

**Obstacles to Considering Terrorist Crimes
before the International Criminal Court
(An analytical study of legal attribution and
the principle of complementarity)**

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The establishment of the International Criminal Court as a permanent independent judicial body represented the culmination of the international will to reduce the commission of the massive human rights violations that occurred during the previous decades and led to the deaths of millions of people. The establishment of this judicial system came in order to ensure that criminals do not go unpunished, especially in crimes that affect the peace and security of the international community in general and reveal atrocities committed against basic human rights⁽¹⁾.

In its work, the International Criminal Court relies mainly on the Rome Statute, which is based on an agreement between states, whereby these states recognize and recognize the jurisdiction of that court as an independent legal personality⁽²⁾ to consider all crimes that take international classification and that may occur on the territory of any of the states acceding to the International Criminal Court. The Rome Convention of 1998 and from here it becomes possible to say that the will of states

⁽¹⁾ The Rome Statute of the International Criminal Court is the first legal framework that constitutes a judicial body charged with the task of prosecuting individuals who have committed atrocities and grave violations, especially since the international community has witnessed during the last decade of the last century the perpetration of crimes on a large scale that demonstrated the failure of states to carry out their international duties. This has led to the phenomenon of impunity, especially since this impunity enjoy freedom under the guise of sovereignty. See: Abd al-Wahhab Shamsan, International Humanitarian Law and the Legal Necessity for the Establishment of the International Criminal Court, Al-Halabi Legal Publications, first edition, Lebanon, 2005, p. 207.

⁽²⁾ See: Article 4 of the Rome Statute of the International Criminal Court. Also, Article Two of the Special Agreement on the Privileges and Immunities of the International Criminal Court, of the United Nations, 2002.

is the objective basis on which the powers of the permanent international criminal justice⁽¹⁾, represented by the International Criminal Court, are based.

Within the framework of the International Law Commission, many discussions have arisen about crimes within the subject matter jurisdiction of the International Criminal Court. This committee put forward a proposal during the preparation of the first draft for the establishment of the International Criminal Court, which requires the exercise of jurisdiction over all crimes included in international conventions⁽²⁾.

The proposal proposed by the International Law Commission in 1994 has been amended to include 7 types of criminal acts: genocide, war crimes, drug trafficking crimes, aggression crimes, crimes against humanity, crimes committed against UN personnel, and terrorism crimes. However, at the convening of the Rome Conference, which established the International Criminal Court as a permanent judicial body, the crime of terrorism⁽³⁾, crimes of drug trafficking and crimes committed against United Nations personnel were excluded, and agreement was reached on four types of crimes: war crimes⁽⁴⁾, genocide, crimes against humanity⁽⁵⁾ and the crime of aggression, which is still suspended in terms of the court's jurisdiction over it and determining its pillars until there is international consensus on its definition⁽⁶⁾.

Until now, terrorist crimes remain outside the objective framework of the International Criminal Court due to the adoption of the principle of legality of crimes and penalties as one of the most important principles of international

⁽¹⁾ See: Article 1 of the Rome Statute of the International Criminal Court.

⁽²⁾ This proposal was not accepted. Despite the large number of crimes regulated by those international conventions. There was only one crime that was agreed to be defined and criminalized at the international level, which is the crime of genocide. See: Report of the International Law Commission on the Work of the Forty-Third Session of the United Nations General Assembly, pp. 39-43.

⁽³⁾ The Preparatory Committee for the International Criminal Court, at its session held from February 11-21, 1997, discussed the inclusion of three other crimes within the jurisdiction of the Court: terrorism, crimes against United Nations personnel, and crimes related to the illicit trade in narcotic drugs, but no agreement was reached on them. Some states opposed this, citing the difficulty of defining these crimes and the ability of the national criminal judiciary to consider them better. See: Muhammad Yusuf Alwan, Crimes against Humanity, research submitted to the International Criminal Court symposium (challenging immunity), Damascus, 2001, p. 206.

⁽⁴⁾ JUR. H. C. HANS-PETER KAUL, the Protection of Human Rights through the international criminal court as a contribution to constitutionalization and nation- building, Human Rights And The International Criminal Court, ICC, 2011, p.5.

⁽⁵⁾ A/CN.4/680, 17 March, 2015, p.16

⁽⁶⁾ See: Explanatory Note to the Elements of International Crimes, International Criminal Court Publications, ICC, ASP/1/3, The Hague, Netherlands, 2002, p. 139 and beyond.

criminal law, and in the absence of a text criminalizing this type of crime, it cannot be said that the international criminal judiciary is able to hold the leaders and leaders of terrorist organizations accountable for what they commit of crimes. Although terrorism bears the international characteristic in many crimes that the world has witnessed, the authors of the Rome Statute of the International Criminal Court justified its lack of comprehensiveness for terrorist crimes by saying that the crimes considered by the International Criminal Court are crimes that are characterized by extreme gravity and that fall into the interest of the international community as a whole⁽¹⁾.

Therefore, the main problem lies in the absence of terrorist crimes within the statute of the International Criminal Court, and when analyzing the issue of including terrorist crimes within the subject matter jurisdiction of the International Criminal Court, we will encounter the principle of legality of crimes and penalties. However, given the seriousness of terrorist crimes at the present time and with the emergence of the most dangerous terrorist organizations in the world, it has become necessary to re-examine the issue of the ability of the International Criminal Court to consider international terrorist crimes.

