



***Israeli Persecution Crime of Palestinian Refugee Under Rome
Statute:
Right of Return as a Model***

Rabiaa Ferhi*

Echahid Cheikh Larbi Tebessi University(Algeria) rabiaa.ferhi@univ-tebessa.dz

( <https://orcid.org/0009-0005-9338-7164>)

Received: 22/12/2024

Accepted: 29/05/2025

Abstract:

Inhabitants of Palestinian communities across the occupied territories face severe and demeaning circumstances imposed by the occupying entity. Additionally, those in the diaspora are systematically denied their inherent right to return to their own homes, a right stripped from them following the cataclysmic events of the Nakba and subsequent regional conflicts. This relentless denial constitutes a crime of persecution and contravenes basic human rights, particularly the right of return.

Furthermore, the International Criminal Court (ICC) faces a substantial challenge in prosecuting the crime of persecution due to the exertion of control over Palestinian territories. This situation stems from the denial of the Palestinian right of return, while the Court strives to uphold equity and justice for those subjected to the ongoing harsh actions of the occupying authority.

Keywords: Palestinian Refugee; Persecution; International Criminal Court; Right of Return; jurisdiction; crime against humanity; diaspora.

* Rabiaa ferhi

I. INTRODUCTION

Despite the heightened global focus on the Palestinian plight, conditions within the occupied territories continue to deteriorate with each passing day. Beyond physical assaults, the Israeli entity persistently perpetrates a spectrum of international crimes. Since 1948, the original inhabitants of what is today referred to as the Palestinian state have found themselves scattered both within their lands and globally, as refugees and displaced persons .

This populace has systematically been stripped of their fundamental rights on overtly discriminatory grounds, prompting an urgent call for intervention and deterrence by international entities vested with protective mandates, notably the ICC, particularly subsequent to Palestine's ratification of the Court's foundational statute. Within the ICC's framework, persecution is unequivocally categorized as a crime against humanity under Article 7.

The right to return, which is closely linked with refugee law and numerous international human rights treaties, continues to be a pivotal, profoundly affected aspect of the Palestinian dilemma, further aggravated by the persistent conflict. This enduring disconnection from their occupied homeland due to discriminatory persecution practices underscores the critical relevance of this study.

This research focuses primarily on the question: How does the statute of International Criminal Court tackle the offense associated with obstructing the right of return for Palestinian refugees?

Additional questions examine the following:

- What constitutes the crime of persecution targeting Palestinian refugees?
- What are the identifiable forms and elements of persecution associated with the right of return?
- What opportunities exist for the ICC to adjudicate these issues?

To tackle these queries, a descriptive methodology was adopted to delineate the crime and articulate its components, alongside an exploration of the Court's jurisdiction and its applicability to the transgressions committed in Palestine, particularly those constituting persecution .

1. Concept Of Palestinian Refugee's Persecution

Since the Palestinian territories fell into the hands of the Israeli occupation, the policies implemented have been based on discrimination between Palestinians and Jewish immigrants to the area. These policies have constituted a model of oppression rooted in various criteria national, religious, and racial that fall under the concept of persecution as a crime against humanity

1.1. Definition of The Crime of Palestinian Refugee Persecution

To fully comprehend the definition of the crime of persecuting Palestinian refugees, it is necessary to understand the terms that constitute this concept, which is primarily linked to the fundamental human rights enjoyed by individuals.

1.1.1 Definition of Persecution

Persecution denotes the unjust treatment of individuals based on their religious, political, or ethnic affiliations (Definition of Persecution, 2024) . In a more formal context, persecution encompasses discriminatory practices executed either by individuals against others or by a state against its citizens or foreigners.

This aligns with the definition articulated by the legal scholar Bassiouni, who described persecution as actions related to governmental activities or state policies that inflict severe material, mental, psychological, or economic distress on victims, attributable to their belonging or perceived association with specific ethnic, religious, political, or linguistic

groups, or due to the perpetrator's explicit intent to target these particular groups.(Bassiouni, 1999)

Persecution can manifest as either active engagement in discriminatory practices or as a failure to act, resulting in tangible discrimination among individuals by contravening fundamental rights that are enshrined in international conventions and established through customary international legal practice .(Boas, 2009).

The concept of persecution (Cryer, 2010), crucial for refugee status, lacked a formal definition in initial international law texts. It was recognized as a crime against humanity in WWII tribunals and later solidified through various international treaties. A definitive legal definition was only established with the Rome Statute of the ICC .

Neither international treaty law nor judicial precedents offer an exhaustive enumeration of the illegal acts that constitute persecution, a concept that remains unofficially acknowledged in major international criminal justice frameworks. This crime has required meticulous and deliberate development, adhering to the principle of legality.

