTR.

> *Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> *(a) Killing members of the group;*
>
> *(b) Causing serious bodily or mental harm to members of the group;*
>
> *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
>
> *(d) Imposing measures intended to prevent births within the group;*
>
> *(e) Forcibly transferring children of the group to another group.*

The definition sets the conditions to be met in order to commit a crime that constitutes genocide, but there are some instances more complicated to prove than others. In brief, the chapeau defines

[155] *Ibid*, page 18.

the primary mental element (*mens rea*) of genocide, whereas the enumerated acts under (a)(e) define the material elements (*actus reus*) of the crime[156].

The Holocaust served as the foundation for the paradigmatic crime of genocide. Its historical symbolism may have been dethroned because of the same punishment all ICC crimes receive, yet it still has a strong hold on the collective conscience[157]. It is paradoxical that the Jewish community that suffered the extermination is today committing through the State of Israel the exact same crime against the Palestinian population. Is this one of the reasons why the ICC has retracted itself from charging Benjamin Netanyahu of genocidal crimes?

The ICTR handed down its first verdict for the crime of genocide in *Akayesu*[158] on September 2, 1998. *"A landmark decision in the history of international criminal law... [that]... brings to life, for the first time, the ideals of the Genocide Convention, adopted 50 years ago"* [159] was how UN Secretary-General Kofi Annan praised it. The *Kambanda* ruling, which was made two days later on September 4, 1998, declared genocide to be the "crime of crimes"[160].

According to recent South Africa's official application instituting proceedings before the ICJ: "The Palestinians in Gaza are "living in utter, deepening horror" as they "continue to be relentlessly bombarded by Israel… suffering death, siege, destruction and deprivation of the most essential human needs such as food, water, lifesaving medical supplies and other essentials on a massive scale"; it is "apocalyptic"[161] "An entire population is besieged and under attack, denied access to the essentials for survival, bombed in their homes, shelters, hospitals and places of worship"[162]. Gaza is "the most dangerous place in the world to be a child"[163].

Unfortunately, the number of dead victims, injured people, attacks, evacuated, and so on and so forth has risen, and it will continue to do so in a horrific manner as there is no eyesight for a cease-

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156 Akhavan, P., "The crime of genocide in the ICTR jurisprudence", *Journal of International Criminal Justice*, 2005, *3*(4), page 992.
157 *Ibid, page* 1005.
158 *Akayesu, supra* note 60.
159 UN Information Centre (Pretoria), Statement by U.N. Secretary-General Kofi Annan on the Occasion of the Announcement of the First Judgement in a Case of Genocide by the International Criminal Tribunal For Rwanda. UN document PR/10/98/UNIC, 1998.
160 Judgment, Kambanda (ICTR 97-23-S), Trial Chamber I, 4 September 1998, paragraph 16.
161 UN OHCHR, Opening statement by UN High Commissioner for Human Rights Volker Türk at press conference ahead of Human Rights Day (6 December 2023).
162 UN IASC, Statement by Principals of the Inter-Agency Standing Committee, on the situation in Israel and the Occupied Palestinian Territory, "We need an immediate humanitarian ceasefire" (5 November 2023).
163 Application Instituting Proceedings, *infra* note 167, paragraph 44.

fire. The world is witnessing a genocide that is being broadcasted in live, and only those who do not want to admit what is happening can defend that there is not enough evidence to name the conflict with its name, that is, a genocide.

The "general appreciation" of genocide as the height of evil has no special legal significance. Since murder, torture, rape, and other similar-gravity actions are common to all three categories of crimes—war crimes, crimes against humanity, and genocide—it is unavoidably challenging to rank them in an abstract manner. For example, a single killing with the necessary special intent may be considered genocide, whereas the mass murder of thousands of prisoners of war with a broad goal may be considered a war crime[164].

To answer whether Genocide has and is being committed in Gaza the Courts need evidence of both the *actus reus* of genocide (the acts set out in paragraphs (a) to (e) of Article II of the Genocide Convention, such as killing, causing serious bodily or mental harm, and forcibly transferring children) and the *dolus specialis* (that those acts were 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'). In legal terms, what differentiates genocide from war crimes or crimes against humanity is not the degree of severity or scope of impact. Genocide is not defined with reference to the number of deaths but, rather, with reference to the specific intent (*dolus specialis*) of the perpetrator.

5.1.1. *ACTUS REUS* (MATERIAL ACTS)

The ICJ has explained that *"*there is an inherent inequity in asking a victim state to provide evidence of the accused state's direct control when the accused state retains control over the proof that would establish such control"*[165]*. It is really difficult to obtain evidence and up to date information coming from Gaza, as Israel is deliberately imposing telecommunications blackouts on Gaza and restricting access by fact-finding bodies and the international media. To date, only correspondents embedded with and subject to the censorship of the Israeli army have been permitted entry[166].

[164] Akhavan, *supra* note 156, pages 997-998.
[165] Bosnia v. Serbia, *supra* note 65, Dissenting Opinion of Vice-President Al-Khasawneh, paragraph 35.
[166] See, e.g., "Foreign correspondents petition Israel Supreme Court for Gaza access", Reuters (19 December 2023), https://www.reuters.com/world/middle-east/foreign-correspondents-petition-israel-supreme-court-gaza-access-2023-12-19/ .

The Application of South Africa before the ICJ instituting proceedings has made it possible to gather and comprise the evidence needed so as to conclude without doubt the Israeli genocidal intent, which has been concluded in detailed and huge work. The following figures, sources and statements have all been extracted from that Request of Provisional Measures, so as to ensure the highest accuracy possible and make use of the best information available. The following statements are excerpts from the vast amount of material collected, for more precision, please do check the whole report [167].

According to the figures set out in the "200 days of War" Health Cluster Overview in the Occupied Palestinian territory and the Latest Figures Set out by the Palestinian Ministry of Health and Palestine Red Crescent Society[168]:

(a) Killing members of the group

"Nowhere is safe in Gaza", as many United Nations experts have now made clear to the international community. Palestinians in Gaza have been killed in their homes, in places where they sought shelter, in hospitals, in UNWRA schools, in churches, in mosques, and as they tried to find food and water for their families. They have been killed if they failed to evacuate, in the places to which they fled, and even while they attempted to flee along Israeli declared "safe routes"[169]. Reports are multiplying of Israeli soldiers performing summary executions, including of multiple members of the same family — men, women and older people[170].

Over 36,000 Palestinians are reported to have been killed since Israel began its military assault on Gaza, according to the Palestinian Health Ministry, at least 70 per cent of whom are believed to be women and children. An additional estimated 7,780 people, including at least 4,700 women and children, are reported missing, presumed dead under the rubble of destroyed buildings — slow deaths — or decomposing in the streets where they were killed[171].

For Palestinian children, in particular, "[d]eath is everywhere" and "nowhere is safe", as over 115 Palestinian children in Gaza are killed every day. It is estimated that more Palestinian children

[167] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel), Application Instituting Proceedings and Request for Provisional Measures (Oct. 23, 2023).
[168] https://reliefweb.int/report/occupied-palestinian-territory/200-days-war-health-cluster-overview
[169] Application Instituting Proceedings, *supra* note 167, paragraph 46.
[170] *Ibid*, paragraph 46.
[171] *Ibid*, paragraph 45.

were killed in the first three weeks in Gaza alone (a total of 3,195) than the total number of children killed each year across the world's conflict zones since 2019. The scale of Palestinian child killings in Gaza is such that United Nations chiefs have described it as "a graveyard for children"[172].