Given the inability to rely on a clear legal text criminalizing international terrorism within the framework of the Rome Statute of the International Criminal Court, we can say that the analysis of some of the principles underlying international criminal law in general may further hinder this matter. Perhaps the most prominent of these principles is the principle of complementarity between international criminal justice and national criminal justice, which is one of the most important principles that apply to the relationship between international criminal justice and national criminal justice. However, it may turn from a key factor in achieving international criminal justice to one of the most prominent procedural obstacles that prevent the prosecution of grave violations of human rights such as terrorism.

⁽¹⁾ The limitation of the statute of the International Criminal Court to specific types of crimes did not meet the aspirations of many countries that wanted to expand the jurisdiction of the court, and some have considered that expanding the substantive jurisdiction of the court will lead to a decrease in its acceptability due to the reluctance of many countries to agree to it. Other countries have gone to delete crimes that are not related to international conflicts, and that crimes that are committed at the internal level of states must be subject to the authority of the national judiciary, as is the case for Germany and some European countries. The basic principle of the United Nations is the maintenance of international peace and security, and everything that hits this goal is a germedolithic act in which jurisdiction must fall to the International Criminal Court. See: Ibrahim Ahmed Al-Samarrai, International Criminal Court, Journal of Legal Sciences, College of Law, Baghdad, 2001, p. 126.

♦ **The main problem:**

Through what was presented above, we can say that the main problem of this research lies in the following question:

What are the substantive and procedural obstacles of the 1998 Rome Statute that prevent the activation of the jurisdiction of the International Criminal Court in cases of terrorism?

Through this problem, it can be said that a number of sub-questions branch out from it, namely:

- What is the legal and objective basis on which the international criminal court can consider crimes of international terrorism?
- What is the legal concept of the principle of complementarity between international criminal justice and national criminal justice?
- What are the implications of applying the principle of complementarity with regard to terrorist crimes between national and international criminal justice?

♦ **Research importance:**

The importance of analyzing the main problematic of this research and the problems that stem from it are related to the importance of accountability for international crimes that were committed in the framework of many armed conflicts that a number of countries have witnessed at the present time, especially some Arab countries such as the armed conflict in Syria, Libya, Yemen and Iraq. In light of the many obstacles that stand in the way of referring grave violations of human rights to the International Criminal Court, especially political ones, it becomes necessary to search for a legal mechanism through which these violations can be stopped and those responsible for them to be held accountable before the permanent international criminal court represented by the International Criminal Court.

♦ **Research method:**

In this research, we will rely on the analytical approach, where we will analyze the legal concept of the crime of terrorism and the extent to which its elements are compatible with international crimes that fall within the substantive jurisdiction of the International Criminal Court, in addition to analyzing the legal concept of the principle of complementarity as part of the legal procedures followed within the framework of the Rome Statute and the impact of applying this principle of accountability for terrorist crimes.

♦ **Plan start:**

We will divide this research into two parts:

The first: the legalization of terrorist crimes within the Rome Statute of the International Criminal Court.

The second: the effects of applying the principle of complementarity in accounting for terrorist crimes.

○ **The first part: The legalization of terrorist crimes within the Rome Statute of the International Criminal Court**

The crime of terrorism is one of the crimes of great concern to the international community at the present time⁽¹⁾, despite the great shift witnessed by international law in the definition of this crime and the attempt to establish an integrated legal framework for it, especially after the events of September 11, 2001⁽²⁾. However, the armed conflicts that took place in many countries in the past few years showed the high degree of seriousness of this type of crime. It also showed the extent of the damage caused by these crimes to human rights and the concepts that the international community has settled on the need to preserve, the most important of which is international peace and security.

With the development of armed conflicts in many countries, especially some Arab countries, terrorist crimes have witnessed a major transformation on multiple levels, most notably the level of organization that made them leave the national framework of many countries and extend to include the damage caused by the countries of the entire world. This was coupled with the emergence of many terrorist organizations that followed a systematic policy in carrying out their crimes after taking control of large geographical areas. This can be seen mainly in the context of the armed conflict in Syria from 2011 to the present, when the formation of the Islamic State in Iraq and the Levant was announced in 2014, turning over time into the most serious international threat to global peace and security⁽³⁾.

⁽¹⁾ See: Report of the Working Group on the Review Conference of the Rome Statute of the International Criminal Court: ICC-ASP/8/20. P.20.

⁽²⁾ Khaled Salem Abdel Majid Falah, *Objective Criminal Policy in the Face of Terrorist Crimes - A Comparative Study*, Dar Al-Nahda Al-Arabiya, Cairo, 2014, pp. 222-223.

⁽³⁾ See: UN Security Council Resolution 2249, adopted at its session on 20 November 2015, S/RES/2249 (2015).

During the period of terrorist organizations' control over cities, villages and towns, whether in Syria or Iraq, their fighters committed many grave violations against civilians in those areas. These violations included hundreds of mass massacres, field executions, war crimes and crimes against humanity⁽¹⁾. The issue of terrorist organizations' control over large geographical areas within some countries was a major obstacle to the national judiciary's exercise of its jurisdiction to hold members of these organizations accountable for the crimes they committed under the national criminal law. As a result of this matter, and in light of the importance of the principle of non-impunity, it becomes necessary to research the extent to which the international criminal justice system is able to consider these crimes and hold those responsible to account under international criminal law. However, the issue of adherence to the principle of legality of crimes and penalties renders the International Criminal Court unable to consider crimes of terrorism due to the lack of provision for them in the 1998 Rome Statute.

From this point of view, we can say that given the seriousness of terrorist crimes, especially after the transformation witnessed by this type of crime at the global level, it is necessary to analyze the legal qualification of terrorist crimes within the International Criminal Court and to search for the legal basis that can be relied upon to criminalize this type of crime under the Rome Statute of the International Criminal Court in the absence of an express and clear text.

