

Violation of laws in Israel – Hamas war and role of International Criminal Court

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Abstract

The surge in violence occurred once again in one of the world's highly volatile regions with launching of a sudden attack by Hamas militants on Israel, resulting in many casualties. This attack in October 2023 is an important blood stained chapters in the saga of Independent Israel. Immediately after the dangerous attack on the territory of Israel, the military of Israel retaliated by attacking Gaza. During these attacks, the Palestinian Arab civilians suffered huge losses in terms of life and property. The government of Israel with the aim of taking revenge is strongly determined to eradicate Hamas. There were a number of violations attributed to Israel, which did not respect the postulates of International Humanitarian Law (IHL) and also ignored the fundamental principles to ensure protection of their Arab citizens. The government and military of Israel faced criticism Internationally, but Israel justified every step undertaken in the conflict. The International Criminal Court (ICC) has an important role in fixing accountability in serious crimes committed by the parties in Israel and Palestine. The ICC upon analysis of causes and consequences involved in this conflict has highlighted the so called war crimes committed by forces of Israel in West Bank and Gaza besides turning the spot light on gross atrocities committed by Hamas who initiated this conflict. However, much required strong and effective steps need to be taken for fixing responsibilities for war crimes and crimes against humanity committed repeatedly throughout this conflict. Decisive and stringent measures can also help in putting an end to this conflict and may act as a deterrent in future conflicts.

Keywords : Israel Hamas War Atrocities Hamas International Laws Rome Statute International Criminal Court

Introduction

The first week of October 2023 was marked with bloodbath in the recent history of Israel as the Palestinian group, Hamas launched a surprise massive attack on Israel on October 7th, 2023, killing nearly 1400 people including a large number of Jews and nationals of other countries including US. The Hamas along with some other organizations took two hundred and fifty-three people as hostages.^{1,2} To counter the barbaric attack, Israel proclaimed war on Hamas and other targets in Gaza by launching Operation Swords of Iron.³ Israel blocked supply lines providing basic necessities including water and fuel to the people living in Gaza. According to reports Israel dropped six thousand bombs within first six days as the conflict escalated, and the hostilities and civilian sufferings are still continuing.⁴ After launching of terrorist attacks by Hamas against Israel, the government also showed a rigid attitude in catering to necessary needs of Palestinian population in crisis. Israel retaliated and unleashed a reign of terror on its Arab citizens and a “complete siege” on Gaza, killing at least 23,000 Palestinians, most of them being women and children.⁵

The present conflict over the past few months, cannot be treated as a political matter only, but is also essentially a well established legal issue. In the past, Israel has been undeniably charged with alleged crimes of deliberate killings, material and moral torture, maiming, bombing of civilian settlements, hospitals, schools and refugee camps, and deprivation of basic necessities in Gaza. There is mounting evidence of acts of genocide under International Law with violations of Laws of Armed Conflict and

Humanitarian Laws, genocide and war crimes. The intent seemed to be complete or limited destruction of a national, ethnic, racial or religious group which has seen a surge in the last few months.⁶

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1. ¹ U.S. naval institute staff, Report to Congress on Israel and Hamas Conflict, U.S. Policy Options, April 18th, 2024, USNI News, *available at*: <https://news.usni.org/2024/04/18/report-to-congress-on-israel-and-hamas-conflict-u-s-policy-options-2> Accessed April.7th, 2024
 2. ² Israel and Hamas Conflict In Brief: Overview, U.S. Policy, and Options for Congress, April 16th, 2024, Congressional Research Service, *available at*:
 3. [https://crsreports.congress.gov/product/pdf/R/R47828#:~:text=On%20October%207%2C%202023%2C%20the,citizen%20in%20Israel\)%20were%20killed.](https://crsreports.congress.gov/product/pdf/R/R47828#:~:text=On%20October%207%2C%202023%2C%20the,citizen%20in%20Israel)%20were%20killed.) Accessed April 20th, 2024
 4. ³ Lawati A.A, Ebrahim.N., Israel is at war with Hamas. Here’s what to know, Oct. 15th, 2023, CNN, *available at*:<https://edition.cnn.com/2023/10/09/middleeast/israel-hamas-gaza-war-explained-mime-intl/index.html>, Accessed April 1st, 2024
 5. ⁴ Tan K.W.K., Israel says it dropped 6,000 bombs on Gaza in one week. That’s almost as many as what U.S dropped in Afghanistan in one year, Nov. 6th, 2023, BUSINESS INSIDER INDIA, *available at*:
 6. <https://www.businessinsider.in/international/news/israel-says-it-dropped-6000-bombs-on-gaza-in-one-week-thats-almost-as-many-as-what-the-us-dropped-in-afghanistan-in-one-year-/articleshow/105009760.cms> . Accessed April 20th, 2024
 7. ⁵ Sara bashi, Hamas-Led Attack in Southern Israel Kills Hundreds <https://www.hrw.org/news/2023/10/10/hamas-led-attack-southern-israel-kills-hundreds>.
 8. Accessed November 20th, 2023
 9. ⁶ Israel’s War Crimes and the Jurisdiction of the International Criminal Court. <https://politicstoday.org/israel-war-crimes-and-the-jurisdiction-of-the-international-criminal-court/>. Accessed October, 20th, 2023

Main Body

Recap of crimes in the conflict and contravention of International Laws

As per reports around 1.7 million Palestinians were displaced, amounting to victimization of 75% population of Gaza due to internal displacements with displaced people undergoing more problematic phases due to heavy shortages of basic essentials for supporting their lives like food, medical care and safe water for drinking.^{7, 8} The sufferings of the displaced people amount to violations of the International Humanitarian Law (IHL) particularly it's Rule 55 which states that in case of conflict between two parties, there must be rapid and uninterrupted passage to provide relief on humanitarian basis for civilians who are in urgent need of that relief, which should quickly be facilitated and the activity conducted with no distinction subjected to right of control.⁹ The act of such forceful displacements is covered in the violations of Geneva Conventions of 1949 and stands as a war crime under Article 8 (2) (a) (vii) of Rome Statute.¹⁰ Additionally unlawful deportations of people are crimes against humanity under Article 7 (1) (d) of Rome Statute.¹¹ The civilians not involved in any hostilities have to be regarded as protected persons as per the IHL and these people are obliged to receive all forms of protection from different violations.¹²

The authorities of Israel started to cease selling and supply of electricity to Gaza strip, and reducing the hours for electricity to 3-4 hours in a day since the start of the conflict. There was reduction in replenishment of fuel reserves especially for the only source of power for Gaza i.e. Gaza Power Plant that ran out of fuel.¹³ The civilians including the workers from Gaza were missing due to arrests. The trade unions and various Human Rights Groups were of the opinion that the workers faced mass detentions in the military facilities located in West Bank followed by revoking of their work

⁷ The collapse of Gaza's health system, Feb. 9th, 2024, Gaza crisis, International Rescue Committee, available at: <https://www.rescue.org/article/collapse-gazas-health-system#:~:text=The%20conflict%20has%20resulted%20in,whom%20remain%20held%20in%20Gaza>. Accessed February 20th, 2024

⁸ Rule 55. Access for Humanitarian Relief to Civilians in Need, International Humanitarian Law Databases, ICRC, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55>. Accessed October 25th, 2023

⁹ *ibid*

¹⁰ Article 8 (2) (a) (vii) war crimes, Rome Statute of the International Criminal Court, available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 20th, 2023

¹¹ Article 7 (1) (d) crimes against humanity, Rome Statute of the International Criminal Court, available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 23rd, 2023

¹² Persons protected under IHL, Oct. 29th, 2010, International Humanitarian Law Databases, ICRC, available at: <https://www.icrc.org/en/document/persons-protected-ihl>. Accessed October 23rd, 2023

¹³ Hostilities in the Gaza Strip and Israel, Flash Update #4, Oct. 10th, 2023, United Nations Office for the Coordination of Humanitarian Affairs, OCHA, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-4>. Accessed October 23rd, 2023

¹⁴ <http://jier.org>

permits.¹⁴ The authorities of Israel refused to release workers particularly held by them. Many of them were rounded up and transferred by the Israeli army to different unknown locations.¹⁵ Such acts clearly amount to enforced disappearances, and fall under the group of Crimes against Humanity as per Article 7(1) (i) of Rome Statute.¹⁶

