

# Violation of human rights and The Jurisdiction of The International Criminal Court

Jeffry Alexander Ch Likadja<sup>1</sup>, Novilinda Dwiputri Irtanti Saudila<sup>2</sup>

Nusa Cendana University, Indonesia<sup>1&2</sup>

[tantisaudila2@gmail.com](mailto:tantisaudila2@gmail.com)



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## Abstract

**Purpose:** The territorial disputes between countries will always be a crucial aspect of the doctrine of national sovereignty, even though international law has now introduced the concept of borderless existence to enhance universal cooperation among nations. In reality, territorial disputes still occur in some regions, resulting in significant casualties on both sides of the conflict and often marked by reports of humanitarian tragedies. This research aims, firstly, to identify and analyze humanitarian crimes occurring in the conflict zone between Palestine and Israel and, secondly, to examine the jurisdiction of the International Criminal Court (hereafter referred to as ICC) in handling humanitarian crimes resulting from the conflict between Palestine and Israel

**Methods:** The research methodology employed is normative legal research, utilizing an approach based on legal regulations or international rules and a case-based approach. Secondary legal materials serve as the primary sources, and the research involves library research as well as qualitative descriptive analysis of legal materials.

**Results/findings:** Moreover, the research shows indicate the emergence of victims, particularly women and children, and the extensive damage to non-military public facilities due to the conflict, suggesting indications of violations of the laws of war (humanitarian law). To summary up, The ICC has jurisdiction covering the principles of genocide, crimes against humanity, war crimes, and aggression.

**Limitations:** A novelty in this research is the affirmation of the ICC's jurisdiction and the United Nations Security Council's obligation to promptly halt the war on humanitarian grounds as an Obligation Erga Omnes. This study is limited to the humanitarian tragedy between Israel and Palestine without considering territorial status based on sovereignty principles.

**Keywords:** *Human Rights, International Criminal Court, Obligation Erga Omnes*

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## 1. Introduction

Human rights are related to the dimensions of human life, where it can be explained that human rights exist not derived from society and the benevolence of the state but are based on the dignity of being human (El-Muhtaj, Asshiddiqie, & Abbas, 2007). Justice, legality, and the rule of law serve as instruments to uphold Human Rights (hereafter abbreviated as HAM). However, with the abundance of existing rules, the situation in Indonesia is not perceived to have improved. This research aims to unravel the concept of a legal state by focusing on the application of the principles of liberty, legality, and equity, and their contributions to the enforcement of human rights. The principles of liberty, legality, and equity play crucial roles in the context of human rights enforcement. Liberty emphasizes

the freedom and rights of individuals, legality underscores adherence to established laws, and equity highlights the importance of fairness and justice. Understanding and applying these principles are essential for ensuring the protection and promotion of human rights (Likadja, 2015).

The doctrine of Human Rights is currently universally accepted as a moral, political, and legal framework, as well as a guideline in building a world that is more peaceful and freer from fear, oppression, and unfair treatment. This is also one of the benchmarks indicating that within the concept of the rule of law, the guarantee of the protection of human rights is considered an absolute characteristic that must exist in every state referred to as a "Rechtsstaat." (El-Muhtaj et al., 2007).

The conflicts and disputes that occur in the world are dynamics that are inevitable and cannot be avoided by states. Interstate conflicts have been experienced by several countries, generally caused by issues such as territorial disputes, border conflicts, political policy matters, natural resource disputes, and so on. The history of the conflict between Palestine and Israel can be traced back to the Balfour Declaration, an open statement issued by the British government in 1917 during World War I to express support for the establishment of a national home for the Jewish minority in Palestine. The Palestinian Muslim community views this as the British imposition of the establishment of a Jewish state in the Palestinian region, contradicting the desires of the majority of the Palestinian population (Kaloko, Daulay, Syofyan, Utari, & Harmelia, 2022).