We will look into this matter through two sections:

Section one: the extent of objective compatibility between the crime of terrorism and international crimes.

Section two: the crime of terrorism within the legal framework of the Rome Statute.

• **Section One: The extent of objective compatibility between the crime of terrorism and international crimes**

The process of determining the elements of crimes that fall within the substantive framework of the International Criminal Court is based primarily on the interpretation and application of Articles VII, VIII and IX of the Rome Statute of the International Criminal Court⁽²⁾. The elements of these crimes, and any

⁽¹⁾ See: Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations, Human Rights Council HCR, 2013, p. 26.

⁽²⁾ See: Article 9 of the Rome Statute of the International Criminal Court.

amendments agreed upon⁽¹⁾ in their regard, must be consistent with the statute itself. By reviewing the elements of international crimes that fall within the jurisdiction of the International Criminal Court, it can be said that terrorist crimes share their pillars with those of those crimes, making their legal design similar to that of the crimes contained in the Rome Statute. We will analyze this through the following:

▪ **First: The congruence of the elements of the crime of terrorism with the international crimes stipulated in the Rome Statute**

The material element of the crime of terrorism is manifested in all the behaviors and material actions carried out by the perpetrator with the intention of spreading terror and fear in the souls by multiple means such as murder, the use of explosives and toxic materials and all means that would affect public order, security and public safety⁽²⁾. During the terrorist organizations' control over geographical areas in Syria and Iraq, their members committed many criminal acts, such as deliberate attacks against civilians, indiscriminate bombing, rape and hostage-taking⁽³⁾. By reviewing the Rome Statute of the International Criminal Court, it can be said that the material acts and behaviors that constitute material elements of international crimes within the jurisdiction of the International Criminal Court are the same as the actions and behaviors that are included in the material element of the crime of terrorism.

As for the moral element in terrorist crimes, it is based on the legal criteria considered legal within the framework of realizing the moral element in any criminal act, which is represented by the presence of knowledge and will that the committed criminal act constitutes a legally punishable crime and that the will of the perpetrator has directed directly to the resulting result. On these acts, which are taught by the terrorists themselves. In this field also, we can note the congruence of the moral component of terrorist crimes with the moral pillar of international crimes that fall within the substantive jurisdiction of the International Criminal Court, especially since there are many distinct criteria for international crimes that are

⁽¹⁾ The second paragraph of Article 9 of the Rome Statute of the International Criminal Court states: "Amendments to the Elements of Crimes may be proposed by any State Party or by the judges by an absolute majority or by the Prosecutor, and such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."

⁽²⁾ See: Ali Youssef Al Shukri, *International Terrorism in the Light of the New World Order*, Dar el Salaam, Cairo, 2007, p. 48.

⁽³⁾ See: Mahmoud Sherif Bassiouni, *Customary Framework for International Humanitarian Law "Interventions, Gaps and Ambiguities"*, *International Humanitarian Law, Guide to Implementation at the National Level*, International Committee of the Red Cross, 2003, p. 86.

directly related to the moral pillar as a legal criterion available in the framework of terrorist crimes.

The intentionality required in international crimes is the same upon which the criminalization of terrorist acts is based, especially since this type of crime is based on the availability of the general criminal intent represented by knowledge and will, and it also contains a special intent represented by the intention of spreading terror in the souls and intimidating the safe, and what is included in the law The Rome Statute of the International Criminal Court of crimes based on a moral element identical to the moral element found in terrorist crimes, especially since all criminal acts and behaviors in international crimes raise terror and cause panic in the hearts of civilians⁽¹⁾. Therefore, the criminalization of terrorism in accordance with the legal rules and principles of the Rome Statute is clear as a result of the congruence of the elements of the crime of terrorism with the elements of international crimes⁽²⁾.

▪ **Second: The international character of terrorist crimes**

International crime is defined as every act that is unlawful under international legal rules, where this act is carried out by natural persons with a legal will. Therefore, all acts that violate the rules of this law and are issued as a result of a clear and explicit will fall within the framework of international crime⁽³⁾.

The objective basis for qualifying any material behavior as an international crime is related to the damage this act causes to the international public order and international interests, and perhaps the most prominent international interests that the international community seeks to achieve is the preservation of international peace and security. From this standpoint, we can say that terrorism as a crime directly affects the special interests of the international community and leads to undermining international peace and security⁽⁴⁾.

⁽¹⁾ See: International Criminal Court Review Conference, Official Documents of the Assembly of States Parties, Third Item, 2010, p. 1.

⁽²⁾ A person is not criminally responsible for committing a crime within the jurisdiction of the court and is not liable to punishment unless the material elements of the crime are present with the presence of intent and knowledge. It is understood from the moral element intent or knowledge or both of what is contained in the applicable Article 30.

⁽³⁾ Salah Hassan Matroud Al-Rubaie, Al-Wajeez in the Principles of Contemporary International Humanitarian Law, Dar Al-Nahda, 1st Edition, Damascus 2010, p. 164.

⁽⁴⁾ See: Youssef Goran, The Crime of Terrorism and Its Responsibility in Internal and International Criminal Law, no publication date, p. 186.

The terrorist crime is not only related to the concepts of international peace and security as international interests, but the fact that this act is considered an international crime is linked to the fact that it represents a violation of basic human rights stipulated in international conventions and treaties. International humanitarian law, international human rights law, and many human rights conventions prohibit the material acts and behaviors involved in terrorist crimes on the grounds that they are a direct harm to those basic rights, and since the aforementioned agreements constitute the main focus of international law⁽¹⁾, the result is to adapt terrorist crimes within the category of International crimes.