There has been destruction of residential buildings in violation of the provisions of Rome Statute violating its Article 8 (2) (e) (i), that highlights the intentional attacks on individual civilians who are not involved directly in the hostilities in a non-international armed conflict.¹⁷ As per the data of Gaza Ministry of Public Works and Housing, many housing units were destroyed and many more severely damaged due to Israeli strikes, rendering them inhabitable,¹⁸ The action violates another important provision of Rome Statute i.e. Article 8 (2) (e) (xii), which highlights the war crime of either destruction or seizure of property of adversary until and unless such acts were indispensable by the necessities involved in the conflict and that too in a conflict that is not international in nature.¹⁹

This conflict saw a number of both ground and aerial attacks, on civil infrastructure including educational institutions killing many people. Basically the Article 8 (2) (e) (iv) of the Rome Statute has a wide applicability, as it describes the war crime of attacking buildings that are dedicated to education. Reports suggest that even religious sites have not been spared with many attacks on such sites during first two and a half months (Oct. 7th-1 Dec. 31st, 2023) when around 117 religious sites were destroyed.²⁰ The attack on the Great Omari Mosque left the largest and oldest in Gaza totally destroyed.²¹ This mosque of medieval times had connection with heritage, and its attack violated another important segment of same Article 8 (2) (e) (iv) which amounts to the war crime of attacking a historic monument.²² Such attacks have led to severe destruction to architectural heritage of Gaza.

¹⁴ Marsi.F., Gostoli.Y., Thousands of Gaza workers go 'missing' in Israel amid wartime mass arrests, Oct. 28th, 2023, News, Israel-Palestine conflict, ALJAZEERA, *available at*: <https://www.aljazeera.com/news/2023/10/28/thousands-of-gaza-workers-go-missing-in-israel-amid-wartime-mass-arrests>. Accessed October 23rd, 2023

¹⁵ *ibid*

¹⁶ Article 7 (1) (i) crimes against humanity, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 23rd, 2023

¹⁷ Article 8 (2) (e) (i) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 23rd, 2023

¹⁸ Palestine Complex Emergency 2023 DREF Operation MDRPS015, Oct. 15th, 2023, OCHA, relief web, *available at*: <https://reliefweb.int/report/occupied-palestinian-territory/palestine-complex-emergency-2023-dref-operation-mdrps015>. Accessed October 23rd, 2023

¹⁹ Article 8 (2) (e) (xii) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 23rd, 2024

²⁰ Kansara.R., Nour.A., Israel-Gaza war: Counting the destruction of religious sites, BBC News, *available at*: <https://www.bbc.com/news/world-middle-east-67983018>. Accessed December 20th. 2023

²¹ Hamas says Gaza mosque destroyed, urges UNESCO to save heritage, Dec. 8th, 2023, Gaza, News, ALJAZEERA, *available at*: <https://www.aljazeera.com/news/2023/12/8/hamas-says-gaza-mosque-destroyed-urges-unesco-to-save-heritage>. Accessed December 20th. 2023

²² *Supra* note 19

In view of the wider scope of the same Article, this provision was also violated when hospitals were attacked, notably the attack on Al-Shifa hospital (Nov.15th,2023) supposed to be the largest hospital in Gaza, that lead to trapping of 1200 patients and staff and death of 40 patients including infants.^{23,24} The horrendous act was justified by Israel's authority, who claimed that the hospital was utilized by Hamas as a Command Centre. However Israel was not able to bring forth strong evidence supporting their so called valid grounds.²⁵ The accusations highlighted by Israel were rejected by Hamas who invited the investigators of United Nations for verification of the truth.²⁶ Such attacks violate Article 8 (2) (e) (iv) of Rome Statute that describes the war crime of attacking particular buildings dedicated to charitable purposes, religion, education or science and even hospitals depicting clearly the commission of war crime.²⁷

During conflicts, the civilians often try to sneak to any neighboring territories for safety adding to refugee problem for the other country. The Rafah border crossing is a very crucial border crossing, as it serves as the only crossing point for Palestinians in to Egypt.²⁸ The bombardments of Rafah border crossing between the territory of Gaza (occupied by Israel) and Egypt, by the forces of Israel prompted an exodus of Palestinians from Gaza to Sinai region of Egypt, causing an alarming situation for Egypt, which tried to avert the entry of the fleeing affected people into its territory.²⁹ Israel has a long standing policy of encouraging and ensuring its presence in the occupied territories of Gaza and West Bank. As a part of this strategy, the government of Israel encourages its Jewish citizens to migrate and settle in the areas inhabited by prosperous Palestinian Arabs, and there are reports of Jewish settlers attacking and killing Palestinians.³⁰ Such incidents involving a particular group that is identified on national, political, cultural, religious, racial or ethnic grounds and is then persecuted, simply reflects the Crimes against Humanity. These incidents clearly exemplify targeting and persecution of Palestinian Arabs. The act of persecution is criticized as per Article 7 (1) (h) of the Rome Statute, that highlights many criteria including political basis, religious and ethnic backgrounds that receive universal recognition of being not at all permissible under International law.³¹

²³ Israeli soldiers raid al-Shifa hospital in escalation of Gaza offensive, Nov. 15th, 2023, The Guardian, *available at*: <https://www.theguardian.com/world/2023/nov/15/idf-entered-gaza-al-shifa-hospital-raid-targeted-operation-hamas>. Accessed December 15th, 2023

²⁴ *ibid*

²⁵ Israel raids Gaza's al-Shifa Hospital for second day, Nov. 16th, 2023, Israel-Palestine conflict, News, ALJAZEERA, *available at*: <https://www.aljazeera.com/news/2023/11/16/israel-raids-gazas-al-shifa-hospital-for-second-day>. Accessed December 15th, 2023

²⁶ *ibid*

²⁷ Article 8 (2) (e) (iv) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed December 15th, 2023

²⁸ Hasan.A.M., Mughrabi.N.A., Egypt moves to prevent exodus of Palestinians from besieged Gaza, Oct. 11th, 2023, Reuters, *available at*: <https://www.reuters.com/world/middle-east/bombardments-hit-area-gaza-sinai-border-crossing-gaza-officials-2023-10-10/>. Accessed October 20th,2023

²⁹ *ibid*

³⁰ Israel's occupation: 50 years of dispossession, June 7th, 2017, AMNESTY INTERNATIONAL, *available at*: <https://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/> Accessed October 20th,2023

³¹ Article 7 (1) (h) crimes against humanity, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 20th,2023

The blockade of fuel, water, food and electricity supplies has made the living conditions of people in Gaza even worse, highlighting discrimination and collective punishment of Palestinians by cutting off their basic modes of sustenance.³² Lack of basic amenities has further created havoc in the medical and health sector as there was an acute non-availability of medicines, medical supplies and fuel for the hospitals as stated by the health ministry of Palestine amounting to war crime under Article 8 (2) (a) (iii) of Rome Statute, when there is deliberate causing of great sufferings or even serious injuries to body or health.^{33,34} The Integrated Food Security Phase Classification(IPC), reports that acute food insecurity is faced by the entire population of 2.2 million people, which involves the largest share of people facing high levels of acute food insecurity, classified by IPC initiative for any given area or country.³⁵

There is a huge significance of IHL that governs the do's and don'ts in any armed conflict as well as in military occupation. Israel and non-state armed wings of Hamas and Islamic Jihad, even though the latter will not ever give its ratification to the important treaties on a formal basis, are bound by the laws during a conflict, in order to ensure that the rights of its citizens in those territories where it exercises its own jurisdiction are protected.³⁶ Such a framework of law is even applicable to the occupying power eg. Israel's occupation on the lands of Gaza and West Bank.³⁷ It is the responsibility of the occupying authority to promote the sustenance of humanitarian treatment in the occupied territories by ensuring that there are no obstacles in the flow of aid for basic needs. The important understanding of the IHL is to differentiate between the civil population and combatants. Israel is obliged to follow these principles of IHL especially while dealing with the civilians. It is the responsibility of the governing authorities to cater to the rights of civilians and duly applies to Hamas and Palestinian authority who have de-facto authority and control over Palestinians.³⁸

³² Kouachi.I.I., No electricity, water, fuel for Gaza until Israeli prisoners return home: Energy minister, Oct. 12th, 2023, AA, World, *available at*: <https://www.aa.com.tr/en/world/no-electricity-water-fuel-for-gaza-until-israeli-prisoners-return-home-energy-minister/3016648#>. Accessed October 20th,2023