(b) ***Causing serious bodily or mental harm to members of the group;***

Over 81,000 Palestinians have been wounded in Israel's military attacks on Gaza since 7 October 2023, the majority of them being women and children.
There are reports of Israeli forces using white phosphorus in densely populated areas in Gaza: as the World Health Organisation describes, even small amounts of white phosphorus can cause deep and severe burns, penetrating even through bone. There are no functioning hospitals in the North of Gaza, in particular, such that injured persons are reduced to "waiting to die", unable to seek surgery or medical treatment beyond first aid, dying slow, agonising deaths from their injuries or from resultant infections[173].

It is already known that "[r]epeated exposure to conflict and violence, including witnessing and experiencing housing demolition, combined with Israel's siege of Gaza since 2007" is "associated with high levels of psychological distress among Palestinians"[174].

Alongside its military campaign, Israel has engaged in the dehumanisation, and cruel, inhuman and degrading treatment of members Palestinians in Gaza. Large numbers of Palestinian civilians, including children, have reportedly been arrested, blindfolded, forced to undress and remain outside in the cold weather, before being forced on to trucks and taken to unknown locations. Many Palestinian detainees who have been released report having been subjected to torture and ill-treatment, including the deprivation of food, water, shelter and access to toilets[175].

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Concerning the health systems functionality, 32 out of 34 hospitals have been damaged, 25 out of 36 hospitals are not functioning in Gaza, 62 out of 77 primary health care centres are neither

[172] *Ibid* paragraph 48.
[173] *Ibid,* paragraph 51.
[174] *Ibid,* paragraph 53.
[175] *Ibid,* paragraph 54.

functioning. In an estimated recount, over 443 attacks have been directed to healthcare, not to forget the long-term conditions that people have to cope with in Gaza.

I. Mass expulsion from homes and displacement of Palestinians in Gaza

It is estimated that over 1.9 million Palestinians out of Gaza's population of 2.3 million people — approximately 85 percent of the population — have been forced from their homes. There is nowhere safe for them to flee to, those who cannot leave or refuse to be displaced have been killed or are at extreme risk of being killed in their homes[176].

Israel is repeatedly issuing 'evacuation orders' demanding that Palestinian civilians in certain areas of Gaza leave their homes for other areas. Many of those who are unwilling or unable to evacuate are then bombed in their homes[177].

"Gaza's housing and civilian infrastructure have been razed to the ground, frustrating any realistic prospects for displaced Gazans to return home, repeating a long history of mass forced displacement of Palestinians by Israel"[178]. The forced displacements in Gaza are genocidal, in that they are taking place in circumstances calculated to bring about the physical destruction of Palestinians in Gaza[179].

II. Deprivation of access to adequate food and water to Palestinians in Gaza

On 9 October 2023, Israel declared a "complete siege" on Gaza, allowing no electricity, no food, no water and no fuel to enter the strip[180].

As the Secretary-General has starkly assessed, the level of destruction in Gaza is now so catastrophic that: "[t]he conditions for the effective delivery of humanitarian aid no longer exist… But even if sufficient supplies were permitted into Gaza, intense bombardment and hostilities, Israeli restrictions on movement, fuel shortages, and interrupted communications, make it impossible for UN agencies and their partners to reach most of the people in need"[181].

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[176] *Ibid,* paragraph 55.
[177] *Ibid,* paragraph 56.
[178] *Ibid,* paragraoh 60.
[179] Croatia v. Serbia Judgment, *supra* note 55, pages 71-72, paragraph 163.
[180] Application Instituting Proceedings, *supra* note 167, paragraph 61.
[181] Application Instituting Proceedings, *supra* note 167, paragraph 61.

Experts are now predicting that more Palestinians in Gaza may die from starvation and disease than airstrikes, and yet Israel is intensifying its bombing campaign, precluding the effective delivery of humanitarian assistance to Palestinians. It is clear that Israel is through its actions and policies in Gaza, deliberately inflicting on Palestinians conditions of life calculated to bring about their destruction[182].

III. Deprivation of access to adequate shelter, clothes, hygiene and sanitation to Palestinians in Gaza

The majority of the 1.9 million displaced Palestinians in Gaza are seeking shelter in UNRWA facilities, which primarily consist of schools and tents. These locations are themselves not safe: to date — and despite Israel having been provided with the coordinates of all United Nations facilities— Israel has killed hundreds of Palestinian men, women and children seeking shelter in UNRWA facilities, and injured over a thousand[183].

Since the Commissioner-General of UNRWA wrote to the President of the United Nations General Assembly on 7 December 2023, advising that the humanitarian situation in Gaza was already "untenable", over one million Palestinians have continued to be forced by Israeli military 'orders' into the Rafah Governorate near the Egyptian border. The area has become the "epicentre of displacement", with an estimated "fourfold" increase in its population density, thought to now exceed 12,000 people per square kilometre. OCHA is warning there is "no empty space left for people to shelter, not even in the streets and other open areas"[184].

Israeli forces have bombed the displacement tent camp in a designed safe zone in Rafah, killing some 40 Palestinians, according to the Wafa news agency. Many of the victims were women and children, who have died being burnt alive. Rafah attack shows Israel is ignoring ICJ's binding orders. Triestino Mariniello, a lawyer with the Palestinian Centre for Human Rights (PCGR), told Al Jazeera that Israel's latest attack on an area designated as a safe zone in Rafah shows that Israel is still ignoring the ICJ. "These horrible images that arrive from Rafah show that the Israeli

[182] *Ibid,* paragraph 70.
[183] *Ibid*, paragraph 71.
[184] *Ibid,* paragraph 74.

authorities are completely disregarding the binding, provisional measures issued by ICJ, which just two days before ordered Israel to stop any military action in Rafah," he said[185].

(d) Imposing measures intended to prevent births within the group;

I. Deprivation of adequate medical assistance to Palestinians in Gaza

Almost above all else, Israel's military assault on Gaza has been an attack on Gaza's medical healthcare system, indispensable to the life and survival of the Palestinians in Gaza. Israel "has declared an 'unrelenting war' on the health system in Gaza"[186].

Since early December 2023, Israeli army attacks on Palestinian hospitals have only increased. The Israeli army has continued to attack and besiege hospitals and healthcare centres; to deprive them of electricity and fuel crucial to maintain effective functioning and equipment; to obstruct them from receiving medical supplies, food and water; to force their evacuations and closure; and effectively to destroy them[187].

Those wounded by Israel in Gaza are being deprived of life-saving medical care: Gaza's healthcare system — already crippled by years of blockade and prior attacks by Israel — is unable to cope with the sheer scale of the injuries. There are reports of severely injured patients walking for miles trying to find help. UNICEF highlighted the case of a boy from the North "whose leg had been blown off in the violence", who "had spent 'three or four days' trying to reach the south, delayed by checkpoints … The smell [of decomposition] was clear … and that boy had shrapnel all over. Potentially, he was blind and had burns to 50 per cent of his body"[188].