The objective basis for qualifying terrorist crimes as harming international interests and breaching the rules of international law is not limited to the aforementioned, but it can also be said that the subject of the infringed right in terrorist crimes is a right protected by international law⁽²⁾. This is what distinguishes between international and domestic crime, where internal crimes affect a right linked to the sovereignty of states over their lands and linked to their public order, while international crimes affect a right protected by international law, and this matter we find its practical application in the context of analyzing the objective nature of terrorist crimes and their inclusion in by international law.

As a result of this approach, we can say that the crime of terrorism is an international crime⁽³⁾ based on the legal definition of the concept of international crimes and based on the facts related to this type of crime, especially since terrorist crimes at the present time cross the borders of states and pose a threat to the entire international community.

• Section two: The crime of terrorism within the legal framework of the Rome Statute

By reviewing the legal rules of the Rome Statute of the International Criminal Court, we will find that Article 22 of it states: “This article does not affect the qualification of any conduct as criminal under international law outside the

⁽¹⁾ The United Nations Global Counter-Terrorism Strategy secured by Resolution No. 60/288 of 2006 and the Declaration on Measures to Eliminate International Terrorism, General Assembly Annex No. 49/60 of 1994, 60th Session, and Agenda items 46 and 120.

⁽²⁾ See: Muntasir Saeed Hammouda, *International Terrorism, Its Legal Aspects and Means of Combating it in Public International Law and Islamic Jurisprudence*, Dar Al-Fikr Al-Jamii, Alexandria, 1, 2008, p. 45.

⁽³⁾ See: Rana Ibrahim Suleiman Al-Atour, *Commitment to criminal legitimacy in international crimes*, Sharia and Law Journal, No. 46, April 2011, p. 78.

framework of this Statute.”⁽¹⁾ By analyzing this legal text, it can be said that the first practical result learned from it is that the statute of the International Criminal Court enshrines the principle of criminal legality, which is based on not considering any act as a crime unless it is specified by a legal text⁽²⁾.

As for the second conclusion learned from this text, it can be expressed that the Rome Statute does not put an end to the concept of international crime and limits it to the crimes contained in it that fall within the subject matter jurisdiction of the International Criminal Court. International law criminalizes many material behaviors and actions on the grounds that it harms international interests and harms rights protected by it.

Therefore, the inclusion of terrorist crimes within the subject matter jurisdiction of the International Criminal Court is linked to the legal principle enshrined in Article 22 of the Rome Statute, especially since the aforementioned text does not put an end to the enumeration of acts that are classified as international crimes. However, the issue of adherence to the principle of criminal legality prevents the International Criminal Court from considering terrorism cases and prosecuting the officials of terrorist organizations for the crimes they have committed.

In practice, the rules contained in international conventions related to the criminalization of international terrorism are considered general principles of law that are applied in the absence of a legal text, and this is consistent with the nature of international criminal law. Therefore, the search for the legal basis on which to criminalize terrorism under the Rome Statute of the International Criminal Court is linked to the texts of international conventions related to international terrorism⁽³⁾.

The legal basis on which terrorism can be criminalized under the Rome Statute of the International Criminal Court is not limited to international conventions related to terrorism, but there are many international resolutions that represent the will of the international community as a whole to reduce the danger of terrorism and the global threat it poses, as the Assembly has consistently General of the United Nations to set legal standards by which states can limit the commission of terrorist crimes.

⁽¹⁾ See: Article 22, third paragraph of the Rome Statute of the International Criminal Court.

⁽²⁾ See: Hasina Tharwat, *International Criminal Justice - Court - Crimes*, Gill Center for Scientific Research, 2014, p. 13.

⁽³⁾ See: *International Counter-Terrorism Instruments*, Counter-Terrorism Committee, UN Security Council, UN Global Network Services Division, Department of Public Information, United Nations, 2010.

The legal value of the resolutions issued by the United Nations General Assembly regarding the phenomenon of international terrorism is related to its legal status as an international body that works to embody the will of states in the entire media for the benefit of humanity, and therefore its resolutions are considered a major part of international law that criminalizes terrorism and calls for accountability for it.

In this regard also, it is necessary to review the resolutions issued by the UN Security Council, as it is one of the most important international authorities according to its statute, and it is responsible for maintaining international peace and security⁽¹⁾. In the context of criminalizing terrorism, the Security Council has adopted a large number of resolutions condemning terrorist crimes and calling for international accountability for those responsible. Terrorism has been one of the most prominent topics on which the Security Council has taken many international resolutions⁽²⁾. These decisions defined the objective concept of terrorist crimes and their main elements⁽³⁾.

However, the basic analysis of these decisions in the context of the problematic criminalization of terrorism within the Rome Statute of the International Criminal Court lies in the extent to which its decisions are binding on the one hand, and the extent to which these decisions are considered part of international law on the other. From our point of view, these decisions establish the accountability of those responsible for committing terrorist crimes before the permanent international criminal court, especially since the Security Council had previously taken decisions regarding the establishment of special international criminal courts to consider crimes that have been classified as terrorist crimes, and perhaps the most prominent example of this matter is the establishment of the International Criminal Tribunal for Lebanon to hold accountable for the crime of the assassination of former

⁽¹⁾ See: Ahmed Abdullah Abu El-Ela, *The Evolution of the Role of the Security Council in Maintaining International Peace and Security*, Dar al-Kutub al-Qanuniyyah, Egypt 2005, p. 33.

⁽²⁾ S/RES/2249 2015 & S/RES/2178, 2015, S/RES/1963, 2010.