³³ Alouf.R.A., Slow.O., Gaza 'soon without fuel, medicine and food' - Israel authorities, Oct. 10th, 2023, BBC, *available at*: <https://www.bbc.com/news/world-middle-east-67051292>. Accessed October 20th,2023

³⁴ Article 8 (2) (a) (iii) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 28th,2023

³⁵ The gaza strip – ipc special brief besiegement and ground operations drive catastrophic acute food insecurity <https://www.ipcinfo.org/ipcinfo-website/alerts-archive/issue-94/en/> . Accessed December 20th,2023

³⁶ Baldwin.C., How does International Humanitarian Law apply in Israel and Gaza?, Oct. 27th, 2023, HUMAN RIGHTS WATCH, *available at*: <https://www.hrw.org/news/2023/10/27/how-does-international-humanitarian-law-apply-israel-and-gaza>. Accessed October 20th,2023

³⁷ *ibid*

³⁸ Report: Hamas capabilities depleted, but terror group 'remains in de-facto control of swaths of Gaza', April 13th, 2024, THE TIMES OF ISRAEL, *available at*: https://www.timesofisrael.com/liveblog_entry/report-hamas-capabilities-depleted-but-terror-group-remains-in-de-facto-control-of-swaths-of-gaza/. Accessed April 20th,2024

The war crimes are repeated now and then be it in the form of air strikes by Israel on civilian areas or the attacks on civilians by Hamas and other armed groups, whose acts of killing Jews signify violations of laws governing warfare. In fact the policies of Israel towards Palestinians are promoting apartheid, a crime against humanity.

Taking into consideration the questions related to a conflict, two critical points regulated by UN Charter, are *jus ad bellum*, affirming under what condition a state has the authority to engage in warfare and use of its armed force and the second being *jus in bello* that ensures least possible sufferings at the time of armed conflict that can be only achieved by rendering protection and assistance to victims of a conflict with maximum efforts.³⁹ The principles of Geneva Conventions of 1949 are also applicable to this conflict. The Common Article 3 of Geneva Conventions particularly finds applicability with respect to the armed struggle between the forces of Israel and Hamas as this common Article applies to the present war that is not fought at an international level.⁴⁰

There is also a set of treaties governing how the civilians, soldiers and even prisoners of war are to be treated, which together constitute the Laws of Armed Conflict and are meant to be followed by the government controlled military forces of Israel and Hamas militants who are an example of non-state armed groups. Taking of hostages, large scale organized murders, torturing people, all stand in clear contravention of The Geneva Conventions.⁴¹

In an attempt to wipe out Hamas militants, Israel has used civilian objects as legitimate military targets, justifying the action by stating that Hamas uses residential neighborhoods to cover themselves and buildings of civilians for concealing command posts and arms.⁴² But still excessive civilian casualties and destroying civilian objects is not justified as the combatant, while attacking a valid military target must always ensure that the assault is in proportionality avoiding excessive loss of human life.⁴³

The negligent attacks with scant respect for preservation of civilian lives have drawn worldwide attention and condemnation. The refugee camps, home to many displaced people are being targeted, time and again, killing and injuring many people highlighting that the murder of non-combatants is due to attacks directed against the civilian population pursuant to or an organizational policy to such attacks.⁴⁴ Deliberate targeting of people in such a way by killing them constitutes a very basic level war

³⁹ What are jus ad bellum and jus in bello?, Jan. 22nd, 2015, INTERNATIONAL COMMITTEE OF THE RED CROSS, ICRC, *available at*: <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0%E0%BB%BF>. Accessed October 20th, 2023

⁴⁰ Ranjan.P., Israel, Hamas, and the laws of war | Explained, Oct. 15th, 2023, WORLD, THE HINDU, *available at*: <https://www.thehindu.com/news/international/explained-israel-hamas-and-the-laws-of-war/article67424529.ece> Accessed October 20th, 2023

⁴¹ Explained | What war crimes laws apply to the Israel-Palestinian conflict?, World, Nov. 17th, 2023, DECCAN HERALD, *available at*: https://www.deccanherald.com/world/explained-what-war-crimes-laws-apply-to-the-israel-palestinian-conflict-2774526#google_vignette. Accessed November 20th, 2023

⁴² *ibid*

⁴³ *ibid*

⁴⁴ Article 7 (1) (a) crimes against humanity, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 24th, 2023

crime highlighted as a provision in Rome Statute specifically under Article 8 (2) (a) (i).⁴⁵ Such attacks on refugee camps stand as an absolute violation to the Article 8 (2) (a) (i) of Rome Statute, the offense against civilians being of a serious nature. Apart from being a war crime it also falls under classification of crimes against humanity and is highlighted under Article 7 (1) (a) of Rome Statute defining murder. Besides the Rome Statute, there are violations of principles of International Law. The assaults on refugee camps stand in clear contradiction to IHL and Geneva Conventions as civilian population cannot ever be targeted and are protected by both. The rule of proportionality under IHL offers protection to civilians and states about the prohibition of any such attack aimed at a military target with greater possibilities of increasing civilian casualties which must not be disproportionate.⁴⁶ Besides the Rome Statute numerous issues arise, while considering the killing of civilians, be it the Jewish civilians massacred by Hamas or the Palestinian Arab civilians who had no role in the conflict, and all come under violations of principles of International law.

With respect to the very recent Israel-Hamas conflict, it is the primary obligation of the military of Israel to carefully assess and determine the impact on civilians before taking any military step or even before launching an attack against any military target. In case of chances of disproportionate attack that might lead to casualties of civilians, the attack must be withdrawn.⁴⁷ The Hamas, a non-state actor and its armed fighters as per the International Law will be non eligible for being treated as Prisoners of War in case they are captured, but can face trials by Israel in view of their dreaded acts irrespective of complying with the laws governing warfare or not. The fighters of Hamas are basically categorized as an irregular force and in order to fulfill the criteria for acquiring the status of a Prisoner of War according to Article 4 (A) (2) of Third Geneva Convention, such members have to compulsorily follow the very stringent standards both collectively as a group force or even as individual fighters.⁴⁸ There have been unlawful killings targeting men, women and children indiscriminately during the escalation of the present conflict with a huge uncertainty regarding the safety of children who often

become objects of unlawful killings.^{49,50,51} The concept of violence to life has been criticized since long through different treaties at International level be it Hague Regulations of 1899 and 1907 or the

⁴⁵ Article 8 (2) (a) (i) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 20th,2023

⁴⁶ Goldman.R., How the 'laws of war' apply to the conflict between Israel and Hamas, Oct. 15th, 2023, THE CONVERSATION, *available at*: <https://theconversation.com/how-the-laws-of-war-apply-to-the-conflict-between-israel-and-hamas-215493>. Accessed October 20th,2023

⁴⁷ *Ibid*

⁴⁸ *ibid*

⁴⁹ Fabian.E., agencies and toi staff, Thousands of Gazans head north, in potential challenge to IDF's campaign after truce, Nov. 24th, 2023, THE TIMES OF ISRAEL, *available at*: <https://www.timesofisrael.com/thousands-of-gazans-head-north-in-potential-challenge-to-idfs-campaign-after-truce/amp>. Accessed November 28th,2023

Geneva Conventions of 1949. The Fourth Geneva Convention emphasizes particularly protection of civilian life and incidents of unnecessary killings of civilians in Gaza directly violate this Convention. The protection offered to civilians is very well defined under first paragraph of Article 27 of Fourth Geneva Convention stating about the protection of persons during each and every act of violence.⁵² Prohibition of unlawful killings of people comes under Article 32 of the Fourth Geneva Convention, with the Article stating the prevention of enacting any such measure that causes physical sufferings or even extermination of people who are categorized as protected persons.⁵³ The prohibitions within this Article are applicable to murdering or torturing people besides any brutal act carried out by either military personnel or by civilians.⁵⁴

A significant problem in this conflict is the safety of doctors and other health workers. These people involved in their service to cater to injured and dying are increasingly vulnerable due to lack of security and safety to life.⁵⁵ Various anecdotes of killing of doctors signify a war crime under Article 8 (2) (e) (iii) of Rome Statute, the provision stating about the intentional directing of attacks in non-international armed conflicts against any such personnel, installations or any units who have involvement in giving any sort of humanitarian assistance or a peacekeeping mission as according to charter of United Nations.⁵⁶ The protection and safety of those who provide any humanitarian assistance or support is of paramount consideration keeping in view their role and contribution in reducing further the casualties. The civilians and many other important people have faced the war crimes of torture including the members of Palestinian Red Crescent, who play a highly supportive role by providing humanitarian assistance during conflict, helping to contribute a lot through their services. The harassment of people