Nonetheless, international judicial efforts have produced some definitions, as seen in the Tadić case by the Yugoslav tribunal, which identified persecution as physical, economic, or legal measures infringing on an individual's right to enjoy fundamental rights on an equal footing with others. The court also recognized that persecution extends beyond physical acts to include various discriminatory measures against political, social, and economic rights (Grenfell, 2003) .

In the Jean Kambanda case, the International Criminal Tribunal for Rwanda defined persecution as a significant and explicit rejection, based on discrimination, of a fundamental right recognized by customary or treaty international law, categorizing it as an international crime.

This definition closely aligns with the one outlined by the ICC in its Rome Statute, which describes persecution as " the deliberate refusal to grant fundamental rights, in violation of international law, based on group identity."

1.1.2 Definition of the Palestinian Refugee

A refugee typically denotes an individual who escapes their homeland to evade persecution, war, famine, or other dire economic circumstances .The primary international treaty concerning asylum identifies a refugee as someone who, due to a legitimate fear of persecution based on race, religion, nationality, affiliation with a certain social group, or political belief, resides outside their home country .

This definition includes those who are either incapable or unwilling to seek the protection of their nation, or who, if stateless and residing outside their usual country, cannot or choose not to return due to such fear .

The notion of a refugee in international law has evolved from customary to treaty-based international law, garnering considerable attention from scholars and legal experts, especially in the areas of international studies and refugee law .(Moldovan)

These definitions are inadequate due to the unique circumstances of their situation, making the classification of Palestinian refugees a critical issue in their cause. Despite various individual or collective efforts, a comprehensive definition that includes all Palestinian groups whose rights to reside and move within the occupied Palestinian territories have been infringed has not been formulated.

Within this context, a critical definition from the UN Relief and Works Agency identifies refugees as individuals who were ordinarily resident in Palestine from June 1, 1946, to May 15, 1948 .

These definitions, whether from the UN Relief and Works Agency, the 1951 Geneva Convention, or established norms for the displaced, impose restrictions based on residency. This categorization splits the issue of Palestinian refugees into three parts, leading to the

fragmentation of what is essentially a unified issue, as the definition attempts to specify the group eligible for assistance.

Thus, internally displaced persons differ from refugees as previously defined and thus lack the necessary protection. They have been subject to numerous practices by the Israeli occupation authorities. Thus, international statutes, despite their diverse forms, have failed to adequately define Palestinian refugees and do not apply to them .

The deliberate restriction of essential rights, contrary to international norms, based on the group's identity, highlights the precarious situation of Palestinian refugees under international law. Such persecution represents a deliberate and severe violation of the basic rights of the Palestinian community.

1.2. Elements of the Crime of Persecution of Palestinian Refugee

As a crime, the persecution consists material element (*Actus Reus*) and a Mental Element (*Mens Rea*) in addition to the international element which features international crimes according to the nature of the violation of the international instruments.

1.2.1 Actus Reus

Defined by the Rome Statute, the fundamental components of persecution involve the perpetrator's grave infringement on the basic rights of one or more persons in a manner that violates international law. Essential rights, which are typically assumed to be accessible for most people, are often out of reach for Palestinian refugees in the occupied territories, emphasizing the crime's focus on rights such as movement, healthcare, nutrition, and employment.

Particularly in the Gaza Strip, the deprivation experienced by refugees fulfills the criteria of persecution due to its basis on religious, ethnic, and national motives, as verified by ongoing reports from the United Nations Relief and Works Agency (UNRWA) across different operational domains.

This deviation from the global definition underscores the complex status of Palestinian refugees under international law. This classification requires certain essential elements, specifically that these violations occur as part of a widespread or systematic assault aimed at any civilian population .

This characterization is apt for the enduring occupation that has persistently targeted diverse groups within Palestinian territories since 1948.

The persecution of Palestinian refugees involves a calculated and profound violation of their essential rights, breaching international norms due to their collective identity or their affiliations related to religion, ethnicity, race, or politics . (Boling, 2001)

United Nations resolutions, particularly General Assembly Resolution 194, consistently uphold the rights of Palestinian refugees to return and to claim compensation if impeded. Although many nations endorse this resolution, Israel has persistently declined to implement it, claiming it could

Despite international consensus and continuous commitments to uphold justice, Israel remains non-compliant with the right of return, focusing primarily on the ethical dimensions of the refugee issue while neglecting legal obligations. This inaction continues to perpetuate the persecution of Palestinian refugees on ethnic, religious, and political bases, depriving them and their descendants of their right to reclaim their ancestral homes (Lawand, 1996).