⁽³⁾ Resolution No. 1066 stated that the Security Council considers terrorist acts a threat to social and economic development and a threat to human rights, and criminal acts that are committed against civilians with intent to kill or inflict serious bodily injury or take hostages with the aim of spreading terror among the general public or a group of persons or persons or to intimidate a group of the population or compel a government or an international organization to do or refrain from doing an act that constitutes crimes within the scope of international conventions and protocols related to terrorism. Session No. 5053 of October 8, 2004.

Lebanese Prime Minister Rafik Hariri⁽¹⁾, which also considered that terrorism in peacetime constitutes an international crime that requires accountability⁽²⁾.

The work under the Rome Statute of the International Criminal Court to criminalize terrorism as an international crime before the permanent international criminal justice is based not only on the interpretation of the legal texts contained in this system, but on the legal principles under which the work is carried out within the framework of international criminal law in general. One of the most prominent principles on which this law is based is the principle of non-impunity, which is considered one of the most important principles that establish the concept of international criminal justice and establish accountability for severe violations of human rights.

The Dutch delegation at the Review Conference of the Rome Statute of the International Criminal Court referred to this principle as the substantive basis for the inclusion of the crime of terrorism in the Statute of the International Criminal Court⁽³⁾. The issue of the absence of an international agreement on a definition of the crime of terrorism remains the obstacle to the entry of the crime of terrorism within the substantive jurisdiction of the International Criminal Court, knowing that this crime is defined and defined in many international conventions that constitute a major source of international criminal law.

The absence of a legal text within the Rome Statute on which those responsible for terrorist crimes are held accountable before the International Criminal Court has been the most prominent obstacle that contributes to the persistence of impunity. This can be translated realistically by reviewing the crimes committed by terrorist organizations within the armed conflict in Iraq and Syria, where hundreds of civilians were killed en masse, and the terrorist organization ISIS committed hundreds of grave violations of human rights, without any judicial moves by the Prosecutor of the International Criminal Court to hold these people accountable.

The analysis of the possibility of the International Criminal Court to consider terrorist crimes is not related to the legal provisions contained in the Rome Statute,

⁽¹⁾ The International Criminal Tribunal for Lebanon was established by Security Council Resolution No. 1757 issued on 30/5/2007. Its establishment was linked to the investigation of the terrorist crime represented in the assassination of the Lebanese Prime Minister Rafik Hariri and 22 other members of the Lebanese parliament, his personal escorts and journalists. The Lebanese government requested the The Security Council is to set up this court to punish those who are proven to have committed this crime.

⁽²⁾ STL-11-01/1, 16/2/2011. Para: 85.

⁽³⁾ ICC-ASP/8/20. P78.

but is also based on the principles that are applied within the framework of the International Criminal Court in its relationship with the national criminal justice. Perhaps the importance of this matter lies mainly in the existence of an integrated national legal framework that criminalizes terrorist acts and behaviors. Is it possible by relying on the principle of complementarity to reach international criminal accountability for terrorist crimes?

We will analyze this problem through the second requirement.

○ **The second part: The effects of applying the principle of complementarity in accounting for terrorist crimes**

The principle of complementarity within the framework of the Rome Statute of the International Criminal Court has received great attention since the preparations for the establishment of the Court began, as it regulates the relationship between the criminal justice of the States parties to the Rome Convention and the International Criminal Court as an independent judicial body. The principle of complementarity is considered one of the most prominent and most important principles on which the international criminal justice is based in general, and the reason for this is not only related to its regulation of the relationship between national criminal justice and international criminal justice, but because it is related to the theory of sovereignty that was a justification for many countries that rejected the statute of the international criminal court law based on the freedom of states to organize their national affairs⁽¹⁾.

Based on the fact that the Rome Statute depends on the will and consent of states to accede to the Rome Convention, the International Criminal Court, according to this matter, is not considered an authority above the authority of states, as it was not established to replace the national criminal judicial authorities, but rather complements them. This constitutes the content of the principle of complementarity in order to achieve criminal justice and to hold accountable those responsible for

⁽¹⁾ See: Abdel Raouf Dababish, Humanitarian Intervention and its Impact on Sovereignty in International Law and Islamic Jurisprudence, Journal of the Researcher in Humanities and Social Sciences, No. 1, Algeria, 2010, p. 76.

committing grave violations of human rights⁽¹⁾, based on the universality of these rights and their importance to all of humanity⁽²⁾.

Under the principle of complementarity, the national criminal authority takes precedence over the jurisdiction of the International Criminal Court with regard to accountability for international crimes⁽³⁾, as the task of investigation, collection of evidence, arrest and trial of suspects falls under the jurisdiction of the national criminal judiciary.

However, talking about assigning the main role of the national criminal judiciary to accountability for terrorist crimes may collide with many obstacles that the Rome Statute took into account when formulating the principle of complementarity, especially factors related to the national criminal justice itself. However, an examination of the content of this principle and the merits on which it is based can change the perception of it as an important principle in the framework of achieving international criminal justice.

From this point of view, the analysis of the effects of the application of the principle of complementarity becomes linked to the negative impact that it may have in the framework of accountability for terrorist crimes in particular, without other international crimes that are specialized in the International Criminal Court, especially since these crimes are defined within the Rome Statute while there is no legal framework regulating the crime of terrorism within this system. What makes the application of the principle of complementarity a negative impact in the framework of accountability for crimes of international terrorism?

We will answer this question through two sections. In the first, we will review the nature of the principle of integration and its basic elements, and in the second we will review the negative impact of its application on accountability for terrorist crimes.

Section one: the legal framework of the principle of integration.