In line with international regulations, a country initiates relation with other nations to achieve improved diplomatic ties. In the realm of international legal subjects, especially states, conflicts often arise due to differences in interests, and not all of these conflicts can be resolved through peaceful means. These conflicts of interest are often referred to as disputes. Disputes among states can be caused by various factors, including economic, political, ideological, military strategy, or a combination of these interests (Suwardi, 2006).

The consequence of resolving disputes through violence is the emergence of casualties. Although international law has instruments regulating how the resolution through violence should be carried out, violations still occur in reality. Those who become victims are the ones supposed to be protected by these international legal instruments. When a violation occurs in an armed conflict, it is at that moment that international legal instruments extend their role as tools to seek justice. An important instrument in the history of regulating warfare is International Humanitarian Law (Navisa, Winarno, & Hamidah, 2019).

International humanitarian law consists of a set of restrictions imposed by international law, where the force required to defeat the enemy can be used and principles that govern the treatment of individuals during times of war and armed conflicts. As the law that regulates international armed conflicts, international humanitarian law consists of rules that apply during conflicts (in times of war) or regulate the conduct of conflicts (*jus in bello*). These rules also apply to situations of occupation (*occupation*) that arise from armed conflicts (Suryadi, 2019). The primary purpose of international humanitarian law is to provide protection to individuals who are wounded, whether they are civilians or combatants, including combatants who do not directly participate in the fighting.

A state as a subject of international law is a party obligated to protect, ensure, and fulfill human rights. Regarding human rights on an international level, it is regulated by various international human rights legal instruments such as the Universal Declaration of Human Rights. Every country is obligated to respect human rights law, without any exception (*Obligatio Erga Omnes*).

Even though the Universal Declaration of Human Rights has been ratified by all countries and international courts have been established to prosecute perpetrators of crimes, especially against humanity, human rights violations still occur worldwide. One such case is the Israel-Palestine conflict, resulting in numerous casualties in Palestine, including thousands, including children, women, and even volunteers. The UN Human Rights Commission stated that the atrocities committed by the Palestinian

armed group ( Hamas ) on October 7 were heinous, brutal, shocking, and can be classified as war crimes (Indonesia, 2023).

The United Nations defines human rights: *“Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.” These rights include the rights to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the rights to work and education. And everyone is entitled to access to these rights, without discrimination.”* (Nweke, 2020) In others words The United Nations defines human rights as rights inherent to all members of the human family. This definition encompasses rights that are universal, inherent, and inalienable, and they are granted without any discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Human rights include civil, political, economic, social, and cultural rights, and they are recognized as fundamental norms that protect the dignity and freedom of every individual. This definition reflects the UN's commitment to advance and protect human rights worldwide. Meanwhile, the definition of human rights violations in international law is a breach committed by a state against its obligations under instruments regulating Human Rights, whether intentional or due to the negligence of that state.

As one of the instruments of international regulation, the Rome Statute has governed the establishment of the International Criminal Court (ICC) with the authority to prosecute and punish the most serious violations of human rights in cases of humanitarian law when national judicial systems fail to fulfill their duties. This represents a benchmark in the progressive development of international human rights, which began more than sixty years ago, leading up to the declaration of human rights by the UN General Assembly in December 1948. On the day before, on December 9, 1948, the UN had adopted a resolution authorizing the international legal commission to begin work on the ICC (Schabas, 2011).

ICC is an international criminal court with the capability to conduct investigations and prosecute any individual accused of committing serious human rights violations. The ICC serves as a complement to the national judicial systems of a country and will take action only if the national courts of a country lack the willingness or ability to investigate and prosecute the crimes in question. Additionally, the ICC also plays a role in defending the rights of women and children, who often have limited power to defend their rights and seek justice.

ICC has a role and function as an "exit strategy" for conflict-ridden countries to turn to. The ICC's role is crucial to prevent legal interventions between one country and another. If elaborated further, the function of the ICC is an implementation of the non-intervention principle. According to this principle, a country should not interfere in the internal affairs of another country unless the country itself agrees. When a country becomes a party to the Rome Statute, it agrees to submit to the jurisdiction of the ICC regarding crimes mentioned in the statute.