Those hospitals which are still functioning are described as scenes from a "horror movie". The critical shortages of staff and supplies — including anaesthetics, analgesics, medicine and disinfectants — have led not only to otherwise unnecessary amputations of limbs, but also to amputations without anaesthesia, often undertaken by flashlight. Pregnant women are also being subjected to caesareans without anaesthetic[189].

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185 https://www.aljazeera.com/news/liveblog/2024/5/27/israels-war-on-gaza-live-news-35-killed-in-rafah-tent-bombings (last accessed on 10/06/2024).
186 *Ibid,* paragraph 76.
187 *Ibid,* paragraph 78.
188 *Ibid,* paragraph 83.
189 *Ibid,* paragraph 84.

Experts assess that the death toll from disease and hunger “could be multiples of that from fighting and air strikes”. Israeli is through its relentless attacks on the Palestinian healthcare system in Gaza is deliberately inflicting on Palestinians in Gaza conditions of life calculated to bring about their destruction[190].

II. Destruction of Palestinian life in Gaza

Across Gaza, Israel has targeted the infrastructure and foundations of Palestinian life, deliberately creating conditions of life calculated to bring about the physical destruction of Palestinian people[191]. The Israeli army — erecting the Israeli flag over the wreckage of devastated Palestinian homes, towns and cities, and spurred on by calls from within the Israeli government and re-establish Israeli settlements on the rubble of Palestinian homes — is destroying the very fabric and basis of Palestinian life in Gaza[192]. Israel’s actions are impacting Palestinian women and children in Gaza especially severely, with 70 per cent of those killed estimated to be women and children. Two mothers are estimated to be killed every hour in Gaza[193].

5.1.2. MENS REA

There are two degrees of *mens rea* in the definition of genocide[194]. The underlying crimes that qualify as genocide are subject to a relatively simple intent requirement; however, and this is where things get really confusing, as they only qualify as genocidal if they are "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such”[195].

Thus, in order to be found guilty of genocide, a person or entity must have committed at least one of the crimes listed in Article II of the Genocide Convention and that crime must have been committed with the intentional aim to completely or partially eliminate a protected group. Therefore, for genocide to be proven, two degrees of *mens rea* must exist. The Commission stated that the offender must have "the criminal intent required for the underlying offence (killing,

[190] *Ibid,* paragraph 87.
[191] *Ibid,* `paragraph 89.
[192] *Ibid,* paragraph 94.
[193] *Ibid,* paragraph 95.
[194] Some academics have proposed other perspectives for the genocide crime: see e.g. Greenawalt, A. K. A., “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation”, *Columbia Law Review*, 1999, *99*(8), pages 2259-2294; Ambos, K., “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, *91*(876), pages 833–858.
[195] Van Der Wilt, H. G., “Genocide, Complicity in Genocide and International v. Domestic Jurisdiction”, *Journal of International Criminal Justice*, 2006, *4*(2), page 241.

causing bodily or mental harm, etc.)" in order for his actions to have the intended consequences[196]. Furthermore, the offender must have the deliberate intent to completely or partially destroy the targeted group as a whole. This intent "amounts to *dolus specialis*," as Cassese has observed, and it "must exist in addition to the criminal intent accompanying the underlying offence"[197].

The *dolus specialis* of genocide is the fundamental mental element; each act requires a matching *mens rea*, but this is separate from the primary mental element[198]:

1. the term *'killing' refers to 'intentional but not necessarily premeditated murder*[199]*.*

2. the term *'causing serious bodily or mental harm include 'acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution'*[200]*.* The Chamber in *Akayesu* found on the facts that systematic sexual violence, rape, mutilations and interrogations combined with serious beatings and/or threats of death were committed, and rightfully considered these to constitute serious bodily and mental harm within the meaning of genocide[201].

3. For the term *'deliberately inflicting on the group conditions of life calculated to bring about its destruction'* the Chamber in *Akayesu* explains that this should be construed *'as methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction'*[202]*.* This concept of 'slow death', the Chamber concludes, includes acts such as *'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement'*[203]*.*

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[196] Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/ 60, 25 January 2005 ('Darfur Report'), page 491.
[197] Similarly, the Appeals Chamber in Krstiç held at paragraph 20 that '[a]s a specific intent offence, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part.' *Judgment*, Krstiç (IT-98-33-T), Trial Chamber I, 2 August 2001.
[198] Akhavan, *supra* note 156, pages 1003-1004.
[199] Judgment, Kayishema (ICTR-95-1-T), Trial Chamber II, 21 May 1999, at 151.
[200] *Akayesu*, *supra* note 60, at 504.
[201] *Ibid,* at 706-707 and 711-712.
[202] Akayesu, *supra* note 60, at 505.
[203] *Ibid, at* 506.

I. DOLUS SPECIALIS

It is this special intent that makes the crime of genocide so unique. The ICJ described the specific intent as *[t]he additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis.... It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasise that intent to destroy the protected group*[204]*.*

All material acts of genocide listed in Article 2(a)–(e) of the Statute are covered by this mental element[205]. *"It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder (…),* according to the statement*, "because the underlying acts, such as killing or causing serious bodily or mental harm, are not international crimes as such"*[206]*.*

In order to distinguish genocide from other types of crimes that are goal-oriented, the ICTR has appropriately centred its jurisprudence on the special intent (*dolus specialis*) to destroy a group, making it its distinguishing characteristic. Genocide has been crowned as "the crime of crimes" by the ICTR, but it has also been dethroned by the ruling that it carries the same punishment as other breaches of humanitarian law. However, distinguishing the extermination of the Tutsi as a genocide from crimes against humanity was a significant contribution of the ICTR[207].

For a better understanding, special intent requires that the offender *"clearly intended the result,"*[208] denoting *"a psychological nexus between the physical result and the mental state of the perpetrator." Dolus generalis*, on the other hand, requires that the offender *"means to cause"* a particular consequence *"or is aware that it will occur in the ordinary course of events"*[209]*.* According to conventional belief, this "intent to destroy" implies a "special intent," or a desire to completely eliminate the group. Put another way, it is insufficient to merely know or recognise that a group would be destroyed as a result of the killings. The "genocidaire" also needs to have a discriminating mindset, choosing his victims based on whether or not they belong to the group he

[204] *The Genocide case, supra* note 65, at 187.
[205] *Kayishema*, *supra* note 199, at 91.
[206] Akhavan, *supra* note 156, page 992.
[207] *Ibid,* page 1000.
[208] *Akayesu*, *supra* note 60, at 518.
[209] Article 30(2)(b) ICC Statute, *supra* note 14.

wants to destroy[210]. Sometimes motive is linked with this special intent. However, ICTY and ICTR case law underlines that these notions should not be confused because personal motives, such as gaining political power, do not preclude the aim to eliminate a group[211].