⁽¹⁾ Ensuring the activation of criminal justice, especially in light of the increasing violations that threaten the international community, is one of the most important considerations on which the principle of complementarity is based. Thus, it can be said that this principle requires the existence of a permanent international criminal judicial body with sovereign powers and competencies to complement, with its mechanisms, the collapse or lack of jurisdiction of the national judiciary. See more: Mahmoud Sherif Bassiouni, *International Criminal Court*, Rose El-Youssef New Press, third edition, Cairo, 2002, p. 144.

⁽²⁾ See: Abdul-Hussein Shaaban, *International Criminal Court*, Arab human rights reading, methodological and scientific problems, Arab Future magazine, No. 281, Lebanon, 2002, p. 62.

⁽³⁾ See: Abdel-Fattah Muhammad Siraj, *The Principle of Integration in International Criminal Judiciary*, Dar Al-Nahda Al-Arabiya, first edition, Cairo, 2001, p. 6 and beyond.

Section two: the negative impact of the principle of complementarity in achieving international criminal justice for terrorism crimes.

• **Section one: Legal framework of the principle of complementarity**

In the framework of the Rome Statute, the principle of complementarity between the international criminal justice represented by the International Criminal Court and the national criminal justice was not clearly defined in a separate legal text, but was referred to in the framework of the preamble to the 1998 Rome Convention⁽¹⁾. It can be said that the principle of complementarity refers to a consensual formula It was adopted by the international community as a fulcrum to urge states to prosecute those accused of the most serious crimes⁽²⁾.

The principle of complementarity in its content is based on the practice of national criminal justice in the states party to the Rome Convention on international crimes that fall within the subject matter jurisdiction of the International Criminal Court first. Under a number of cases, jurisdiction is transferred to the International Criminal Court to consider these types of crimes⁽³⁾.

In practice, we can divide the principle of complementarity into substantive complementarity related to the exercise of jurisdiction over the international crimes mentioned in the framework of the Rome Statute of the International Criminal Court⁽⁴⁾, and procedural complementarity related to the exercise of jurisdiction by the national criminal judiciary to investigate or prosecute. In this case, the International Criminal Court will not be able to exercise its jurisdiction, especially since the Rome Statute prohibits prosecution for the same offense twice, as does the national penal laws of countries⁽⁵⁾.

⁽¹⁾ See: tenth paragraph of the preamble to the 1998 Rome Convention.

⁽²⁾ See: Ikhlas Nasser, The Effectiveness of the Principle of Judicial Integration in the International Criminal Court System and Its Impact on the Palestinian Case, Birzeit Legal Studies Working Paper Series, College of Law and Public Administration, Constitutional Law Unit, 2019, p. 4.

⁽³⁾ See: Farouk Al-Zoubi, The Principle of Complementarity in Jurisdiction between the International Criminal Court and National Legal Systems, Yarmouk Research Journal, Human and Social Sciences Series, No. 3, Jordan, 2008, p. 816.

⁽⁴⁾ PELLET (A), Material jurisdiction and mode of referral, Colloquium Law and Democracy French Documentation, Paris, 1999, p42.

⁽⁵⁾ The Rome Statute states in its Article 20 that a person who has been tried by another court for conduct that is also prohibited by articles 6, 7 and 8 constitutes an offense may not be tried before a court in respect of the same conduct unless the proceedings in the other court have taken for the purpose of protecting the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, in addition to what is related to the rest of the cases in which the transfer of jurisdiction for consideration and trial to the

In practice, the application of the principle of complementarity is accompanied by a major set of conditions under which jurisdiction is transferred from the national criminal judiciary to the International Criminal Court, and these cases are:

▪ **First: The unwillingness of the national criminal judiciary to consider international crimes that fall within its jurisdiction**

The unwillingness of the national judiciary to be held accountable for international crimes is one of the cases of applying the integration system⁽¹⁾. However, countries may not disclose their unwillingness to exercise their jurisdiction over the crimes that take place on their territory. This is often a matter of state policy, especially since all states at present recognize basic human rights and the obligation to protect them. However, the issue of knowing the unwillingness of countries to be held accountable for international crimes that take place on their territory is based on a set of evidence, which is represented by an unjustified delay in criminal judicial procedures such as investigation, prosecution and arrest procedures, or that the judicial procedures that are followed by the concerned state do not correspond to the material facts and special circumstances of this type of crime and the gravity that characterizes it⁽²⁾.

In the context of this matter, the issue of integrity and independence in the national criminal judiciary appears clearly and clearly, as this factor plays a pivotal role in the concept of criminal justice, especially since the ability of states to hold people under their authority accountable remains greater than the ability of any other judicial body that may work to practice this the mission. Thus, the criterion of the judiciary's lack of integrity or independence becomes part of the broad objective framework represented in the unwillingness of states to hold those responsible for grave human rights violations to account⁽³⁾.

The framework of states' unwillingness to hold those responsible for human rights violations accountable also includes issuing lenient criminal sentences

International Criminal Court is applied. See: Article 20 of the Statute of the International Criminal Court in the third paragraph.

⁽¹⁾ See: Tony Fanner, Establishment of a Permanent International Criminal Court, Rome Diplomatic Conference, Expected Results of the International Committee, International Review of the Red Cross, International Committee of the Red Cross, No. 60, Geneva, 1998, p. 367.

⁽²⁾ Flavia Lattanzi, jurisdiction of the international criminal court and consent of states, general review of public international law, N 1, 1999, p428.

⁽³⁾ JOHN T. HOLMES, Complémentairement : Les juridictions nationales contre la CPI dans la cour pénale internationale, Oxford University Press, 2002, p. 675.

compared to the gravity of the crimes and violations committed, and this is related to the concept of protecting states concerned with criminal prosecution of those involved in human rights violations from criminal responsibility⁽¹⁾.