Yurisdiksi is the authority of a court to adjudicate cases and issue orders. The term "jurisdiction" is used in several places in the Rome Statute to identify the scope of the court's authority. According to Article 12 of the Rome Statute, it is agreed that the ICC can exercise its functions when crimes are committed within the territory of a State party to the Rome Statute or when the accused is a national of a State party, or when the United Nations refers a situation to the court, or when a non-party state ad hoc accepts the court's jurisdiction. Based on the principle of *pacta tertiis nec nocent nec prosunt* contained in Article 34 of the Vienna Convention on The Law of Treaties 1969, Indeed, there is no "obligation" for countries not bound by an international agreement, so the jurisdiction of the ICC only extends to states that are parties and bound by the Rome Statute (Putri & Sefriani, 2021).

The jurisdiction of this Court covers four types of crimes considered serious and of international concern because they pose a threat to international peace and security. As regulated in Article 5 (1) of the Rome Statute: *The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with*

*respect to the following crimes:* (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, (d) the crime of aggressions.

Although the jurisdiction of the court restricts its authority to the mentioned crimes, it is important to emphasize that these crimes offend humanity and indeed reinforce the concept of international jurisdiction in addressing and punishing perpetrators of international crimes based on the authority and jurisdiction of the international community (*jus puniendi*). Thus, against any perpetrator suspected of committing crimes as stipulated by the court, the court will impose penalties on every individual based on its authority (*stricto sensu*).

## **2. Research Methods**

The research conducted is normative legal research, which is a type of research conducted to discover legal rules, legal principles, and legal doctrines as a step to address legal issues or problems (Marzuki, 2005). The analysis used in this research is qualitative analysis, categorizing the available legal materials based on the quality of the content related to the study. The approach taken in this research is a legislative approach (Statute Approach), which examines the scope of the ICC's jurisdiction as a judicial institution upholding human rights values, especially in cases of serious human rights violations based on the norms stipulated in the Rome Statute.

## **3. Result and Discussion**

### ***3.1 Crimes Against Humanity in the Conflict Zone (War) between Palestine and Israel***

The Violation of Human Rights by Israel against Palestine began on June 23, 2008, with the first shooting incident carried out by an Israeli civilian against Palestinian civilians who were gathering firewood near the Beith Lahia border by an Israeli military personnel. On the same day as the shooting incident, two mortars landed in Gaza, with no casualties reported in this incident. However, Israel's actions in this case have already violated humanitarian principles (Cahya, 2022).

The conflict between Israel and Palestine continues without a resolution. The latest outbreak occurred when Hamas attacked Israel on October 7, 2023, and Israel responded with airstrikes. This ongoing conflict is not new, as it has persisted for a long time. The impact of this conflict extends beyond the immediate region, affecting the entire world. Israel's attacks have caused extensive damage to homes, places of worship, and UN facilities used for humanitarian assistance. Many countries worldwide, especially those with predominantly Muslim populations, strongly condemn Israel's actions against Palestine. They perceive Israel as infringing upon the rights of Palestinian civilians. Israel has also been accused of violating Human Rights. International Human Rights advocates worldwide assert that Israel's treatment of Palestine constitutes war crimes. In this regard, the UN states that Israel's blockade of Gaza amounts to a war crime and a violation of humanitarian rights.

The Palestinian Central Bureau of Statistics (PCBS) reports that 13,216 Palestinian citizens have died as a result of Israeli attacks in Gaza. The majority of the victims are children and women, while another 32,750 people have been injured due to the Israeli attacks in Gaza since October 7, 2023. Not only causing loss of life, but the Palestinian Authority also records that Israel's attacks have devastated 83 mosques and damaged 166 others. Three churches have also been targeted, and more than 43,000 housing units have been completely destroyed, while 225,000 have suffered severe damage. This means that 60 percent of housing units in the Gaza Strip have been impacted by the bombing. According to information gathered by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), as of November 19, 2023, the number of Israeli casualties has reached 1,269 people (Indiraphasa, 2024).