Expanding upon the importance of the *dolus specialis* requirement, the Akayesu case made the following crucial observation "*[c]ontrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned [e.g. killing members of the group, etc.] is committed with the specific intent [to destroy a group]*[212]*.*

II. EXPRESSIONS OF GENOCIDAL INTENT AGAINST THE PALESTINIAN PEOPLE BY ISRAELI STATE OFFICIALS

"Evidence of Israeli State officials' specific intent *('dolus specialis'*) to commit and persist in committing genocidal acts or to fail to prevent them has been significant and unbelievable since October 2023. Those statements of intent — when combined with the level of killing, maiming, displacement and destruction on the ground, together with the siege — evidence an unfolding and continuing genocide. They include statements by the following individuals in the positions of the highest responsibility"[213]:

a) *Prime Minister of Israel: Benjamin Netanyahu. He described the situation as "a struggle between the children of light and the children of darkness, between humanity and the law of the jungle". His 'Christmas message' stated the following: "we're facing monsters, monsters who murdered children in front of their parents… This is a battle not only of Israel against these barbarians, it's a battle of civilization against barbarism".*

b) *President of Israel. "It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware not involved. It's absolutely not true. … and we will fight until we break their backbone." The Israeli President is one of many Israelis to have handwritten 'messages' on bombs to be dropped on Gaza.*

[210] Judgment, Krstiç, *supra* note 197, paragraph 561.
[211] Van Der Wilt, *supra* note 196, page 241.
[212] *Akayesu*, *supra* note 60, at 497.
[213] Application Instituting Proceedings, *supra* note 167, paragraph 101.

c) *Israeli Minister of Defence: Yoav Gallant. He advised that Israel was "imposing a complete siege on Gaza. No electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals and we are acting accordingly". "Gaza won't return to what it was before. We will eliminate everything. If it doesn't take one day, it will take a week. It will take weeks or even months, we will reach all places."*

d) *Israeli Minister for National Security. "[t]o be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy — they're all terrorists, and they should also be destroyed."*

e) *Israeli Minister of Energy and Infrastructure. "All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world". "Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home. Humanitarianism for humanitarianism. And no one will preach us morality."*

f) *Israeli Minister of Finance. "[w]e need to deal a blow that hasn't been seen in 50 years and take down Gaza."*

g) *Israel Minister of Heritage. He argued against humanitarian aid as "[w]e wouldn't hand the Nazis humanitarian aid", and "there is no such thing as uninvolved civilians in Gaza". He also posited a nuclear attack on the Gaza Strip.*

h) *Deputy Speaker of the Knesset and Member of the Foreign Affairs and Security Committee. "[n]ow we all have one common goal — erasing the Gaza Strip from the face of the earth".*

i) *Israeli Army Coordinator of Government Activities in the Territories ('COGAT'): Israel has imposed a total blockade on Gaza, no electricity, no water, just damage. You wanted hell, you will get hell."*

j) *Israeli Army Reservist Major General, former Head of the Israeli National Security Council, and adviser to the Defence Minister. "Israel has no interest in the Gaza Strip being*

rehabilitated and this is an important point that needs to be made clear to the Americans", and that "[i]f we ever want to see the hostages alive, the only way is to create a severe humanitarian crisis in Gaza". He reiterated that the army should: "[C]reate such a huge pressure on Gaza, that Gaza will become an area where people cannot live. People cannot live, until Hamas is destroyed, which means that Israel not only stops to supply energy, diesel, water, food … as we did in the last twenty years … but we should prevent any possible assistance by others, and to create in Gaza such a terrible, unbearable situation, that can last weeks and months". "The State of Israel has no choice but to make Gaza a place that is temporarily, or permanently, impossible to live in." The US must ultimately back even an operation like this, even if there are thousands of bodies of civilians in the streets afterward". Gaza will become a place where no human being can exist." Giora Eiland has repeatedly underscored that there should be no distinction between Hamas combatants and Palestinian civilians, saying: After all, severe epidemics in the south of the Gaza Strip will bring victory closer . . . It is precisely its civil collapse that will bring the end of the war closer. When senior Israeli figures say in the media 'It's either us or them' we should clarify the question of who is 'them'. 'They' are not only Hamas fighters with weapons, but also all the 'civilian' officials, including hospital administrators and school administrators, and also the entire Gaza population who enthusiastically supported Hamas and cheered on its atrocities on October 7th."

k) *Israeli Army reservist "motivational speech": "Be triumphant and finish them off and don't leave anyone behind. Erase the memory of them. Erase them, their families, mothers and children. These animals can no longer live . . . Every Jew with a weapon should go out and kill them. If you have an Arab neighbour, don't wait, go to his home and shoot him . . . We want to invade, not like before, we want to enter and destroy what's in front of us, and destroy houses, then destroy the one after it. With all of our forces, complete destruction, enter and destroy. As you can see, we will witness things we've never dreamed of. Let them drop bombs on them and erase them."*

Similar genocidal rhetoric is also commonplace in Israeli civil society, with genocidal messages being routinely broadcast — without censure or sanction — in Israeli media. The media reports

call for Gaza to be “erase[d],” turned into a “slaughterhouse”, on the repeated claim that “[t]here are no innocents… There is no population. There are 2.5 million terrorists”[214].

The objective criterion that the "*conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction"* has been added to the definition of genocide under the ICC Elements of Crimes[215], which are merely intended to ‘assist’ in the interpretation of crimes and are not strictly binding under the ICC Statute[216]. This criteria is really important in the current context, as all the acts and evidence have to be interpreted and evaluated in light of the horrific situation that has aggravated since October 2023, while suffering for decades. These are not isolated activities but are all part of the huge Israeli military machinery directed against the Palestinians.

5.1.3. OTHER CONSIDERATIONS

A) ‘PROTECTED GROUP’

The definition of *‘genocide’* is restricted to the intentional destruction of *‘national, ethnical, racial, or religious groups’.*

In the *Rutaganda* case, the Chamber notes that: *“... the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group”*[217].

[214] Application Instituting Proceedings, *supra* note 167, paragraph 107.
[215] See Report of the Preparatory Commission for the International Criminal Court, Addendum, Elements of Crimes, UN document PCNICC/2000/1 (2000), Article 6 at 6-8.
[216] Although Art. 21(1)(a) ICC Statute includes the Elements of Crimes as part of the applicable law, Art. 9(1) provides that they ‘shall assist the Court in the interpretation’ of crimes within the ICC’s jurisdiction.
[217] Judgement, Rutaganda (ICTR-96-3-A), Appeal Chamber, 26 May 2003, at 56.

However, the Chamber quickly declared that, in accordance with the Genocide Convention, "a subjective definition alone is not enough to determine victims' groups," as "the Convention was presumably intended to cover relatively stable and permanent groups"[218].

In the Musema case, the ICTR Appeals Chamber offered the following helpful statement*: "For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone"[219].*

It can be summarised in a sentence as: "*But, beyond the discriminatory intent required for persecution, genocide 'must be accompanied by the intention to destroy ... the group to which the victims belong"[220].* Under the guise of Hamas's attack, this discriminatory and disproportionate policy makes it quite clear that the goal is to wipe out the whole Palestinian population. Israel's attacks on Gaza exhibit every characteristics that the UN *Convention on Genocide* defines as genocide. These individuals have been specifically chosen because of their national, ethnic, religious, and ethical identities[221].

B) *'IN WHOLE OR IN PART':* WHICH EXTENT OF THE GROUP?

What does a "substantial part" mean? This scale-related aspect serves as both a protective measure against the trivialisation of genocide through overly broad interpretations and a crucial part of the definition. However, this scale factor is rather indeterminate and depends on a broad range of judicial appreciation, which can also be misused.