⁵⁰ Shot in 'cold blood': Killing of Palestinian grandmother sparks outcry, Jan. 13th, 2024, News, Israel-Palestine conflict, ALJAZEERA, available at: <https://www.aljazeera.com/news/2024/1/13/shot-in-cold-blood-killing-of-elderly-palestinian-woman-sparks-outcry>. Accessed January 20th, 2024

⁵¹ Palestinian Red Crescent says one killed, many wounded by Israeli gunfire at Gaza hospital, Nov. 10th, 2023, Middle East, Reuters, available at: <https://www.reuters.com/world/middle-east/palestinian-red-crescent-says-one-killed-many-wounded-by-israeli-gunfire-gaza-2023-11-10/> Accessed November 20th, 2023

⁵² Practice relating to Rule 89., Violence to Life, CUSTOMARY IHL, International Humanitarian Law Databases, ICRC, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule89#:~:text=Geneva%20Convention%20IV,-Article%2032%20of&text=This%20prohibition%20applies%20not%20only,12%20August%201949%2C%20Article%2032> . Accessed October 20th, 2023

⁵³ Article 32 - Prohibition of corporal punishment, torture, etc., IHL TREATIES, International Humanitarian Law Databases, ICRC, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-32#:~:text=12%20August%201949.-,Article%2032%20-%20Prohibition%20of%20corporal%20punishment%2C%20torture%2C%20etc.,protected%20persons%20in%20their%20hands>. Accessed October 20th, 2023

⁵⁴ *ibid*

⁵⁵ Four doctors killed in Israeli strike on Al-Awda Hospital in northern Gaza, Nov. 22nd, 2023, ISRAELI-PALESTINIAN CONFLICT, TASS, RUSSIAN NEWS AGENCY, available at: <https://tass.com/world/1709735>. Accessed November 29th, 2023

⁵⁶ Article 8 (2) (e) (iii) war crimes, Rome Statute of the International Criminal Court, available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 20th, 2023

whether or not involved in providing humanitarian assistance amounts to torture which comes under crime against humanity under Article 7 (1) (f) of Rome Statute.⁵⁷ War crime of intentional attack on medical units and even transport facilities that use distinctive emblems associated with Geneva Conventions standing in conformity with International Law, is criticized under Article 8 (2) (e) (ii) of Rome Statute.⁵⁸ Additionally there are cases that involve degrading of personal dignity of individuals amounting to war crimes under Article 8 (2) (c) (ii) of Rome Statute, as this provision states about any outrage on personal dignity of person especially when treatment given leads to high levels of humiliation in a non-international armed conflict.⁵⁹

Role of International Criminal Court

Criminal prosecutions are normally carried out by the individual states involved, but certain international crimes, war crimes, and crimes against humanity carry universal jurisdiction. Till the establishment of ICC, in international conflicts, adhoc tribunals like Nuremberg Trial, Tokyo trials, were set up by the allied powers to prosecute Axis leaders for war crimes after second World War. The Yugoslavia and Rwanda Genocide trials were convened usually by the winning side to deal with such crimes. Claims of contraventions in IHL are examined globally rather than inside the national courts demonstrating a significant change in international justice scene.⁶⁰

The ICC constitutes an international mechanism that is responsible for prosecuting and punishing politicians, soldiers and other officials for their crimes. It is the first International Criminal Court, established in the Hague, the Netherlands, to investigate and prosecute individuals accused of heinous atrocities, war crimes, genocide, crimes against humanity, aggression and other grave crimes when states don't prosecute them. It has jurisdiction over people of more than 18 years of age, and cannot try states or legal entities. The court has jurisdiction over head of state, or government, or a member of government or on an official position (Article 27) and its functioning cannot be influenced under threat, as such acts are an offence under Article 70 of the Rome Statute.⁶¹

Established in 2002 under the Rome Statute and signed by 124 countries, the ICC is a permanent, independent, treaty-based criminal court that fights globally for mass atrocities. Its jurisdiction can extend beyond member countries and has been endorsed by the UN General Assembly (UNGA). It gets involved when nations are unable or unwilling to prosecute crimes on their territory. There is no territorial limitation of jurisdiction of ICC Statute. The temporal jurisdiction applies to crimes committed after the entry into force of the Statute (1 July 2002) (Article 11). A request by a state party to the statute or the United Nations Security Council (UNSC) or by a spontaneous investigation by the

⁵⁷ Article 7 (1) (f) crimes against humanity, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed October 20th, 2023

⁵⁸ Article 8 (2) (e) (ii) war crimes, Rome Statute of the International Criminal Court, *available at*: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

⁵⁹ *ibid*

⁶⁰ The International Criminal Court's Failure to Hold Israel Accountable <https://arabcenterdc.org/resource/the-international-criminal-courts-failure-to-hold-israel-accountable/> Accessed October 20th, 2023

⁶¹ *Supra* note 6

Prosecutor can initiate the proceedings (Articles 13/b-15, 53).^{62,63} It acts in an unbiased way, assessing the situation and handling the war criminals in any conflict. The court enables and supports agreements and dialogues in a constructive way between the stakeholders to promote peace. The ICC operates on the legal principle of complementarity, and can prosecute only when national legal systems cannot or will not pursue justice themselves. It needs to have close cooperation from national governments for accessing crime scenes, arrests, enforcing sentences etc.

The ICC can charge and prosecute non-state group members like Hamas for genocide, war crimes, and crimes against humanity. In case the crime is committed in territory of ICC country, by non state actors, the court has the jurisdiction, but if the crime is committed in a non –ICC country territory, it is the UNSC that should refer non state groups to ICC, and just because the state of Palestine is a ICC signatory, the court automatically has jurisdiction over the nationals of Palestine. The ICC provides territorial protections to states that join it, and their nationals are committed not to carry out any crimes notified by ICC. Hence Hamas leaders being Palestinian nationals, fall well within its jurisdiction. But the case becomes difficult if Hamas members are operating from a country like Lebanon, Qatar, and Egypt who do not concede to ICC, and the custody becomes tough.⁶⁴

Jurisdiction of ICC over Israel

Israel signed the Rome Statute in 2000, but notified the UN Secretary-General later in 2002 about its retraction and hence does not recognize the jurisdiction of the ICC, so shall not consider any charges against it, as it not a party to the Rome Statute.⁶⁵ Many countries including Israel, the United States of America, Russia and China have not signed the Rome Statute, so do not recognize the court's jurisdiction over war crimes, genocide and other crimes. The ICC focused on crimes in Africa earlier, however now it is investigating in Asia, Europe, Middle East and Latin America.⁶⁶

Tension coupled with violence has been prevailing between Palestinians and Israeli forces since a very long time and the courts in Israel were not able to deliver justice. There has been no accountability for crimes, enabling apartheid and persecution by Israel, besides infringement of International Law. According to a non binding advisory opinion of International Court of Justice (ICJ) in 2004, the settlements in occupied territory and Separation Wall by Israel was in contravention of the International Law. However Israel simply put away the court's authority. Further Palestine not being a state also added to the problem in international law suits. It was in 2015, that Palestine ratified and acceded to the Rome Statute, and accepted ICC's jurisdiction for alleged crimes within its territory.⁶⁷ To accept the jurisdiction of the ICC (International Criminal Court Rules of Procedure, Art. 44) the requirement

⁶² International Criminal Court Faces Criticism in Ongoing Palestine Proceedings <https://kashmirilife.net/what-is-international-criminal-court-and-does-it-have-any-role-in-gaza-israel-confilct-338400/>. Accessed October 20th, 2023

⁶³ Supra note 6

⁶⁴ Who could be criminally charged for the Israel-Hamas war? <https://globalaffairs.org/bluemarble/who-could-be-criminally-charged-because-israel-hamas-war>. Accessed April 12th, 2024

⁶⁵ What Is International Criminal Court and Does It Have Any Role In Gaza-Israel Confilct? <https://kashmirilife.net/what-is-international-criminal-court-and-does-it-have-any-role-in-gaza-israel-confilct-338400/>. Accessed April 20th, 2024

⁶⁶ What is the International Criminal court and why it has Israel worried. https://www.business-standard.com/world-news/what-is-international-criminal-court-and-why-it-has-israel-worried-124043000016_1.html. Accessed April 20th, 2023