1.2.2 Mens Rea

Persecution, classified as a crime against humanity, involves intentional actions with a moral dimension characterized by a general criminal intent. The offender must recognize that their conduct results in a serious violation of fundamental human rights, which are prosecutable offenses, such as the denial of access to healthcare and employment opportunities.

Despite international consensus and promises to uphold justice, Israel has not implemented the right of return for Palestinian refugees, focusing only on ethical issues while

neglecting legal obligations. Moreover, a perpetrator does not need detailed knowledge of the strategies or policies used in persecuting Palestinians and hindering their right of return.

Zionist entity has continually displaced individuals and prevented their return to their lands, intentionally and with knowledge of various international covenants that uphold this right.

Moreover, persecution requires a special intent to target an individual or a group based on prohibited discriminatory grounds. ICC precedents necessitate the presence of this specific intent to discriminate, not merely knowledge that one's actions are discriminatory, this requirement is strictly objective and does not necessitate any mental element (Cryer, 2010).

This perspective is pertinent to various offenses committed by the Zionist entity that are categorized similarly, The persistent denial by the Zionist entity to fulfill Resolution 194 and recognize the Palestinians' right to return highlights a deliberate intent to perpetrate persecution based on national, religious, and ethnic distinctions, frequently rationalized by citing the future interests of the Jewish people.

1.2.3 International Element

Persecution is recognized as an international crime, determined by both subjective and objective criteria, with the objective aspect demonstrated by the protected interests under international law. This global dimension is defined by the nature of the rights and interests protected .

As an international crime, it impacts values or interests that are essential to the international community or its foundational institutions. The subjective dimension of this crime is evident in its execution on behalf of or to benefit a state or criminal organization, satisfying this component.

This is particularly evident in the overarching crime of persecution, notably in how it prevents Palestinians, both within and outside the occupied territories, from returning.

2. Jurisdiction of ICC Over the crime of Persecution of Palestinian Refugee

The international community has engaged with the concept of international crimes, setting up ad hoc international criminal tribunals at critical moments in history and eventually establishing the ICC, which began its operations on July 1, 2002, with the goal of reducing impunity. The Court undertakes international criminal proceedings under defined circumstances through diverse mechanisms.

2.1 Palestine's Status and the ICC

Since the establishment of the Court, Palestinians have pinned their hopes on this judicial body to address Israeli aggressions in the occupied territories, despite criticisms directed at the Court. These hopes have undergone two distinct phases, depending on the United Nations' stance towards Palestine and its recognition, which is explored through:

2.1.1 Prior to Palestine's Recognition as A Member of the United Nations:

The development of international criminal justice in Palestine has faced numerous obstacles, including attacks on civilians across Gaza and the West Bank. The establishment of the ICC and its subsequent trials since 2002 have brought renewed hope for accountability.

More than three years after assessing the Palestinian situation, on April 3, 2012, the Prosecutor concluded that the conditions for exercising jurisdiction were not met. This decision was based on Palestine's status as an observer mission, rather than a non-member

observer state at the United Nations, and it noted that the UN Secretary-General is tasked with determining whether an entity satisfies the criteria outlined in Article 12 . (Aamodt, 2016)

In response to the 2009 attacks in Gaza, the Palestinian Authority formally recognized ICC's authority to prosecute crimes committed in Palestinian territories starting from July 2002. Critics argue that the decision was influenced by political pressures from powerful nations like the United States, Israel, and Canada, leading to a dismissal of the facts. (Degard, 2009)

This stance, however, was not adopted, and the dismissal is viewed by many as indicative of a bias towards impunity and a disregard for international criminal justice standards (Dapo Akande, 2012)

2.1.2 After the Recognition of Palestine's Membership in the United Nations

On November 29, 2012, the United Nations General Assembly voted to elevate Palestine to the status of a non-member observer state. This decision also raised hopes that the Security Council would positively reconsider the full membership bid previously presented by Palestinian President Mahmoud Abbas. The application had been delayed in the Security Council because of a potential veto from the United States, a close supporter of Israel.

Subsequently, the UN Secretary-General acknowledged the opportunity for Palestine to participate in various human rights bodies and noted that the ICC could assert jurisdiction over crimes committed in Palestine once the Rome Statute was ratified by the state (Hohler, 2021)

In 2017, following the Security Council's inability to adopt a resolution to terminate the Israeli occupation, the Palestinian Authority delivered the necessary paperwork for ICC membership to the UN Secretary-General. The statute became operative for Palestine from April 1, 2015, after modifications to the Rome Statute were ratified at the 2010 Kampala conference.

2.2 The Court's Jurisdiction Over Persecution's Crime Of Palestinian Refugee

It was not easy for the prosecutor of the ICC to determine the jurisdiction over the conduct of the Zionist Entity in the occupied territory. however, it required the assistance of other organs in the court because the decision would raise many legal issues.