▪ **Second: The inability of the national criminal judiciary to exercise its jurisdiction**

The Rome Statute of the International Criminal Court took into account, in the framework of the application of the principle of complementarity, the inability of the national criminal judiciary to hold accountable for international crimes that fall within the jurisdiction of the International Criminal Court, and this can be seen in situations of armed conflict, where these conflicts lead to an almost total collapse in the governmental institutions of countries, and this may cause inability of local law enforcement authorities to implement rules and regulations and to prosecute, arrest and hold criminals accountable before the law.

It is worth noting that the issue of transferring jurisdiction from the national criminal judiciary to the International Criminal Court is associated with proving the conditions contained in the Rome Statute, but the International Criminal Court has a discretionary power to determine the extent to which the legal conditions for the implementation of the principle of complementarity are complete⁽²⁾. The court may find that despite the collapse of the state that witnesses the crimes and the existence of a state of security instability as a result of the armed conflict, the state is still able to take serious judicial measures to arrest and prosecute criminals, and then it cannot be said that the principle of complementarity and the transfer of jurisdiction to the International Criminal Court will be enforced⁽³⁾.

The issue of determining the state's inability to hold accountable for international crimes and gross violations of human rights or its inability is a matter of great difficulty for the International Criminal Court, and this issue requires an examination of the facts, data and information related to each case⁽⁴⁾. The issue of

⁽¹⁾ See: Item (a) of the second paragraph of Article 17 of the Rome Statute of the International Criminal Court.

⁽²⁾ Prosecutor V. SIMONE GBAGBO, case No: ICC-02/11-01/12, 1 October, 2013.

⁽³⁾ Decision on the Admissibility of the case Against Saif AL ISALM GADDAFI, Prosecutor V. Saif AL ISLAM AL GADDAFI & AL SENUSSI case No: ICC01/11-01/11, 31 May, 2013.

⁽⁴⁾ Determining the state's unwillingness or unwillingness to be held accountable is related to a difficult decision, as the assertion that a state is acting in bad faith, unwillingness or inability to conduct a trial is a serious accusation. The statute has three patterns of state conduct that may lead a court to rule that a state is unwilling to prosecute. These patterns referred to in Article 17 of the system, but they remain subject to the

the state's unwillingness to be held accountable constitutes, in our opinion, objective evidence of the responsibility of leaders and chiefs for the commission of crimes, and this matter differs greatly from the issue of its inability to take criminal measures to search for perpetrators of international crimes.

- **Section two: The negative impact of the principle of complementarity in achieving international criminal justice for terrorism crimes**

Commitment to the principle of legality of crimes and penalties before the International Criminal Court is one of the most prominent legal obstacles that prevent this court from considering terrorism cases. However, the seriousness of this type of crime and the large number of terrorist organizations at the present time and the lack of criminal accountability for its members for the grave violations they commit have become one of the most important issues raised regarding the role of the International Criminal Court in accessing justice and preventing impunity.

However, the analysis of the ability of the International Criminal Court to consider this type of crime depends not only on the legal provisions contained in the Rome Statute of 1998, but also includes the basic principles under which the International Criminal Court operates. Perhaps a comparison between them and the temporary international criminal tribunals may give a better assessment of these tribunals due to their wide procedural capacity regarding international crimes⁽¹⁾.

In the first requirement of this research, we presented an analysis of the problem of the absence of a legal text within the Rome Statute through which the International Criminal Court can hold accountable those responsible for crimes of international terrorism, but the issue of its inability to prosecute the leaders of terrorist organizations is also associated with the main principle under which this

discretion of the court. See: Oscar Solera, Complementary Jurisdiction and International Criminal Jurisdiction, International Review of the Red Cross, International Committee of the Red Cross, Selections from Issues 2002, Geneva 2002, p. 179.

⁽¹⁾ Looking at the international criminal tribunals for Rwanda and Yugoslavia, it can be said that the substantive jurisdiction of these two tribunals rivals the substantive jurisdiction of the national criminal judiciary for the crimes that have been considered by these judicial bodies, especially also that the establishment of these two tribunals and the statute in which they were implemented was by the Council of International security, and these two courts had priority in exercising the substantive jurisdiction over the national courts in these two countries, and these two courts can withdraw jurisdiction over cases from any national court and at any stage of the case. See: Article 9, second paragraph of the Statute of the Tribunal for the former Yugoslavia, and Article VIII, second paragraph, of the Statute of the Tribunal for Rwanda.

Court namely the principle of complementarity. But what is the negative impact of this principle in preventing the criminal court from considering these crimes?

▪ **First: the principle of complementarity as a legal haven**

Despite the importance of the principle of complementarity, which gives the International Criminal Court the jurisdiction to look into grave violations of human rights in the cases mentioned above, this principle may be used in another way that constitutes a circumvention of international criminal justice, and this is related to the concept of the unwillingness of states to hold those responsible to account grave violations of human rights on its territory and protect them from international criminal responsibility. Many countries have witnessed sham trials of those responsible for international crimes, gross violations of human rights, acts of genocide and crimes against humanity that ended with unfair judicial rulings that did not fulfill the requirements of criminal justice. These trials were nothing but an obstacle to the application of the principle of complementarity and the transfer of jurisdiction to the International Criminal Court⁽¹⁾.

This issue is also raised in connection with the discussion of the countries concerned with initiating criminal procedures to hold those responsible for grave violations to account, as this matter becomes a pretext for not transferring jurisdiction to the International Criminal Court. Therefore, it can be said that the legal rules relating to the implementation of the principle of complementarity may themselves contribute to obstructing it in the event that there is an intention of the states to circumvent them.

