

TABLE OF CONTENTS

LIST OF ABBREVIATIONS XIII

INTRODUCTION

1. The Gaza armed conflict of 2008/2009 1

 1.1. The situation in the region prior to the Israeli offensive 1

 1.2. The twenty-two day armed conflict between Israel and Hamas 4

 1.2.1. Armed conflict in a densely populated area 6

 1.2.1.1. The controversial use of white phosphorus and flechettes 7

 1.2.1.2. The destruction of civilian property in the Gaza Strip 8

 1.2.1.3. The humanitarian situation during the conflict 8

 1.2.2. The aftermath of the armed conflict 11

2. Purpose of the research 12

3. Summary of the research 13

Chapter One

THE POSSIBILITY OF THE INTERNATIONAL COURT OF JUSTICE INVESTIGATING THE ALLEGED VIOLATIONS OF INTERNATIONAL LAW DURING THE GAZA ARMED CONFLICT

1. The International Court of Justice 17

2. Possible ICJ contentious jurisdiction over the events of the Gaza armed conflict 18

 2.1. The Court's personal jurisdiction (*ratione personae*) 19

 2.1.1. Access to the Court 19

 2.1.2. The consent requirement 20

 2.2. The Court's subject-matter jurisdiction (*ratione materiae*) 23

 2.3. Implementation in the case at hand 24

 2.3.1. Conferment of jurisdiction by way of international agreement 25

2.3.2. . Conferment of jurisdiction by unilateral declaration (optional clause)	25
2.4. Conclusion.....	26
3. Possible ICJ advisory jurisdiction over the events of the Gaza armed conflict.....	27
3.1. Jurisdiction to give an advisory opinion	27
3.1.1. Bodies authorized to request an ICJ advisory opinion	27
3.1.2. Advisory opinion concerning a legal question	28
3.1.3. Competence to request an ICJ advisory opinion	31
3.2. International legal disputes and the circumvention issue	32
3.2.1. Advisory opinions regarding inter-state disputes	32
3.2.2. The advisory function and the requirement of consent	33
3.3. The legal effect and consequences of the ICJ advisory opinion.....	37
3.3.1. The binding effect of the advisory opinion.....	37
3.3.2. Additional effects and consequences of the advisory opinion	38
3.4. Implementation in the case at hand.....	41
3.4.1. UN Security Council v. General Assembly	41
3.4.2. The discretion of the Court	44
3.5. Conclusion.....	44

Chapter Two

POSSIBLE INVESTIGATION / PROSECUTION OF ISRAELI MILITARY PERSONNEL AND GOVERNMENT OFFICIALS BY THE INTERNATIONAL CRIMINAL COURT FOLLOWING THE GAZA ARMED CONFLICT

1. The International Criminal Court.....	47
1.1. Basic facts	47
1.2. The establishment of the ICC	49
1.3. The structure of the ICC.....	50
1.4. Applicable law	51
1.5. The ICC in relation to the ICJ	52

2. Possible ICC jurisdiction over the events of the Gaza armed conflict	54
2.1. ICC subject-matter jurisdiction (<i>ratione materiae</i>)	55
2.1.1. The crime of genocide	58
2.1.2. Crimes against humanity.....	60
2.1.3. War crimes	63
2.1.3.1. War crimes categories under the Rome Statute.....	65
2.1.3.2. Additional requirements regarding the applicability of Art. 8 Rome-Statute.....	70
2.1.4. Implementation in the case at hand.....	71
2.1.4.1. The crime of genocide	71
2.1.4.2. Crimes against humanity	72
2.1.4.3. War crimes	74
2.1.5. Conclusion	81
2.2. ICC personal jurisdiction (<i>ratione personae</i>).....	82
2.2.1. Jurisdiction over natural persons over the age of eighteen.....	82
2.2.2. Implementation in the case at hand and conclusion	84
2.3. ICC temporal jurisdiction (<i>ratione temporis</i>).....	84
2.3.1. Temporal jurisdiction based on the entry into force of the Rome Statute.....	84
2.3.2. Temporal jurisdiction based on state ratification after entry into force of the Rome Statute	85
2.3.3. <i>Nullum crimen sine lege</i>	85
2.3.4. Limits to ICC temporal jurisdiction.....	86
2.3.5. Implementation in the case at hand and conclusion	87
2.4. State consent as a precondition to the exercise of ICC jurisdiction ...	89
2.4.1. ICC nationality based jurisdiction (active personality jurisdiction)	90
2.4.1.1. Israel and the ICC	91
2.4.1.2. Implementation in the case at hand and conclusion	101
2.4.2. ICC territorial jurisdiction (<i>ratione loci</i>)	102