⁶⁷ Supra note 65

mandates the status of “state”. The jurisdiction of the court was announced after the application of State of Palestine to ICC in 2009. Hence the court’s jurisdiction over the Palestinian territories was confirmed in 2015 after the grant of non-member “observer state” status to Palestine at the UNGA in 2012.⁶⁸

In retrospect, in March 2021 a preliminary investigation was opened by the former Prosecutor of ICC, Fatou Bensouda into the situation in Palestine after the jurisdiction of ICC over Palestine and its territories was announced in 2015. Between 2017-2019, Israel continuously tried to challenge Bensouda’s jurisdiction over Palestine regarding the investigation opened in 2015, but by the end of Dec.2019, Bensouda announced that after five year preliminary investigation of state of affairs in Palestine, there was found adequate basis to conclude that Israel and Palestinian armed groups had both committed war crimes in the West Bank, East Jerusalem and Gaza Strip and suggested investigation of the crimes committed by both Israel and Hamas during Operation Protective Edge, Great March of Return and the crimes committed by Israel through settling Israeli civilians in disputed territory.^{69,70}

The case met all criteria under the Rome Statute for the opening of an investigation. Her decision was based on the fact, that the Palestine was a state and the ICC had jurisdiction over crimes committed in territories controlled by Israel. However her claims were refuted by Israel stating that the ICC did not have jurisdiction over the case as there was no sovereign Palestinian State, delegating to the court criminal jurisdiction over its territory and nationals. The problem was referred to ICC judges about the jurisdiction and then to seven states for opinion, who categorically stated that “State of Palestine” did not presently satisfy the conditions to be considered a “state” as the territories are not controlled by the Palestinian Authority. It was contended that since the ICC was established with the goal of not letting allegations of serious crimes go unaddressed, so it may be accepted by ICC that Palestine had sufficient characteristics of a state and award itself jurisdiction for investigations of alleged crimes by Israel regardless of whether the alleged perpetrators are Israeli or Palestinian. However it was noted that ICC should have no jurisdiction as Israel had not signed to the Rome Statute. Though two judges of the ICC believed that since Palestine joined the Rome Statute, so it should be treated as “state” but according to Justice Kovács, the majority opinion had no legal basis in the Rome Statute, and in public International Law, thus rejecting their argument. It was also noted that though Palestine was defined as an ICC member state that could grant the court jurisdiction for investigation of crimes in its territory, but the ruling did not mean that the court recognized Palestine as meeting statehood norms under International Law. However it was concluded by the ICC Pre-Trial Chamber in 2021 that regardless of Palestine’s status under general International Law, its accession to the ICC Statute followed the correct and ordinary procedure.⁷¹

ICC’s jurisdiction in relation to war in Gaza would have the basis that the Palestinian Authority in Ramallah have accepted its jurisdiction, the Palestine state being a member of ICC since 2015. The Palestinian Authority can also empower the ICC, to exert jurisdiction over crimes allegedly committed

⁶⁸ Supra note 66

⁶⁹ Israel’s clashes with the ICC over the past decade – a timeline of events | Israel-Palestine conflict News | Al Jazeera. Accessed March 20th,2024

⁷⁰ Israel and the International Criminal Court <https://www.jewishvirtuallibrary.org/israel-and-the-international-criminal-court> Accessed March 20th,2024

⁷¹ *ibid*

by Israeli forces in Gaza or those perpetrated by Palestinian groups such as Hamas in accordance with the established principles and legal rules on similar principle that allows the ICC to investigate and prosecute crimes by Russia in Ukraine.⁷²

The present Prosecutor of the ICC Karim Khan has been pressurized by Human Rights Watch to make a firm statement regarding the application of ICC's role in this conflict. Such a decision would act as a notable signal for prosecution of those behind war crimes.⁷³

In view of the present conflict that shook the world with horror since its start in October, 2023, the current ICC Prosecutor was pressed to issue warning to both the parties involved in conflict against committing crimes. In October he visited the Jewish victims of October 7th attack of Hamas and Palestinian sufferers from Gaza. While in Cairo, on October 30th, 2023 he criticized the crimes against humanity and war crimes that took place in Israel and Gaza. He emphasized about the obligation of Israel to follow the laws that administer armed conflict and stated that the State of Israel had moral as well as legal obligation to follow the rules that govern warfare and every military step by Israel must be in conformity with laws to be followed in case of an armed conflict especially when attacks have repercussions on lives of civilians not taking part in warfare.^{74,75} He defined protected status of buildings dedicated to education or humanitarian purposes and also that the burden of proof in targeting such buildings is upon the party that launches attacks.⁷⁶ It was further stressed that even Hamas should comply with the rules with regard to their attacks through rockets on territory of Israel. He called ICC members and non members to follow principles of customary International Law, Geneva Conventions and the Rome Statute, demanding cooperation from them by sharing all evidences about any commission of war crimes or even allegations so that thorough investigations could be conducted for prosecuting the perpetrators.⁷⁷

The ICC prosecutor stated that considering the crimes being committed in Israel by Hamas militants and by the forces of Israel in the Gaza strip, a legal process had to determine the criminal responsibility, asserting about the jurisdiction of ICC even though Israel is not a member state.

A detailed letter by special rapporteurs was sent to the ICC prosecutor on March 23rd, 2023, insisting on a quick action against Israel. Additionally human rights organizations in Palestine have also compiled and forwarded to ICC, a comprehensive documentation about Israeli actions considered violations of International Law, including information against specific Israeli military officers and politicians whose public statements and actions amount to war crimes and crimes against humanity. Further supplemental information was also collected from all quarters including

⁷² Seven questions (and answers) if the ICC issues arrest warrants for Israeli officials - Atlantic Council

<https://www.atlanticcouncil.org/blogs/new-atlanticist/seven-questions-and-answers-if-the-icc-issues-arrest-warrants-for-israeli-officials/>. Accessed April 15th, 2024

⁷³ Supra note 33

⁷⁴ *ibid*

⁷⁵ *Ibid*

⁷⁶ *ibid*

⁷⁷ *ibid*

victims and civil society actors.⁷⁸ The ICC Prosecutor even highlighted how Israel used starvation and other violent acts against civilians in Gaza clearly confirmed by many witnesses including medical doctors.⁷⁹

A UN commission of inquiry mandated by the UN Human Rights Council has affirmed the evidence of potential war crimes, having been committed by both Israel (siege of Gaza) and Palestine (gunning down civilians and taking of hostages). Further Israel is alleged to have used prohibited weapons like artillery fired white phosphorous in densely populated areas of Gaza contravening IHL. Additionally Hamas, Islamic Jihad or any other armed militant groups could also be investigated by ICC for allegations of war crimes in Palestine or Israel.⁸⁰

The investigation launched in 2021 concluded with current ICC prosecutor putting in his Office's applications on May 20th, 2024 for arrest warrants on the situation in Palestine and declared that in the light of evidence collected and examined by his Office, he had reasonable grounds to believe principally the involvement of the five people in the current conflict: Yahya Sinwar (Head of Islamic Resistance Movement of Hamas in Gaza Strip), Mohammed Diab Ibrahim Al-Masri (Hamas's commander in chief of military wing also known as Al-Qassam Brigades) Ismail Haniyeh (Hamas Political Bureau's head).⁸¹ They would face criminal responsibilities for violating various articles of the Rome Statute ie i) extermination as per Article 7 (1) (b) of Rome Statute ii) murder, a crime against humanity under Article 7 (1) (a) and war crime under Article 8 (2) (c) (i) of Rome Statute iii) taking hostages which is a war crime under Article 8 (2) (c) (iii) iv) cruel Treatment, a war crime under Article 8 (2) (c) (i) when seen with reference to treatment given to those under captivity v) torture, a crime against humanity violating Article 7 (1) (f) and a war crime under Article 8 (2) (c) (i) of Rome Statute. vi) other inhuman acts amounting to crime against humanity coming under Article 7 (1) (k) when taken with regard to holding people under captivity vii) the commission of any such particular acts on captives that is an outrage upon the personal dignity thus, constituting war crime under Article 8 (2) (c) (ii) of Rome Statute.⁸²

The application for other two arrest warrants were submitted against Benjamin Netanyahu the Prime Minister of Israel and Yoav Gallant, Defence Minister of Israel who would face criminal responsibilities for⁸³: i) promoting starvation of civilians as a mode of warfare as a war crime violating Article 8 (2) (b) (XXV) of Rome Statute ii) deliberately causing great suffering or serious injury to