The fact that the conflict in the Gaza Strip between Israel and Palestine has resulted in massive casualties, especially among women and children, only underscores to the world and the international community that Israel's violations of human rights against Palestinian civilians seem to have been overlooked by the International Court. Numerous resolutions on the Israel-Palestine conflict have been issued by the United Nations (UN). The UN has also launched missions to investigate crimes committed

by Israel against Palestine, receiving condemnation from many other countries stating that Israel has violated human rights. However, Israel continues to commit crimes and violate the rights of Palestinian civilians.

### ***3.2 ICC Jurisdiction in Handling War Crimes Due to the Conflict between Palestine and Israel***

In the Rome Statute, the establishment of the ICC has been regulated with the power to adjudicate and punish the most serious violations of human rights in cases where national judicial systems fail in their duties. This serves as a benchmark in the progressive development of international human rights, starting over sixty years ago, in December 1948, with the Declaration of Human Rights by the United Nations General Assembly. On the eve of December 9, 1948, the UN adopted a resolution empowering the International Law Commission to begin work on the ICC. The establishment of the ICC took longer than anticipated at that time. In the early 1950s, the UN essentially suspended work on the project, and consideration of the proposed ICC did not resume until 1989 (Schabas, 2011).

The ICC has a role and function as an "exit strategy" for conflicted countries to consider the ICC as a way out. The role of the ICC is crucial in preventing legal intervention between one country and another. When elaborated further, the function of the ICC is an implementation of the non-intervention principle. According to this principle, a country should not interfere in the internal affairs of another country unless the country itself agrees. When a country becomes a party to the Rome Statute, it agrees to submit to the jurisdiction of the ICC regarding the crimes specified in the statute.

With various pieces of evidence showing the significant loss of lives and Israel's attacks on Palestinian civilians, widely broadcast to the public, there is a belief that Israel has systematically and deliberately taken actions to eradicate the Palestinian population. The leaders of Israel, as the most responsible parties issuing heinous orders for oppressing the Palestinian people, are committing war crimes and crimes against humanity, violating human rights, and facing severe punishment. The actions of these Israeli leaders could be prosecuted at the ICC, as Article 5(1) of the Rome Statute limits the ICC's jurisdiction to the most serious international crimes. Despite the ICC's ability to prosecute these war criminals, a fundamental issue hinders the ICC from taking over the matter, namely the issue of the ICC's jurisdiction and its binding nature. Member states of the United Nations are not automatically bound by the ICC's jurisdiction; they must voluntarily declare their commitment by becoming parties to the Rome Statute of 1998. As explained in Article 12(2) of the Rome Statute of 1998, the ICC applies only to states that have ratified the statute. Since Israel has not ratified the Rome Statute, the ICC would not be able to prosecute war crimes cases against Israeli leaders (Kaloko et al., 2022).

However, Article 12(3) states that the ICC has the authority to prosecute non-ratifying states of the Rome Statute of 1998, provided that such a state makes a declaration accepting the ICC's jurisdiction or enters into a specific agreement in which the state submits and accepts the jurisdiction of the ICC. Article 12(3) of the Rome Statute of 1998 stipulates that the ICC may exercise its functions and jurisdiction in a territory of a non-party state if there is a special agreement. This article is less effective because if a non-party state does not enter into a specific agreement binding itself to the Rome Statute of 1998, the ICC's jurisdiction cannot be utilized. However, the purpose of the ICC is to end impunity for those committing crimes and work towards preventing such crimes, which is clearly contradictory to the primary goal of establishing the ICC. The International Criminal Court (ICC) has the ability to conduct investigations and prosecute individuals accused of committing very serious violations of human rights according to the Rome Statute. The ICC also serves as a complement to the existence of a national judicial system of a country and will only take action if the national courts are unwilling or unable to investigate and prosecute serious human rights crimes within their jurisdiction. Additionally, the ICC has the responsibility and obligation to assist in upholding the rights of women and children, who often have limited power to defend their rights and seek justice (Aulia, Djusfi, & Thariq, 2020).