2.4.2.1.	The lawfulness of the ICC's jurisdiction over nationals of non-States Parties	102
2.4.2.2.	Implementation in the case at hand	105
2.5.	<i>Ad hoc</i> acceptance of ICC territorial jurisdiction	109
2.5.1.	The nature of declarations under Art. 12(3) Rome-Statute	109
2.5.2.	Implementation in the case at hand.....	114
2.5.2.1.	The Palestinian Authority's declaration as that of a full-fledged state	115
2.5.2.2.	The Palestinian Authority's declaration as that of a quasi-state for the purpose of the Rome Statute only	146
2.5.3.	Conclusion	174
3.	The ICC and individual participants in the Gaza armed conflict.....	175
3.1.	Official capacity and immunity	175
3.1.1.	Immunity <i>ratione materiae</i>	176
3.1.2.	Immunity <i>ratione personae</i>	177
3.1.2.1.	Art. 27(2) Rome-Statute and officials of non-States Parties	177
3.1.2.2.	Art. 27(2) in relation to Art. 98(1) Rome-Statute.....	179
3.1.3.	Implementation in the case at hand and conclusion	180
3.2.	Individual criminal responsibility	182
3.2.1.	Commission of a crime	182
3.2.1.1.	Immediate perpetration	183
3.2.1.2.	Co-perpetration	183
3.2.1.3.	Perpetration by means.....	184
3.2.2.	Encouragement of a crime	185
3.2.2.1.	Ordering the commission of a crime	186
3.2.2.2.	Soliciting or inducing the commission of a crime.....	187
3.2.3.	Assisting the commission of a crime	188
3.2.4.	Any other contribution to the commission of a crime	189
3.2.5.	Superior responsibility	190
3.2.5.1.	Superior responsibility of military commanders	191

3.2.5.2. Superior responsibility of civilians	196
3.2.6. Implementation in the case at hand.....	198
3.2.6.1. The individual criminal responsibility of senior military commanders	201
3.2.6.2. The individual criminal responsibility of non-military (civilian) leaders.....	207
3.2.6.3. The individual criminal responsibility of lower-level military commanders and soldiers	210
3.2.7. Conclusion	211

Chapter Three

POSSIBLE ADMISSIBILITY OF CASES RELATED TO THE GAZA ARMED CONFLICT BEFORE THE INTERNATIONAL CRIMINAL COURT

1. The rationale behind the principle of complementarity	213
2. The criteria for admissibility of cases before the ICC	216
2.1. Unwillingness – Art. 17(1)(a) and (b) Rome-Statute	216
2.2. Inability – Art. 17(1)(a) and (b) Rome-Statute	218
2.3. Gravity of the offence – Art. 17(1)(d) Rome-Statute	219
3. Implementation in the case at hand	220
3.1. Investigations conducted by Israel following the Gaza armed conflict.....	221
3.1.1. Israel’s system for investigating misconduct allegations	221
3.1.1.1. The military justice system	222
3.1.1.2. Civilian supervision over the military justice system.....	224
3.1.1.3. The IDF investigation procedure regarding alleged violations of the Law of Armed Conflict.....	225
3.1.2. Israeli investigations of misconduct allegations following the Gaza armed conflict	228
3.1.2.1. The launch of five special (expert) command investigations ...	228
3.1.2.2. The sixth special (expert) command investigation	230
3.1.2.3. Other command investigations	230

3.1.2.4. Criminal investigations	230
3.1.3. Changes to IDF operational guidelines as a result of the investigations	231
3.1.3.1. New written procedures regarding the protection of civilians in urban warfare	231
3.1.3.2. New order regulating the destruction of private property for military purposes	232
3.1.4. The Turkel Commission	232
3.2. The view of the international community regarding the Israeli investigations	233
3.3. Analysis.....	236
3.3.1. Sufficient gravity – Art. 17(1)(d) Rome-Statute.....	237
3.3.2. Admissibility – Art. 17 Rome-Statute	238
3.3.2.1. Inability – Art. 17(3) Rome-Statute.....	238
3.3.2.2. Unwillingness – Art. 17(2) Rome-Statute	238
4. Conclusion.....	241
 SUMMARY AND CONCLUSION.....	 243
 BIBLIOGRAPHY AND SOURCES	 247
 CASES, DECISIONS, JUDGMENTS AND ADVISORY OPINIONS	 267
 INDEX.....	 271