2.2.1 The Court's Territorial Jurisdiction over Denying Palestinians Right to Return Crime

After joining ICC, Palestine, on May 22, 2018, initiated a formal referral through its Foreign Minister. This request implored the Court's Prosecutor to conduct investigations, as permitted by its temporal jurisdiction, into past, present, and prospective crimes committed within the territories occupied since 1967, under the Court's judicial purview.

In December 2019, the Court's Chief Prosecutor found substantial evidence of potential war crimes in the West Bank, including East Jerusalem, and moved some cases forward for deeper investigation.

To uphold the integrity of the judicial process, in January 2020, she assigned the Pre-Trial Chamber the task of determining the exact territorial jurisdiction in Palestine.

After a year of discussions, which involved contributions from scholars and organizations offering various legal insights and definitions to support their evaluation, the Pre-Trial Chamber in its decision about the Situation In The State of Palestine, Pre- on 5th February 2021, No:ICC-01/18 determined that its territorial jurisdiction would include the regions occupied by Israel since 1967.

2.2.2 The Court's Subject-Matter Jurisdiction

In her briefing to the Pre-Trial Chamber, the Prosecutor highlighted three main concerns: the 2014 conflict in Gaza, expansion activities in the West Bank and East Jerusalem (specifically identifying the war crime of transferring Israeli civilians), and the continuous suppression of the Great March of Return in Gaza since 2018.

She emphasized that the 2014 referral to the ICC had no end date, allowing the court to investigate any crimes committed in the territories since then, thus requiring an expanded investigation to include all relevant offenses under the court's jurisdiction.

II. Conclusion:

As this research paper reaches its culmination, we delineate some key findings:

- The situation at ICC regarding Palestinian cases needs more support due to the Pre-Trial Chamber's decisions being unclear, especially about future procedural steps and case eligibility.
- She stressed that denying the right of return is a severe persecution, backed by UN resolutions and legal standards.
- Jurisdiction over persecution related to the right of return has been established through multiple cases within the Pre-Trial Chamber's jurisdiction.

In light of these findings, the following recommendations are proposed:

- Stronger advocacy and pressure from the state's friends of the international criminal court and the Palestinian Authority could enhance the investigation and potentially expand the list of indictments to include ongoing offenses by Israeli forces.

- references:

Books :

- Chrif Bassiouni (1999), Crimes Against Humanity In International Criminal Law, Cambridge;
- Gideon Boas (2009), International Criminal Law Practitioner Library Series, Cambridge University Press, New York;
- Robert Cryer(2010), An Introduction To International Criminal Law And Procedure, Cambridge University Press.

Theses:

- Aamodt Emelie (2016) Palestine's Accession to The Rome Statute, Master Thesis, University Of Oslo, Oslo.

Journal Article:

- Katherine Lawand, The Right to Return of Palestinians In International Law, Refugee Law, Oxford, Vol. 8 No. 4;
- Widney Brown & Laura Grenfell, International Crime Of Gender-Based Persecution And The Taliban, International Law, vol 4(2), 2003;
- Yao Li, Persecution in International Criminal Law And International Refugee Law, Zeitschrift Für Internationale Strafrechtsdogmatik, 6/2020;

Seminar article:

- Carmen Moldovan(2016), The Notion of Refugee, Centre for European Studies (CES) Working Papers, Vol 8, Issue 4, p681
- Schababs W(2015). Remarks by William Schabas. Proceedings of the ASIL Annual Meeting, p109;

Internet websites:

- Dapo Akande, ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine.(Apr. 4, 2012). <https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>

- Gail J. Boling, Palestinian Refugees and the Right of Return: An International Law Analysis, BADIL -. 8, January 2001, https://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf, last seen on 19/04/2024 at 17:30
- John Dugard :the UN Representative for Human Rights in the Occupied Palestinian Territory, <https://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html>
- Kevin Jon Heller, Which Organ of the ICC Decides Whether Palestine Is a State? (Apr. 4, 20), <http://opiniojuris.org/2012/04/04/which-organ-of-the-icc-decides-whether-palestine-is-a-state/> , Last Seen 20 /04/2024 AT 15:00
- Palestine refugees, united nations relief and works agency for Palestine refugee in the near east, <https://www.unrwa.org/> , Last Seen 19/04/2024 at 16:00;
- Questions and Answers on the Decision on the International Criminal Court's territorial jurisdiction in the Situation in Palestine: <https://www.icc-pi.int/itemsDocuments/palestine/210215-palestine-q-a-ara.pdf> Last Seen 19/04/2024 at 14:00
- Definition Of Persecution, available AT: <https://dictionary.cambridge.org/dictionary/english/persecution> . Last Seen 19/04/2024 at 15:00 .