The International Criminal Court (ICC) has various jurisdictions, including personal jurisdiction, temporal jurisdiction, territorial jurisdiction, and criminal jurisdiction. The explanations for these jurisdictions are as follows:

### **1. Personal Jurisdiction:**

Personal jurisdiction in international law depends on whether the defendant resides within the court's territory or whether the defendant is a citizen of the country where the court is located. Personal jurisdiction in international law states that only countries that are parties to an international agreement can be part of the dispute resolution process. Personal jurisdiction refers to the court's power over specific defendants.

### **2. Temporal Jurisdiction:**

Temporal jurisdiction implies that a country or court's authority over a legal action may be influenced by the consequences or the passage of time. The authority to adjudicate is limited by the passage of time.

### **3. Jurisdiction:**

If the court does not have territorial jurisdiction over events or individuals within it, the court cannot bind the defendant or any rights within it. Territorial jurisdiction refers to the court's power over events or people within specific geographical boundaries.

### **4. Criminal Jurisdiction:**

Criminal jurisdiction is the authority possessed by the ICC to adjudicate intolerable crimes outlined in the Rome Statute of 1998. The ICC is only authorized to adjudicate four types of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC has jurisdiction only for events occurring after the entry into force of the statute on July 1, 2002. If a country becomes a party to the statute after its entry into force, the court can exercise jurisdiction only in connection with crimes committed after the statute's entry into force for that country, provided that the country has made a statement accepting the ICC's jurisdiction retroactively. However, the court cannot exercise jurisdiction over events that occurred before the statute's ratification in 2002.

Another function of the formation of the ICC is to assist national judicial bodies that want to prosecute perpetrators of serious human rights crimes by providing incentives and implementation guidelines that facilitate the execution of justice mechanisms to hold individuals accountable for serious human rights violations. Thus, in this regard, the ICC serves as a kind of last bastion of justice for victims of serious human rights violations. According to Article 17, the ICC is not the first resort but rather the last of the last resort, meaning it will not undermine the domestic sovereignty of participating states. The ICC follows the principle of domestic remedy, wherein participating states are given the opportunity to prosecute perpetrators of serious human rights violations before the ICC becomes involved. *The International Criminal Court (ICC) applies the principle of non-retroactivity based on the Rome Statute, so it can be understood that serious human rights crimes within the ICC's jurisdiction are those committed after the entry into force of the Rome Treaty on July 1, 2002. Therefore, violations of serious human rights crimes that occurred before the birth of the Rome Treaty are not within the jurisdictional authority of the ICC.*

The International Criminal Court (ICC) has the authority to investigate and prosecute individuals accused of committing serious human rights violations according to the Rome Statute. The ICC can only take action if the national court of a country lacks the willingness or ability to conduct investigations and prosecutions for the serious human rights violations in question. Additionally, the ICC will assist in safeguarding the rights of women and children, who typically have little power to defend their rights and seek justice. As emphasized in Article 1 of the Rome Statute, the International Criminal Court serves as a complementary judicial body to national jurisdictions for crimes. Regarding situations where a country is unwilling or unable to address cases of serious human rights violations, the ICC has jurisdiction to prosecute and adjudicate such actions. Therefore, the principle of complementarity applied prioritizes national jurisdiction in a country.