Genocide must have the intention of destroying a group "in whole or in part." In *Kayishema*, the Trial Chamber held that by its very nature, the crime of genocide *'requires the intention to destroy*

[218] *Ibid,* at 57.
[219] Judgment in Musema (ICTR 96-13-A),Trial Chamber I, 27 January 2000, at 165.
[220] ICTY Judgement, Kupreskic (IT-95-16-T), Trial Chamber II, 14 January 2000, at 636.
[221] Rifai, D. S. L., "The genocide in Gaza and the contempt of international law: Some reflections", *Social Science Research Network,* 2024, page 3.

at least a substantial part of a particular group'. The term *'in part',* it opined, *'would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.* It concludes that genocide requires *'the intention to destroy a considerable number of individuals who are part of the group'*[222]*.* Although this seems like a fair reading of the scale criterion, it is unclear which demographic group determines the "whole" from which a "substantial part" may be identified.

The ICTY Appeals Chamber in the Krstic case provides a useful note to Rwanda in terms of the geographic definition of the group targeted for destruction:

"The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can in combination with other factors inform the analysis"[223]*.* Taking into account all the aforementioned, it can be argued that Palestine is being destroyed 'in whole or in part', as the number of killings has enough gravity and scale to fall under the scope of application of the provision.

5.2. INDIVIDUAL CRIMINAL RESPONSIBILITY

While it is difficult to measure, the existence of an international court dedicated to "the enforcement of international justice" has had an impact on the state of the world[224]. The hypothetical arrest and prosecution of the Israeli authorities would be a huge landmark in the story of the Palestinian conflict. Still many other concepts and efforts will be used to make the punishment of the criminals as hard as possible.

[222] Kayishema, *supra* note 199, at 96.
[223] *Judgment Kristic, supra* note 197, paragraph 13.
[224] Post, *supra* note 72, page 378.

5.2.1. THE PURPOSE OF (INTERNATIONAL) CRIMINAL LAW

The basis of international criminal law is that criminal responsibility is individual. It is decided in a fair procedure, without veto powers and much less influenced by political powers than the decision-making process of the UN Security Council. Most importantly, punishment leads to the individualisation of responsibility, which makes clear that the crimes have not been collectively committed by "the Serbs", "the Germans", "the Croats" or "the Hutus", but by criminal individuals[225].

"No peace without justice" is a further justification for international criminal justice that is frequently used. The assertion assumes that there is a healing process by which criminal justice gives closure to a dispute that affects a society. This concept was part of the justification used by the Security Council to establish the ICTY and the ICTR. The prosecutions were meant to "contribute to the process of national reconciliation and to the restoration and maintenance of peace," according to the Security Council resolution establishing the ICTR[226].

But the idea that "no peace without justice" is not always fulfilled. Rather, it is sometimes asserted that "stability over justice" is prioritised, where there is a risk of renewed violence if the local leaders are forced to face criminal trials. Even more fundamentally, is the question of whether criminal law could ever bring an end to widespread, systemic injustice and suffering and whether the sense of closure that follows a criminal trial's establishment of the guilty could actually silence alternative paths and responsibilities. Maybe there is pain that never goes away[227].

Maybe international criminal law's task is "to naturalise and to exclude from the political battle, certain conditions that are essential for the maintenance of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, and especially white men"[228]. Now in 2023, faced again with a cruel conflict in Palestine (as it happened with the Ukraine in 2022), for the benefit of humanity and the sake of justice, and the ICC itself, it is advisable for the Prosecutor to speed up procedures as much as it can[229].

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[225] Sassòli, M., & Olson, L. M., "The judgment of the ICTY Appeals Chamber on the merits in the Tadic case", *International Review of the Red Cross*, 2000, *82* (839), pages 755-756.
[226] Tallgren, I., "The sensibility and sense of international criminal law", *European Journal of International Law*, 2002, *13*(3), pages 592-593.
[227] *Ibid,* page 593.
[228] *Ibid,* pages 594-595.
[229] Post, *supra* note 72, page 381.

5.2.2. EXCEPTIONS

The *dolus specialis* criterion has many notable exceptions according to ICTR case law. In particular, the need for special intent is eliminated by applying the superior responsibility[230] concept in accordance with Article 6(3) of the Statute. According to this doctrine, if a superior knew or had reasonable suspicion that a subordinate was going to commit a crime or had already committed one and the superior did not take the required and appropriate action to stop the crime or to punish the perpetrators, the superior would be held criminally liable for the acts of the subordinate[231].

What about senior state officials? The Rome Statute asks States to remove government officials' criminal immunity under domestic law. This includes heads of state or Government, members of parliament or the government, elected representatives, and government personnel. Article 27(1) provides: ‘‘This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence’’. Nonetheless, it is still conceivable that current international law will grant protection to government officials in office[232]. For example, in the events that occurred after Kenyan elections, considering that some of the people accused by the OTP came from the most powerful politicians and government officials in the state, opposition to the accountability process was hardly shocking[233].

The ICJ in its Judgement *in the Case Concerning the Arrest Warran*t maintains, on the one hand, the functional immunity of the official capacity and, on the other, proposes that there are exceptions to such immunity in four circumstances [234]. Both doctrines of state immunity and command responsibly are too complicated and extensive to be addressed in this work, but both will certainly appear in the defence arguments.

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[230] Kayishema, *supra* note 199, at 92.
[231] Akhavan, *supra* note 156, page 993.
[232] Yang, *supra* note 74, page 129.
[233] Hansen, *supra* note 108, page 231.
[234] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002, paragraph 58.

5.2.3. STATE COOPERATION AND RISK FOR LATER ATTRIBUTION

In international criminal law, the connection between the state and the individual, as well as the relationship between their respective responsibilities, are anything but straightforward. In the current institutions of the "international community," recourse to international criminal jurisdiction is frequently, if not always, formed as an action against a specific state or states, despite the discourse's clear stress on individual criminal responsibility. It is easy to find appropriate instances, such as how the Lockerbie case led to sanctions on Libya or how Serbia's and Croatia's unwillingness to cooperate with the ICTY resulted in condemnations in Security Council resolutions[235]. Thus, there is a risk for States to be attributed responsibility whenever an individual who was 'close' to the State authority is found to be guilty.

One implicit or indirect goal of the ICTY, ICTR, and ICC is to target the type of crime that is often associated with the use of state authority, as it has convicted individuals who were many times acting under the instructions of a State. This type of criminality is widely considered to be the most serious in the history of international criminal law. As the state authority may be unified or dispersed, the relationship may or may not be close, but a connection of some kind may be assumed[236]. Hannah Arendt wrote on the acts of Eichmann: *'crimes of this kind were, and could only be, committed under a criminal law and by a criminal state'*[237]. There are inevitable connections between state and individual responsibility implementation[238].

There is no denying that the idea of "special intent" has several significant functions. One reason is that it sends a powerful moral statement, fiercely condemning the inhumane attempt to deny existence to an entire group of people. But from a more practical perspective, the extent of genocide typically needs extensive preparation and huge collective effort, which is usually supported by state authority. This aim will hardly be accomplished without a strong determination to achieve the result. The key point is that without sufficient financial and economic support, no genocide or other massive campaign of human rights crimes can be upheld. This has been acknowledged in post-World War II case law, where German industrial captains and their subordinates were put on trial for supplying gas to concentration camps used in the extermination

[235] Tallgren, *supra* note 226, pages 588-589.
[236] *Ibid,* pages 589-590.
[237] Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (New York: the Viking Press, 1963), page 240.
[238] Nollkaemper, A., "Concurrence between Individual Responsibility and State Responsibility in International Law" *International and Comparative Law Quarterly*, 2003, *52*(3), page 627.

of Jews. These scenarios have in common the interest of big business in maintaining conflict and human misery. Perhaps what's different is that there's a greater potential for both domestic and international courts to break the cycle now that political, legal, and institutional advancements have taken place[239].

