THE INTERNATIONAL CRIMINAL COURT
AND THE GAZA WAR

John Quigley*

I. Introduction ........................................................................................................ 26
II. Jurisdiction of the International Criminal Court over the Gaza
    hostilities ............................................................................................................. 26
III. Referral by the Security Council ................................................................. 28
IV. Declaration by a non-party state ................................................................. 28
V. Territoriality of acts ......................................................................................... 31
VI. Participation in acts ......................................................................................... 33
VII. Admissibility of cases ................................................................................... 33
VIII. Standard for assessing the validity of the Palestine declaration .......... 34
IX. Arguments about the validity of the Palestine declaration ...................... 36
    A. European Centre for Law and Justice ..................................................... 37
    B. International Association of Jewish Lawyers and Jurists .................... 38
    C. Daniel Benoliel and Ronen Perry ......................................................... 40
    D. The Hoover Institution ........................................................................... 45
X. Arguments for the validity of the Palestine declaration by interpretation
    of the Rome Statute ......................................................................................... 48
XI. Arguments for the validity of the declaration on the basis of Palestine
    statehood ........................................................................................................... 50
XII. Arguments against Palestine statehood ....................................................... 51
XIII. Consequences ................................................................................................. 53

* John B. Quigley AB/MA/LLB (Harvard University), is President’s Club Professor in Law at the Moritz
    College of Law of the Ohio State University, Columbus, Ohio, USA.
THE INTERNATIONAL CRIMINAL COURT AND THE GAZA WAR

I. Introduction

In the wake of the Gaza hostilities of 2008–2009, credible allegations were made of war crimes committed by the Israel Defense Force. Non-governmental organizations asked the Office of the Prosecutor of the International Criminal Court to investigate. The Court was established by a multilateral treaty, and the treaty sets the parameters of its jurisdiction. The treaty is called the Statute of the International Criminal Court and is sometimes referred to as the Rome Statute of the International Criminal Court [hereinafter Rome Statute] because the text was adopted at a 1998 conference in Rome. Under the Statute, the jurisdiction of the Court is far from universal.

One element of jurisdiction under the Statute is jurisdiction over the subject matter, that lawyers call jurisdiction *ratione materiae*. This means that the act must be one of the crimes specified in the Statute.1 A second element of jurisdiction is that the act must have been committed after the Statute entered into force. This element is called temporal jurisdiction, or jurisdiction *ratione temporis*.2 But these two elements do not alone suffice. In addition, one of three jurisdictional circumstances must obtain. The first is that either the person charged is a national of a state that is a party to the Court’s Statute (jurisdiction *ratione personae*),3 or that the state on whose territory the conduct occurred is a party (jurisdiction *ratione loci*).4 Second, even if this first circumstance is not present—that is, the conduct did not occur on the territory of a state party or the person is not a national of a state party—the Court has jurisdiction if the state on whose territory the conduct occurred confers jurisdiction *ratione loci*, or the state of nationality of the person confers jurisdiction *ratione personae*.5 The third circumstance is that the UN Security Council refers to the Court the situation in the context of which the act was committed.

II. Jurisdiction of the International Criminal Court over the Gaza hostilities

With regard to jurisdiction *ratione materiae*, the Court may prosecute war crimes, crimes against humanity, genocide, and aggression.6 With regard to aggression, however, the Rome Statute specifies that this offense will not be prosecutable until a definition of that offense is written and is added to the Rome Statute by way of amendment.7 To date, no such amendment has been added. Hence, as regards the

---

1 Rome Statute of the International Criminal Court, Art. 5.
2 Id. Art. 11.
3 Id. Art. 12(2)(b).
4 Id. Art. 12(2)(a).
5 Id. Art. 12(3).
6 Id. Art. 5(1).
7 Id. Art. 5(2).