The implementation of the ICC's jurisdiction is carried out by the Independent Prosecutor when a State Party submits one or more of the most serious crimes to it, submitted by the UN Security Council, or by the Prosecutor themselves (Article 13 of the Rome Statute). Regarding this matter, the central issue

is the state's willingness to cooperate in surrendering perpetrators of serious human rights violations and providing information about the crimes to the Prosecutor. This condition is based on a consideration of state sovereignty, where essentially a state has sovereignty that does not desire interference from other countries in its national law applicable within its territory. With such a situation, in reality, a country will not be willing to surrender perpetrators of serious human rights violations for trial under the jurisdiction of the ICC, as typically, perpetrators of serious human rights violations are individuals with significant power and influence in their country. Thus, based on the principle or doctrine of state sovereignty, the country will make maximum efforts to resolve the issue of serious human rights violations by prioritizing its national law and national judicial bodies.

The International Criminal Court (ICC) is an institution established based on the Rome Statute. As stated in this statute, "An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." The ICC is a permanent court authorized to address individuals involved in serious crimes of international concern, complementing the criminal jurisdiction of national legal systems. In other words, the jurisdiction of the ICC applies primarily to serious crimes that attract global attention and concern, including crimes related to humanity, in addition to serving as a complement to national law enforcement systems.

The ICC is an independent and permanent court and only applies to crimes committed after the Rome Statute came into force in 2002 (non-retroactive principle) which was established based on the Rome Statute adopted by 120 countries. Art 11 (1) states that "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute". It is explained that the jurisdiction of the ICC is only related to violations of gross human rights crimes that occurred after the entry into force of this statute, so that the scope of its jurisdiction is only for cases of gross human rights violations that occurred after 2002.

The scope of the Court's jurisdiction includes 4 (four) types of crimes that are serious crimes and are of concern to the international community because they are a threat to international peace and security. As regulated in the Rome Statute, Article 5 (1) has stated that: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, (d) the crime of aggressions. The 4 (four) crimes include the crime of genocide, crimes against humanity, war crimes and crimes of aggression.

several conditions in which judicial jurisdiction can be exercised relate to 3 conditions as described in Art. 13 "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

The ICC will act if there is a case of gross human rights violations filed by the Prosecutor either by a state party, filed by the Security Council or on the Prosecutor's own initiative. However, in reality this is hampered by the principle of complementarity based on the Rome Statute, which makes the ICC a judicial institution with a complementary function to national justice.

The International Criminal Court (ICC) in the context of international criminal law is a permanent and independent international criminal justice body that has the power over its jurisdiction over a person or legal entity that has committed serious crimes condemned by the international community. The ICC is a permanent tribunal to prosecute individuals who violate the provisions of the Rome Statute to assist

the existing national judicial system. Therefore, all crimes regulated in the Rome Statute will be tried by the ICC (Mudore, 2019).

#### 4. Conclusion

Based on the research results above, it can be concluded that:

##### 4.1 Conclusion

Violations committed by Israel against Palestine are included in gross human rights violations, because the actions committed by Israel have violated the provisions of the Rome Statute, Humanitarian Law, the issue of gross human rights violations that occurred in Palestine is under the authority of the ICC (International Criminal Court). This is because the jurisdiction of the International Criminal Court (ICC) over human rights violations that are under its authority, which means seeing what actions and the extent of legal competence to be involved in resolving gross human rights violations that apply in the international world and the Court's jurisdiction includes 4 main cases that are of concern to the international world based on the Rome Statute, namely genocide, crimes against humanity, war crimes and aggression.

The cause of the conflict claimed many lives including children and women between the two regions, and many buildings such as places of worship, hospitals and many public facilities (non-military) were affected by the conflict.

##### 4.2 Limitations

This study is only limited to the humanitarian tragedy that occurred between Israel and Palestine without looking at territorial status based on the principle of sovereignty.

##### 4.3 Suggestions

Seeing the many violations of Humanitarian Law that have occurred in the Palestine and Israel conflict, there needs to be a party or an International court that is truly capable of enforcing International Humanitarian Law fairly and firmly so that the undesirable consequences of armed conflict can be prevented and will not happen again in the future.

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