Last, prior factual or legal conclusions about individual responsibility may be given weight in an interstate procedure on state responsibility without affecting the formal legal implications of such conclusions. There is no hierarchical connection between international courts in the sense that a court tasked with establishing state responsibility ought to defer to a court that has established individual responsibility. So it is not necessary for a court or tribunal to rule that there is no factual basis for individual responsibility in order to determine state responsibility[240]. In contrast to the standard that applies in situations of individual responsibility, the standard of proof in interstate procedures is different and typically lower. Because it is based on the weight of the evidence presented by both sides rather than the "beyond a reasonable doubt" standard [241], it will often be less demanding than the standard of proof that is used in cases involving individual responsibility[242].

Will the arrest warrant against Benjamin Netanyahu influence the proceedings in the ICJ? More importantly, would a decision of the ICC declaring the Prime Minister of Israel innocent make Israel not guilty of genocidal acts? Or rather, would it increase the stress put on the ICJ for being the last resort where any Israeli responsibility could come from?

5.3. STATE RESPONSIBILITY

Evaluations of genocide that have received international condemnation are relatively rare, and assessments of state responsibility for genocide are even rarer since genocide is often evaluated in relation to an individual's criminal prosecution. The ICJ has made some important contributions about how to define state responsibility for genocide[243].

[239] Van Der Wilt, *supra* note 195, pages 256-257.
[240] Nollkaemper, *supra* note 238, pages 628-629.
[241] For determining individual responsibility in the ICC, the standard is proof 'beyond a reasonable doubt'; see Art 66(3) ICC Statute. For proof required for establishing state responsibility, no uniform standard exists, but in principle the standard will be lower than in cases on individual responsibility.
[242] Nollkaemper, *supra* note 238, page 630.
[243] On this matter, see Abass A., "Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur", *Fordham International Law Journal*, 2007, vol 31(4), num. 6, 871-910.

While the Darfur Commission concluded that the "central government" of Sudan had not carried out a state policy or plan for genocide in Darfur, the ICJ emphasised that a state can be held internationally responsible for genocide committed by its officials, holding that if a state organ, individual, or group whose actions are legally attributable to the state, engages in genocide [244]. Thus, it was not 'brave' enough to convict a State for Genocide, but nevertheless wanted to leave open the path for individual trials shifting the burden to another judicial body.

For the international community, the ruling rendered by the ICJ in Bosnia and Herzegovina v. Serbia and Montenegro was momentous. The Court was asked to rule on whether Serbia could be accused of genocide based on crimes committed in Bosnia and Herzegovina after the breakup of the former Yugoslavia in 1992. In the almost sixty years since the Convention on the Prevention and Punishment of the Crime of Genocide was unanimously approved by the United Nations General Assembly, this was the first time a court had to decide whether a sovereign state could be held accountable for genocide[245].

The Court decided that although genocide had occurred in Srebrenica in July 1995, the acts of those who carried out the genocide could not be attributed to the Serbian state. Nonetheless, the Court concluded that Serbia had failed to transfer Ratko Mladic, violating both its responsibilities to prevent and punish genocide (but not committing it). In the same line, even though the Commission acknowledged that some people, including government officials, may have committed acts with genocidal intent, it came to the conclusion that the central government had not committed genocide because it did not appear to possess the necessary *dolus specialis* of genocidal intent[*246*]. So the ICJ held that, as a matter of law, it can find a state responsible for the commission of genocide. But the ICJ's method for resolving factual and legal disputes that crossed over with the ICTY's activities will also prove crucial. Then, according to the interpretation made by the ICJ, is it ever possible to declare a state responsible for committing genocide? And if its so, how?

[244] Loewenstein, A. B., & Kostas, S. A., "Divergent approaches to determining responsibility for genocide: the Darfur Commission of Inquiry and the ICJ's judgment in the genocide case". *Journal of International Criminal Justice*, 2007, 5(4), page 839.
[245] Goldstone, R. J., & Hamilton, R. J., "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia." *Leiden Journal of International Law*, 2008, 21(1), pages 95–96.
[246] Report of the International Commission of Inquiry on Darfur, *supra* note 196.

5.3.1. ARSIWA: STATE ORGANS

International law has historically only recognised the state as the legal agent of persons acting as state organs. State responsibility only comes from a state action rather than an individual one, even if states operate via persons in reality. In legal terms, responsibility of individuals is neither a prerequisite for nor an indication of state responsibility, so that it does not depend on it. The principles governing breach and attribution are indifferent to the subjective conduct of the author of the act [247].

Thus, the only link between the state and individual acts would be the state's obligation to stop crimes committed by its people, to not put up with crimes, and, in the end, to bring charges against those who are accused of committing crimes.[248] For instance, this would reflect the Serb State's sentence for not doing enough to prevent genocide from happening, rather than actively committing it[249].

The PICJ recognised back in 1925 *that 'States can act only by and through their agents and representatives.'*[250] According to Pellet, it is an *'individual ''through whom'' the state ... commit[s] the crime'*[251]*.*

The ICJ established the criteria to be used in determining a state's responsibility for genocide in the Genocide Case. *'[G]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on instructions or directions of the State, or under its effective control'*[252]*.* The first step involves determining *'whether the acts of genocide'* were *'perpetrated by ''persons or entities'' having the status of organs' of the relevant state.* This is done by applying Article 4 of the ILC Articles on State Responsibility, which provides that an organ is *'any person or entity which has that status in accordance with the internal law of*

[247] Nollkaemper, *supra* note 238, pages 616-617.
[248] See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Article 49, according to which the contracting parties 'undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention', and 'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches'.
[249] Tallgren, *supra* note 226, page 588.
[250] Case Concerning Questions Relating to Settlers of German Origin in Poland, Advisory Opinion, PCIJ, Ser. B., No. 6, 1925, at 22.
[251] A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', European Journal of International Law (1999) page 433.
[252] *Genocide case, supra* note 65, at 401.

the State'[253]*.* In the present case, the highest authorities of the Israeli Government and state apparatus are the ones supporting, publicly encouraging and participating authorities, so the determination of state organs is nothing but straightforward.

Thus, the ICJ confirmed in the *Genocide case* the view that "states act though natural persons, where it referred to 'persons' as being 'instruments' of a state's 'action'. As a result, some academics have proposed that a state's intention needs to be ascertained at the leadership level of the state. According to Schabas, 'the conclusion that a State had committed genocide would inexorably depend on proof that its leaders had also perpetrated the crime, as defined in Article II of the Convention. Thus, the mental element is not overlooked, it is simply transferred'. Others propose analogising to corporate criminal liability[254]. What is quite clear in this conflict is that the whole state system is being used to support and commit the punishable acts, so that at least some of the highest authorities should bear with the consequences. In this sense, Article 4.1. of the ARSIWA is quite illustrative, as it states that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'[255].