⁷⁸ The International Criminal Court's Failure to Hold Israel Accountable <https://arabcenterdc.org/resource/the-international-criminal-courts-failure-to-hold-israel-accountable/>. Accessed April 20th, 2024

⁷⁹ Report: Hamas capabilities depleted, but terror group 'remains in de-facto control of swaths of Gaza', April 13th, 2024, THE TIMES OF ISRAEL, available at: https://www.timesofisrael.com/liveblog_entry/report-hamas-capabilities-depleted-but-terror-group-remains-in-de-facto-control-of-swaths-of-gaza/ Accessed May 20th, 2024

⁸⁰ Where Does the ICC Palestine Investigation Stand? | Lawfare <https://www.lawfaremedia.org/article/where-does-the-icc-palestine-investigation-stand>. Accessed May 20th, 2024

⁸¹ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, May 20th, 2024, International Criminal Court, available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state#:~:text=My%20Office%20submits%20there%20are,and%20the%20taking%20of%20at>. Accessed May 30th, 2024

⁸² *ibid*

⁸³ *ibid*

body or health as per Article 8 (2) (a) (iii) of Rome Statute iii) promoting Cruel Treatment under Article 8 (2) (e) (i) of Rome Statute iv) commission of wilfully killing of civilians under Article 8 (2) (a) (i) of Rome Statute v) carrying out attacks against people by persecuting them which is a crime against humanity under Article 7 (1) (h) of Rome Statute vi) committing many inhuman acts that come under Article 7 (1) (k) of Rome Statute vii) directing attacks targeting civilians under Article 8 (2) (e) (i) of Rome Statute since this conflict was not of an international nature.⁸⁴

The ICC Prosecutor has clearly stated despite Israel having full right to take all steps to protect its population, the court does not permit it to go against the compliance to IHL, which was proven by atrocities committed on civilians in Gaza. He emphasized that his decision about the applications for arrest warrants was the culmination of an impartial and independent investigation over serious matters that took place in this conflict.⁸⁵ The panel of experts in International Law assisting him collectively accepted his decision on application for arrest warrants. The material provided by the Prosecutor supporting his every application, creates valid grounds for the jurisdiction of the court over crimes against humanity, as put forth in these applications, due to the repeated commission of offences with suspects holding criminal responsibility. The panel also confirmed the jurisdiction of ICC in this case, as Palestine was a state party according to ICC Statute. There was also the inference that apart from existence of non-international armed conflict, there was a conflict at international level between Israel and Palestine that received statehood in 1988.⁸⁶ Both these parties have ratified the Geneva Conventions.⁸⁷ The evaluation by experts criticized Hamas perpetrators for their common intention to carry out war crimes and crimes against humanity by systematically attacking Jewish civilians on Israel's territory.⁸⁸ Israel's authority was highlighted and their strategy of using starvation as a method of war condemned although it has been firmly stressed that parties involved in an armed conflict must never try to block the transfer of humanitarian aid reaching civilian population.⁸⁹ There were also enough reasons to acknowledge that Israel's Prime Minister and Defence Minister knowingly targeted civilians in Gaza, that led to acute starvation.⁹⁰

Mr. Khan in his statement, insisted that all attempts to impede, intimidate or improperly influence the officials of the court must cease immediately. The Prosecutor's applications along with evidence and

⁸⁴ Ochab.E.U., ICC Prosecutor Seeks Arrest Warrants For Hamas And Israeli Leaders, May 20th, 2024, Forbes, *available at*: <https://www.forbes.com/sites/ewelinaochab/2024/05/20/icc-prosecutor-seeks-arrest-warrants-for-hamas-and-israeli-leaders/?sh=4829ab0f1b35>. Accessed May 30th,2024

⁸⁵ Supra note 81

⁸⁶ Mac Mohan.R., Masters J., Palestinian Statehood at the UN, Nov. 30th , 2012, council on foreign relations, *available at*: <https://www.cfr.org/backgrounder/palestinian-statehood-un> . Accessed October 20th,2023

⁸⁷ Who are the experts backing ICC warrants against Israel, Hamas leaders?, May 21st, 2024, News, Israel-Palestine conflict, ALJAZEERA, *available at*: <https://www.aljazeera.com/news/2024/5/21/who-are-the-experts-backing-icc-warrants-against-israel-hamas-leaders>. Accessed May 30th,2024

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ *ibid*

information will be examined by the judges of Pre-Trial Chamber to check if the conditions listed in Article 58 (1) of the Rome Statute have been met. The conditions being: (1) there are reasonable grounds to believe that the person has committed a crime, within the jurisdiction of the Court; and (2) the arrest of the person appears necessary to either (i) ensure the person's appearance at trial, or (ii) to ensure the person does not obstruct or endanger the investigation or the Court proceedings, or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.⁹¹ However there are no warrants yet which can only be issued by pre trial judges.

The Secretary General of Amnesty International has lauded the ICC Prosecutor's role regarding application for five important warrants of arrest for war crimes and crimes against humanity especially in Gaza strip, and has supported the bold decision by highlighting that no one is superior to International Law irrespective of positions held, be it leader of an armed group or head of state. The step of ICC's Prosecutor served as an alarm to wake up parties involved in conflict in Gaza as they would be facing accountability in view of the horrific acts committed upon common people.⁹² The application for arrest warrants could serve as a good opportunity to mark an end to the network of privileges that Israel has on the territories under its occupation. Such a decision could help to restore the reliability of prevalence of international system of justice. Finally, it is all up to Pre-Trial chamber to immediately review and take best decisions on applications for arrest warrants.

Response to conflict from other countries

The retaliation of Israel in an attempt to eliminate Hamas violated many internationally recognized humanitarian principles including the Geneva Conventions. Its response has affected its image including diplomatic ties throughout world. On November 1st, 2023 the government of Bolivia decided to cease all its diplomatic ties with Israel blaming it for commission of serious crimes against humanity within territory of Gaza, besides criticizing severely the interrupted passage of humanitarian aid to Gaza.^{93,94} Chile opposed Israel's treatment to Palestinians in Gaza stating that many policies of Israel towards Gaza reflected clearly the crime of carrying out collective punishments.⁹⁵

In November 2023, the ICC was prompted to investigate the crimes in Palestinian territories. On November 17th, 2023 the ICC Prosecutor issued a statement regarding the referral of the situation in Palestine from the five state parties of South Africa, Bangladesh, Bolivia, Comoros and Djibouti. He reiterated that there was already an ongoing investigation by his office that started on March 3rd, 2021,

⁹¹ State of Palestine | International Criminal Court <https://www.icc-cpi.int/palestine>. Accessed May 30th, 2024

⁹² Israel/OPT: ICC applications for arrest warrants for Netanyahu, Sinwar and other senior Israeli and Hamas officials crucial step towards justice, May 21st, 2024, AMNESTY INTERNATIONAL, *available at*: <https://www.amnesty.org/en/latest/news/2024/05/israel-opt-icc-applications-for-arrest-warrants-for-netanyahu-sinwar-and-other-senior-israeli-and-hamas-officials-crucial-step-towards-justice/#:~:text=On%2029%20October%20and%20again,on%20and%20after%207%20October>. Accessed May 30th, 2024

⁹³ Agencies and toi staff, Bolivia cuts ties with Israel, accusing it of 'crimes against humanity' in Gaza, Nov. 1st, 2023, THE TIMES OF ISRAEL, *available at*: <https://www.timesofisrael.com/bolivia-cuts-ties-with-israel-accusing-it-of-crimes-against-humanity-in-gaza>. Accessed May 30th, 2024

⁹⁴ *ibid*

⁹⁵ *ibid*

regarding the crimes, in contravention of Rome Statute 2014 in Gaza, West Bank and East Jerusalem and the same was extending to the present escalation of conflict since 7th October 2023. In December 2023, the prosecutor stated that it was the priority of his office to carry out investigation of potential crimes by Hamas militants and members of Israeli military in the recent conflict, after his visit to Israel and West Bank. Besides Chile, the United Mexican State, had already submitted in January 2024 to investigate the current situation, extending their full cooperation to ICC for the investigation.⁹⁶