▪ **Second: The specificity of terrorist crimes in relation to the concept of states' unwillingness to be held accountable**

The principle of complementarity constitutes one of the most important and prominent obstacles that prevent the International Criminal Court from considering terrorism cases. Despite other obstacles that fall within the substantive framework and prevent the entry of terrorist crimes within the substantive framework of the

⁽¹⁾ In the context of the Darfur situation in Sudan, special criminal courts were established to try those responsible for the grave human rights violations that occurred in the Darfur region, but these courts did not undertake serious criminal procedures that demonstrate a real desire to prosecute those responsible for those violations. The national judicial rulings issued in the framework of the criminal trials that were established are not commensurate with the nature of the violations that occurred. See more: Youssef El-Behairy, *The United Nations System in the Face of the Transformations of the Arab Spring*, Marrakesh, 2012, p. 283.

International Criminal Court, it can be said that the principle of complementarity constitutes a procedural obstacle.

The political exploitation of terrorist crimes and their association with state policies at the present time answers the question related to the relationship between the application of the principle of complementarity and the prosecution of terrorists internationally. Whereas, officials and leaders of terrorist organizations can be prosecuted for the crimes they commit, given that the elements of the crime of terrorism are similar to the elements of international crimes within the jurisdiction of the Court, but adapting these crimes within the description of terrorism prevents them from reaching the International Criminal Court on the one hand as it clearly expresses the legal concept of states' unwillingness to hold those responsible for terrorist crimes accountable. This is related to the relationship between terrorist organizations and the orientations of some political regimes that try to take advantage of terrorism to implement their strategic policies⁽¹⁾, and therefore these countries may conduct mock trials of the officials of terrorist organizations or overlook their crimes.

From this point of view, we can say that the concept of states' unwillingness to hold accountable those responsible for the massive human rights violations that occur on their territory is largely embodied in the crimes of terrorism that are currently linked to the policy of many states in the context of armed conflicts.

○ **Conclusion**

The analysis of the obstacles that stand in the way of the International Criminal Court and prevent the entry of terrorist crimes within its substantive jurisdiction is directly related to the legal rules and principles contained in the Rome Statute of the International Criminal Court, despite the importance of international criminal justice as one of the tools for achieving justice and holding those responsible for grave human rights violations accountable, there are still many loopholes in this system that prevent accountability for hundreds of thousands of victims and the systematic destruction of infrastructure in many countries of the world. With the increase in armed conflicts at the present time and the spread of the horrific crimes of terrorist organizations that benefited from these conflicts to control large

⁽¹⁾ Denial L. BYMAN, *Confronting Passive Sponsors Of Terrorism*, Analysis Paper, the SABAN center for Middle east policy at the Brookings Institution, No: 4, February, 2005, p. 2.

geographical areas, it has become necessary to search for a legal mechanism through which to stop the grave violations committed by these organizations and hold their leaders accountable before the criminal justice.

However, the search for this mechanism within the Rome Statute of the International Criminal Court collides with multiple obstacles. Where these obstacles can be divided into substantive obstacles and procedural obstacles, the rules of the substantive jurisdiction of the International Criminal Court, which are limited to four types of international crimes, constitute the first obstacle in the way of referring those responsible for terrorist crimes to international criminal justice and prosecuting them.

From a practical point of view and based on the Rome Statute of the International Criminal Court, and international treaties and conventions that constitute a source of international criminal law, it can be said that the International Criminal Court is able to exercise its jurisdiction to consider the actions and behaviors of the leaders of terrorist organizations as grave violations of human rights similar to its material and moral pillars are what the Rome Statute guarantees, and this matter constitutes a way to achieve criminal justice and hold these people accountable.

However, research on the issue of the jurisdiction of the International Criminal Court to consider terrorist crimes is not limited to analyzing the obstacles related to attribution or legal conditioning of acts and behaviors involved in terrorist crimes, but also relates to the procedural obstacles that prevent this matter and open the way for political benefit from terrorist crimes. The principle of complementarity between international and national criminal justice is the most prominent of these obstacles, and the reason for this is that the concept of states' unwillingness to be held accountable for crimes and serious violations of human rights finds its real and clear embodiment in the context of this type of crime, especially since terrorism is currently linked to many political regimes made him an excuse to implement their political methodology.

♦ Through the above analysis, we can reach the **following conclusions**:

First: The principle of legality remains the most prominent obstacle to the Court's ability to consider crimes of international terrorism, but the congruence of

the elements between this type of crime and the international crimes contained in the Rome Statute makes the Court capable of examining them.

Second: The issue of the inability of the International Criminal Court to consider terrorism cases does not depend on the absence of a legal text within the Rome Statute that enables it to do so. Rather, there are many procedural obstacles that prevent this matter, the most important of which is the principle of complementarity between international criminal justice and national criminal justice. Especially since the analysis of the relationship between terrorism and the methodology of some political systems leads to a full understanding of the issue of the unwillingness of states to be held accountable for the massive violations of human rights that occur on their territories.

♦ From the foregoing results, we can **suggest** the following:

First: Establishing a systematic policy to assess the concept of states' unwillingness to be held accountable for crimes and grave violations of human rights as part of the rules for applying the principle of complementarity between international criminal justice and national criminal justice.

Second: In the absence of international consensus to include the crime of terrorism in the statute of the International Criminal Court. Work to organize the concept of the discretionary authority of the International Criminal Court as a competent judicial authority to adapt material actions and behaviors to determine their conformity with the pillars of international crimes in a way through which the leaders of terrorist organizations can be prosecuted and held accountable.