However, identifying genocidal intent at the state leadership level raises a number of questions that remain unanswered: which leaders represent a state's intentions? How high-ranking must a state official be to qualify as a 'leader'?[256] Moreover, focusing on state leadership presents big evidentiary obstacles since the adjudicating court or tribunal will frequently lack access to relevant information. One may argue that a state's aim is directly dependent upon the intent of its leaders and that the state bears direct responsibility for the goals of its leaders. For instance, the ICJ's judgement of "state intent" in the Application of the Genocide Convention case would be directly impacted if the ICTY decided in the Milosevic case that there was intent to commit genocide[257].

[253] *Genocide case, supra* note 65, at 385.
[254] Loewenstein & Kostas, *supra* note 244, pages 846-847. For this matter, see also Fox, H., "The International Court of Justice's Treatment of Acts of the State, and in Particular the Attribution of Acts of Individuals to the State", in *Liber Amicorum Judge Shigeru Oda,* Brill, 2022, vol 1, pages 158-160.
[255] Article 4.1. ARSIWA, *supra* note 40.
[256] Loewenstein, & Kostas, *supra* note 244, page 847.
[257] Nollkaemper, *supra* note 238, page 634.

5.3.2. THE DETERMINATION OF GENOCIDAL INTENT: STATES *DOLUS SPECIALIS?*

The mental state of the author of the crime is crucial in determining individual responsibility, but it usually isn't relevant or shows up in a different, objectified form when determining state responsibility. This is one of the key distinctions between the law of individual responsibility and the law of state responsibility. However, certain norms and obligations have a fault component that might lead to concurrent state accountability, and one such instance is the Genocide case[258].

In the context of prosecuting an individual for a crime, it is theoretically not difficult to determine if the perpetrator possessed the necessary genocidal intent. When genocidal intent is applied to the state level, the problem becomes conceptually more challenging: how can one ascertain the intent of a state? It has historically been difficult to label actions taken by a state as genocide due to the difficulties of determining the precise purpose of the state[259].

The ICJ decided to adopt the general rules of state responsibility for internationally wrongful acts in order to determine Serbia's intention[260]. Its ruling made it clear that a state can perpetrate genocide through the actions of its officials, stating that "*the Contracting Parties are bound by the obligation under the Convention not to commit genocide and the other acts enumerated in Article III, through their organs or persons of groups whose conduct is attributable to them."* Thus, *"the international responsibility of that State is incurred if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention" [261].*

In the Musema case, the ICTR Appeals Chamber remarked: *"On the issue of determining the offender's specific intent, the Chamber considers that the intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other*

[258] *Ibid,* page 634.
[259] Loewenstein & Kostas, *supra* note 244, page 846.
[260] *Ibid,* pages 849-850.
[261] *Genocide case, supra* note 65, at 179.

factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[262].

Prosecutors for the *ad hoc* tribunals consistently advance the following factors as indicative of the perpetrator's genocidal intent[263]:

a. the general and widespread nature of the atrocities committed;
b. the general political doctrine giving rise to the acts;
c. the scale of the actual or attempted destruction;
d. methodical way of planning the killings;
e. the systematic manner of killing and disposal of bodies;
f. the discriminatory nature of the acts;
g. the discriminatory intent of the accused.

Hence, the policies planned, instructed or carried out by a state can serve as valuable evidence of State's *dolus specialis*. Then an important question arises: is a State policy or plan necessary for genocide? The very scale of the crime usually requires meticulous preparation and a preconceived plan[264]. The ICTY Appeals Chamber in Jelisic stated that '*the existence of a plan or policy is not a legal ingredient of the crime', although it noted that 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases'*[265].

The elements of crimes require for the actus reus of genocide that *'[t]he conduct took place in the context of a manifest pattern of similar conduct'; however there is no requirement of a state plan or policy*[266]. Genocide is not restricted to crimes carried out in accordance with a state plan or policy, and governments' duties to prevent and punish genocide should not be limited in that way[267].

[262] Musema, *supra* note 219, at 166.
[263] *Rutaganda supra* note 217, at *528*.
[264] The ICTR held that 'although a specific plan to destroy does not constitute an element of genocide, it would be difficult to commit genocide without such a plan or organization'. See Judgement, Kayishema, *supra* note 199, at 94.
[265] Judgment, Jelisic (IT-95-10A), Appeals Chamber, 5 July 2001, at 48.
[266] Article 2, 6(a)(4) Elements of Crimes, UN Document PCNICC/2000/INF/3/Add.2.
[267] Loewenstein, & Kostas, *supra* note 244, page 853.

The ICJ regarded the existence of a policy or plan as supporting evidence of the perpetrator's genocidal intent, not as a separate component of genocide, in accordance with the ruling of the ICTY Appeals Chamber in Jelisic[268]. Genocide usually calls for coordination as it is a crime with a collective aspect, since the ultimate objective of destruction must be a group. The ad hoc tribunals have demonstrated that direct evidence, such as an admission from a perpetrator—whether or not they are state officials—rarely serves as proof of genocidal intent, as it will not happen [269].

In *Jelisic*, the ICTY Trial Chamber made a deeper analysis and stated that killings committed by a single perpetrator: "*... are sufficient to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated*"[270].

The Chamber opined that the Genocide Convention: "*... did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such*"[271].

Overall, neither state nor individual criminal liability for genocide is dependent on the presence of a state policy or plan. The investigation begins at the level of the actor perpetrating the crimes, and from there, indirect evidence like planning, coordination, and other details are used to assess whether the actor's purpose may be inferred, so as to determine the genocidal intent[272].

[268] Genocide case, *supra* note 65, at 373 ('the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist'; ibid. at x 376. Compare Jelisic, *supra* note 265, at 48 ('[t]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.')
[269] The absence of such statements is not determinative, because the intent may still be inferred from the factual circumstances of the crime. Krstic, *supra* note 197, at 34.
[270] Judgment, Jelisic (IT-95^10-T), Trial Chamber I, 14 December 1999, at 100.
[271] *Ibid.*
[272] Loewenstein & Kostas, *supra* note 244, page *855*.

5.4. CONCURRENCE OF INDIVIDUAL AND STATE RESPONSIBILITY

Before WWII, international law imputed the unlawful conduct of an individual to a state and absolved the individual of guilt.[273] However, the theoretical advances at Nuremberg and later judgments have opened the possibility for concurrence of state and individual criminal responsibilities for the planning and execution of genocides. As a consequence, an individual may be subject to individual criminal responsibility and the state may be simultaneously subject to state responsibility[274].

For some academics, shielding the individual from responsibility undermined the efficacy of international law. Philip Allott said that 'the moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails'. For instance, despite the fact that the military and political leaders of both countries were tried for separate crimes, Germany and Japan were held accountable for the Second World War[275]. It doesn't seem that the states that were being sued in any of these cases used the defence that the activities could not be traced to the state since they had previously been linked to specific agents[276].

As Dupuy observes, internationally wrongful acts may be *'imputed both to a sovereign State and to an individual acting on its behalf'*[277]. This possibility of concurrent responsibility is reflected in Article 25(2) of the Rome Statute, which provides that *'[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.* Article 58 of the ARSIWA provides that *'[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State'*. In the *Genocide Case* too, the ICJ accepted the concurrent approach to responsibility, observing that the *'duality of responsibility continues to be a constant feature of international law'*[278].