Appeal by South Africa to ICJ against genocide by Israel

Apart from ICC, the International Court of Justice (ICJ) which handles disputes between countries, also witnessed significant developments associated with the present conflict. South Africa which was determined to act for the protection of human rights of Palestinians in Gaza besides preserving their right to existence and supporting their collective right to self-determination has appealed to the ICJ on December 29th, 2023 accusing Israel of genocide.⁹⁷ The case involves state-to-state litigation between member states of UN governed by legal provisions in the UN charter, the Genocide Convention and the ICJ Statute. On January 26th, 2024 the ICJ issued its ruling determining the acts of Israel in Gaza clearly as genocide, and also indicated enactment of provisional measures that include prevention of genocide of Palestinians by Israel in Gaza, enable basic services and humanitarian assistance and forbid and punish incitement to commit genocide.⁹⁸ The UNSC would also be notified of whether the orders of ICJ were in pursuance with Article 41 (2) of court's statute. It was further asserted that the individual states yielding their power to VETO were barred to skip international justice especially with reference to the circumstances in Gaza because of Israel's deterrent policies that stood in contravention to Geneva Conventions.⁹⁹ The measures directed by court created a sense of binding on Israel which is obliged to follow the order of court and Genocide Convention by stopping all such genocidal attacks especially on Palestinians in Gaza.¹⁰⁰ Israel had no basis to claim that the operations carried out by its military were in accordance with the International Law or Genocide Convention. South Africa's initiative was backed by Egypt, stating that it would join its move against Israel in ICJ, that holds Israel guilty for violation of the principles of Genocide Convention with regard to its acts in Gaza.¹⁰¹ The Egyptian government even issued the statement, calling on Israel to comply with the obligations of occupying power regarding the condition of Palestinians in Gaza and also ensure that

⁹⁶ Supra note 91

⁹⁷ Berg, R., What is South Africa's genocide case against Israel at the ICJ?, May 24th, 2024, BBC, *available at*: <https://www.bbc.com/news/world-middle-east-67922346>. Accessed May 30th, 2024

⁹⁸ Statement by South Africa welcoming the provisional measures ordered by the International Court of Justice against Israel, Jan. 26th, 2024, international relations & cooperation, Department: International Relations & Cooperation, REPUBLIC OF SOUTH AFRICA, *available at*: <https://dirco.gov.za/statement-by-south-africa-welcoming-the-provisional-measures-ordered-by-the-international-court-of-justice-against-israel/>. Accessed May 30th, 2024

⁹⁹ *ibid*

¹⁰⁰ *ibid*

¹⁰¹ Egypt says it will join South Africa's genocide case against Israel at ICJ, May 12th, 2024, News, Gaza, ALJAZEERA, *available at*: <https://www.aljazeera.com/news/2024/5/12/egypt-says-it-will-join-south-africas-genocide-case-against-israel-at-icj>. Accessed May 30th, 2024

proper basic humanitarian aid reaches the Gaza Strip.¹⁰² Prior to Egypt's strong stand criticizing Israel's acts, similar stand was taken by Germany on January 26th, 2024, when its Foreign Minister highlighted that Israel was obliged to follow the international obligations by refraining from carrying out barbaric acts on Palestinian civilians and allow uninterrupted humanitarian aid to civilians of Gaza.^{103,104}

Obstacles in ICC investigations

Various issues that could hamper the ICC investigation include non cooperation by Israel, influence by countries who believe that solution could be easily achieved without ICC involvement and the prospect of war-crimes charges being leveled, that could pose a threat to the credibility of the court. The ICC faces a challenge regarding judicial independence and legitimacy. The last potential maneuver that Israel can probably resort to avoiding a hearing, is citing the matter of complementarity.¹⁰⁵ The ICC rules specify, that the court's jurisdiction is only complimentary to national courts, signifying that it cannot look into cases specifically that are presently being judged or have been judged in national courts, unless the courts are either unwilling or not able to provide a suitable forum for managing the alleged crimes. Given these facts, admitting a case is not possible unless certain conditions according to the Article 17 of the Rome Statute are fulfilled.

Charges by the ICC

The ICC in likelihood could frame charges against Israeli officials and military leaders and Hamas leaders and not against the state of Israel. Both Palestine and Israel can prevent and not allow the trials and investigations at ICC, in case they genuinely investigate and persecute in their own systems, as ICC is only supposed to exercise its powers in case of failure of national legal system to carry out its duty in view of principle of complementarity. However, it seems unlikely under Hamas rule, but could definitely work in Israel if the proceedings are genuine like the action taken by Israel on some of its military officers after the Israeli attack on World Central Kitchen aid workers on April 1st, 2024 that killed 7 workers. Broadly such actions can lead ICC to refrain from investigation and prosecutions.¹⁰⁶

If the ICC proceeded with its decisions, Israel's right to self defense would come into picture, as the ICC lacks jurisdiction on the right of self defense in context of the present conflict. But the ICC Prosecutor has not considered right to self defense and has instead indicated the investigation of both the parties involved in the conflict with respect to war crimes and crimes against humanity. Although Israel has every right to protect its population but there has to be limits when exercising this right and the ICC would be the most logical judge in a debate concerning the respecting of the limits. However the Prime minister and officials of Israel have stressed that the Israel's right to self defense was not endangered.

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ The International Criminal Court's Failure to Hold Israel Accountable <https://arabcenterdc.org/resource/the-international-criminal-courts-failure-to-hold-israel-accountable/>. Accessed May 30th, 2024

¹⁰⁶ Supra note 72

Challenges to ICC investigation

Differing responses from the stake holders have been noticed. While Israel completely criticizes the ICC inquiry as politically motivated and biased, Palestine welcomes its long-overdue chance for responsibility. The response from the world community is variable, as some nations endorse ICC's authority as a means to enforce International Law, while others worry about influence that the court could have on regional peace initiatives.

The USA, a very strong ally of Israel criticized ICC's plea for arrest warrants for high ranking officials in Israel's government including Prime Minister Benjamin Netanyahu. The US congressmen have reacted to the response of the Prosecutor's office, but he has implicitly asserted that though comments and engagements in its activities from activists, NGO's, state and elected officials are appreciated but all efforts to influence wrongly or obstruct the probe should stop immediately. There were debates raised on the point of jurisdiction of ICC and the grounds of such an application as it could endanger the agreements for achieving a ceasefire to end the conflict and a hostage deal for releasing many other hostages and provide them the much required humanitarian aid.¹⁰⁷ There will be strong challenges for the ICC, in case of arrest warrants for Netanyahu as Israel has strong backing in European states who are committed to its safety.

To avoid jurisdiction of the ICC, Israel has already pointed out and claimed that it has an independent and an effective legal system that can deal with any alleged crimes, including war crimes. The Israeli Prime Minister called on "leaders of the free world" to oppose possible arrest warrants of Israeli officials by the ICC, before filing of applications for arrest warrants on April 30, 2024. It was followed by Mr. Netanyahu's response, who labeled the arrest warrant requests a "disgraceful attempt" to interfere in Israel's war on Gaza (May 21, 2024).¹⁰⁸

It is feared that ICC arrest warrants might interfere with negotiations with Hamas on a ceasefire and the release of hostages. Israel has stated that it will punish the Palestinian Authority if the ICC issues warrants. Actually it is not the Palestinian Authority but the ICC prosecutor, who brings requests to a panel of three ICC judges, to confirm any arrest warrants. However priority should be given to legitimate efforts to deescalate a war than efforts to bring criminal justice. At the moment both the ICC prosecutor or the Palestinian Authority may not directly help in de-escalation of the war. It is at the UNSC where under Article 16 of the ICC statute, the USA and its allies who have a considerable voice can freeze any investigation or prosecution for one year, (a term that is renewable), for the purpose of facilitating such negotiations.¹⁰⁹

The ICC faces a challenge regarding judicial independence and legitimacy. It has been losing legitimacy among many African nations, who accuse it of too many investigations. The Philippines has withdrawn from the ICC in 2019, after the court stated that it would investigate Manila's war on drugs.