[273] P.-M. Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary, Vol. II (Oxford: Oxford University Press, 2002), page 1086.
[274] A. Nollkaemper, *supra* note 238, pages 618-619.
[275] Dupuy, *supra* note 273, page 1086.
[276] Nollkaemper, *supra* note 238, pages 618-620.
[277] Dupuy, *supra* note 273, page 1088.
[278] Genocide Case, *supra* note 65, at 173.

The *erga omnes* notion, or the recognition of a category of peremptory norms in international law, is necessary to understand the main characteristics of the concurrence of individual and state responsibility. These characteristics include the (semi-)transparency of the state, the role of the international community in defining and enforcing responsibility, and the potentially systematic consequences of state responsibility[279].

Thus, State responsibility can coexist with individual responsibility; it is not necessary for individual responsibility to atomize the state or cause the state to negate its own obligation by shifting accountability to certain state entities[280]. The character and substance of the rules on state responsibility are influenced by the individualisation of responsibility, which is a response to the rigid and occasionally helpless concepts of state responsibility.

As a threshold issue, the Court first addressed Serbia's question of whether, as a matter of law, it would be possible to find a state responsible for genocide in the absence of an individual, over whom the state had control, having first been held criminally liable for genocide by a duly constituted court[281]. In response, the Court stated that it was indeed empowered by the ICJ Statute to decide whether a state had committed genocide and that it was granted jurisdiction over this matter by the Genocide Convention.*[282].* Moreover, the Court noted that a different response might result in a situation where victims of genocide could not have access to legal remedies in a scenario where political limitations had prevented the individual offenders from being held accountable: "*The Court accordingly concludes that state responsibility can arise under the Convention for genocide or complicity, without an individual being convicted of the crime or an associated one' [283].*

However, it is unclear whether a state will ever be held accountable for genocide beyond the confines of the previous convictions of individual perpetrators given the Court's fact-finding approach in its caseload. Is this possibility of concurrence being used as a way to ellude the obligations of each court and not bite the bullet?

[279] Nollkaemper, *supra* note 238, page 631.
[280] *Ibid,* page 621.
[281] *Genocide Case, supra* note 65, at 180.
[282] *Ibid,* at 181.
[283] *Ibid,* at 182.

The availability of evidence will always have an impact on the outcome of judicial proceedings, but the availability or non-availability of judgements rendered by a tribunal should not be decisive for the outcome of the case before another independent body. In this sense, it is problematic that in cases where the accused died before or during proceedings (Milosevic, Talic and Kovacevic), the Court seems to give weight to the lack of a conviction for genocide committed elsewhere other than Srebrenica. By doing so, the Court suggests that it would have come to a different conclusion if Karadzic and Mladic had been detained and put on trial, or if Milosevic, for instance, had survived trial and been found guilty of the crimes for which he was accused [284].

Adding to that, the fact-finding strategy used by the Court in the *Bosnian case* raises questions for future cases attempting to prove state responsibility for genocide before the ICJ. If one is to accept the Court's position that it has the authority and jurisdiction to find positively that a state was responsible for genocide, even in the absence of a conviction for any one perpetrator, consequently, the Court should not use the lack of a genocide conviction to prevent it from finding that genocide was actually committed. Without a criminal court having convicted individual genocide criminals, it is difficult to see how the Court will ever reach a positive genocide decision. It appears that the ICJ will not find genocide if another court having jurisdiction over the relevant events has not previously done so. If this is true, the Bosnia v. Serbia ruling may have achieved the opposite of what it had promised: an international legal framework holding governments responsible for genocide crimes, but that is in practice rarely implemented [285].
The international community may choose between two courses of action with regard to a restricted number of violations of international law: the road of individual accountability and the one of state responsibility. One could argue that there is a law of international responsibility, of which the laws of individual and state accountability are elements and, in some situations, interconnected [286].

[284] Goldstone & Hamilton, R. J., *supra* note 245, pages 105-106.
[285] Goldstone, & Hamilton, *supra* note 245, pages 111-112.
[286] Nollkaemper, *supra* note 238, page 639.

6. CONCLUSIONS

Nothing like the war in Gaza highlights better the political hypocrisy of some Western states, as their involvement in the ongoing genocide is the best example of the double standards of their political elites. Moreover, this conflict has placed the ICC and the ICJ in a challenging situation. The purpose of these tribunals and international organisations is to uphold fairness and justice in all international disputes, and they are not allowed to apply justice in a way that favours some nations over others (that is depending on the territorial location of the conflict). Some of the greatest Western ideals, like the defence of human rights, democracy, equality, justice, freedom, and liberty, are at danger because of the occurring in the Gaza Strip. It is now very obvious that these Western principles are implemented differently and selectively depending on the geographic regions [287].

Respecting and ensuring respect for international humanitarian law is a legal need, not a political one, even if there has to be a political will for that. But it has to be reminded that the obligations imposed on States are not moral ones, but legal ones, these are not abstract duties, but concrete ones.

Will the two highest courts be 'brave' enough and have the legal power to hold accountable all those responsible for numerous crimes during the previous eight months since October 2023, or even more, the last seventy-five years? Inaction on the part of the international community will allow many other regimes to carry out similar atrocities in the future, with the conviction that their acts will not bear any responsibility on them. This genocide in Israel will serve as a military model for all other oppressive governments looking to carry out similar crimes against humanity[288].

Thus, even if it has always been known that the most powerful states will manage to get away with their responsibilities and their aftermath, the position in which both the ICC and the ICJ are now will define their legitimacy and capacity as safeguards of the most serious crimes. If this situation is not strong, grave and alarming enough to act as forcibly as possible, what other situation could? What is their purpose if they cannot put an end to a breach of this magnitude? This potential failure raises urgent questions about the efficacy of current international legal frameworks in addressing severe human rights violations and holding perpetrators accountable.

[287] Rifai, *supra* note 221, pages 1-2.
[288] Rifai, *supra* note 221, pages 10-11.

Some academics present the ICC as seeking to "stay clear from politics, to subordinate politics to law, and speak law to power. Politics, in other words, is portrayed as external to law, as something that needs to be overcome". Recent critics, though, have argued that war crimes tribunals, as well as the ICC, established a "dual-standard system' of international criminal justice, where major powers and their political and military authorities ... enjoy total impunity' while 'victor's justice [is] applied to vanquished, weak and oppressed peoples" [289]. But can law and politics be really separated one from each other? What is happening in Palestine, above a humanitarian crisis, is a political conflict: the source is political, the context is political, the functioning and inaction of the international community are political, it is not a 'humanitarian catastrophe', but a politically pursued genocide.

In can be concluded that the atrocities that have impacted the world, and even more, the impunity that some of them have been granted are not a failure of an otherwise benign system, as they are outcome of a fundamentally flawed system that is built on selectivity and double-standards. Statehood has become a new ground to play ethnic divisions that had been boosted during colonial times: "the [post-colonial] state – instead of being neutral and modern – may be viewed as the arena in which different ethnic groups battle to advance their interests", and this is clearly one of the issues in the Palestinian struggle to find support within the international community. Unfortunately, for the time the ICC and the ICJ will have made their own determinations, it will be too late to act, as there will be no Palestine to defend and no Palestinians to protect.

[289] Grzybowski, J., & Reis, F. D., "After states, before humanity? The meta-politics of legality and the International Criminal Court in Iraq, Afghanistan, and Palestine". *Review of International Studies*, 2024, 50 (2), page 358.

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