India's stand

¹⁰⁷ Biden says ICC move on arrest warrants for Israeli leaders "outrageous", May 20th, 2024, Reuters, *available at*: <https://www.reuters.com/world/biden-says-icc-move-arrest-warrants-israeli-leaders-outrageous-2024-05-20/>. Accessed May 30th, 2024

¹⁰⁸ Israel's clashes with the ICC over the past decade – a timeline of events | Israel-Palestine conflict News | Al Jazeera. Accessed May 30th, 2024

¹⁰⁹ Supra note 73

India had a formal diplomatic relationship with Israel since its inception but the then leadership in India chose to adopt a wait and watch policy due to the Islamic nations of Arab World. Factors responsible for India not having a completely supportive attitude included India's traditional support of Palestinians, besides solidarity with the positions of Soviet blocks and Non-aligned blocs and also to some extent being dependent on Arab states on the economic fronts.¹¹⁰

The policies of former Indian Prime Minister Dr. Manmohan Singh showed a high level harmony with the Palestinian cause inherited from India's struggle for independence against British colonialism. This policy in general proved to be successful and India's support towards Palestinian issue was further enhanced.¹¹¹ In 2015, India abstained on UN Human Rights Council Resolution calling for a probe by International Criminal Court into war crimes by Israel. India despite its good cooperation with Israel on strategic fronts, was the first non-Arab state that recognized Palestine Liberation Organization (PLO) as the one and only representative of Palestinians.¹¹² Importantly, in 1988 India was one of the few nations to recognize the State of Palestine.¹¹³ However in view of the changing geopolitics in West Asia, a shift in its approach policy towards Israel has been observed since the last decade.

In view of the relations between India and Israel, there is the consideration of National Security Determinant that has emerged as a substantial factor mainly due to converging national security interests.¹¹⁴ There is an increased perception that India supports Israel because of its strategic ties with it in various fields including technology, defense, etc. All such ties have particularly got a boost since NDA government in power.¹¹⁵ Israel has also contributed to be one of India's greatest defense supplier together with Russia and France. The recent unprecedented Israel-Hamas war of Oct.7th2023 sparked by the sudden attack by Hamas against Israeli civilians received wide spread condemnations from many nations and India was one such nation which clearly condemned the attacks by Hamas and designated such acts by Hamas as acts of "Terrorism".¹¹⁶ Though India does not consider Hamas a terrorist organization, the attack on Israel that prompted retaliation, was considered a terrorist attack.

The approach seemed to be cooperative regarding the Indian attitude towards Israel, when the Indian Prime Minister Sh.Narendra Modi condemned the attacks carried out by Hamas expressing solidarity with Israel in its fight against terrorism in all its forms, signaling India's supportive attitude with the government of Israel in its fight against terrorism. However immediately the External Affairs Ministry reiterated that though India considered the attack by Hamas as a "Terrorist Attack", yet India was

¹¹⁰ Dash.S.P., Israel-Palestine Conflict: Role of India & Major Global Players, World Scientific, available at: https://www.worldscientific.com/doi/10.1142/S2717541324500037?srsId=AfmBOoqZXlismDs_CrvWiXDbYJDl1W9_FfQVsj0AD1QLBlqRYrDFD. Accessed Dec 3rd,2024

¹¹¹

Nazir.L., 1 Year in, India's Approach to the Gaza War Reflects a Wider Foreign Policy Change, Oct.7th, 2024, THE DIPLOMAT, available at: <https://thediplomat.com/2024/10/1-year-in-indias-approach-to-the-gaza-war-reflects-a-wider-foreign-policy-change/> Accessed Dec 3rd,2024

¹¹² Pieal.J.N., India Once Was a Strong Ally of Palestine. What Changed?, Nov. 6th, 2023, THE DIPLOMAT, available at: <https://thediplomat.com/2023/11/india-once-was-a-strong-ally-of-palestine-what-changed/> Accessed Dec 3rd,2024

¹¹³ *ibid*

¹¹⁴ Supra note 110

¹¹⁵ Singh.U., Explained: India's Stand Amid Threat Of Open War Between Iran, Israel, April 14th, 2024, NDTV, available at: <https://www.ndtv.com/india-news/explained-indias-stand-amid-threat-of-open-war-between-iran-israel-5440444> Accessed Dec 3rd,2024

¹¹⁶ Supra note 112

committed to its long standing policy of establishment of sovereign, independent and viable state of Palestine (116). But then after three weeks of the attacks of Oct.7th,2023, India abstained from voting in a resolution in United National General Assembly that basically was calling for a humanitarian truce in the conflict between Israel and Hamas.¹¹⁷ A condemnation of Israel's settlements in Palestine was shown when India voted in favor of the United Nations Resolution that condemned Israeli settlements in Palestine.¹¹⁸

This pro-Israel stance was noticed earlier in 2019 when India voted in favor of Israel at United Nations Economic and Social Council to deny observer status to a Palestinian Human Rights Organization called "Shaheed". The move was an initial step standing away from India's old support for advocating a two-state theory under which Israel and Palestine were viewed as two independent and separate nations.¹¹⁹ Further, India also abstained on a United Nations Resolution (Sept.19th, 2024) that called on Israel to put an end to illegal occupation of Palestine within a time period of a year.¹²⁰

Though India has been struggling with a complex diplomatic challenge, on the whole it has been exhibiting a balanced viewpoint in the Israel-Hamas War. The previous Indian Permanent Representative to United Nations (Ms. Ruchira Kamboj) urged (Mar. 2024) for a very quick de-escalation of hostilities putting an end to violence, releasing of hostages and immediate resumption of negotiations for promotion of peace. She also stressed on the approach of a Two State solution achieved through concrete and direct negotiations between both the parties about the issues that could help to establish peace in that region .¹²¹ There was also a strong condemnation of the civilian casualties that took place in these hostilities. The critical problem associated the issues of civilian casualties especially of children and women that led to grave human rights violations and humanitarian crisis was highlighted. She urged for augmenting humanitarian aid immediately for those living in Gaza. She also stressed upon the India's impartial attitude, as it was firm on its stand about criticism of all types of terrorist activities. A demand was also made for the unconditional release of all hostages of the present conflict on a priority basis. India being an advocate of humanitarian causes, has backed a two-state solution that would act as a remedy to enable the Palestinians live freely and with safety in an independent nation of their own .¹²²

India's External Affairs Minister, Sh.S.Jaishankar met the Palestinian Foreign Minister of (Jan.20th, 2024) in Kampala and reiterated Indian support for a two-state solution, condemning terrorism and taking of hostages. He further explained that unbalanced nature and lack of focus on terrorism led

¹¹⁷ Roy.S., Israel-Hamas war: India shifts stand, backs UNGA resolution on 'immediate ceasefire', Dec. 14th, 2023, The Indian EXPRESS, *available at*: <https://indianexpress.com/article/world/india-votes-unga-draft-resolution-ceasefire-gaza-9065853/> Accessed Dec 3rd,2024

¹¹⁸ India votes in favour of UN resolution that condemns Israeli settlement activities in 'Occupied Palestinian Territory', Nov. 13th, 2023, Israel-Palestine conflict, The Hindu, *available at*: <https://www.thehindu.com/news/national/india-votes-in-favour-of-resolution-that-condemns-israeli-settlement-activities-in-occupied-palestinian-territory/article67527409.ece> Accessed Dec 5th,2024

¹¹⁹ Supra note 111

¹²⁰ *ibid*

¹²¹ Committed To Support A Two-State Solution": India On Gaza Conflict, March 5th, 2024, NDTV, *available at*: <https://www.ndtv.com/india-news/india-on-gaza-conflict-says-committed-to-support-a-two-state-solution-5178122> Accessed Dec 3rd,2024

¹²² *ibid*

India to abstain from certain UN resolutions on Gaza. He cited that India has also voted in favor of a draft resolution in United Nations General Assembly demanding for an immediate ceasefire in Israel-Hamas conflict on humanitarian grounds and also release of all hostages.^{123,124} As a matter of concern for humanity India sent seventy tonnes of aid which also included medicines through Egypt to Gaza.¹²⁵

Conclusion

The developments so far in this conflict have shed lights on horrors of conflict that have been witnessed especially by the common people of Gaza. There is a need to respect the independence and legitimacy of ICC without any interference in its proceedings. The court should be given full support by all governments. Leaving aside the geopolitical interests, the court should take a fair view of all the available facts of the situation and the ICC statute, to uphold the court's long term legitimacy. Non accountability for the crimes committed shall lead to further abuses, leave grievances unconsidered and both victims and survivors will be deprived of right to justice which is their right. With so many complexities in this conflict, there is an urgent need to put an end to it. Further due to emerging geopolitical compulsions there could be likely changes in Indian foreign policy due to bilateral, regional and global groupings and agreements involving India that could affect its interest.

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¹²³ India supports ceasefire in West Asia, favours two-state solution: EAM, Nov. 25th, 2024, Business Standards, *available at*: https://www.business-standard.com/external-affairs-defence-security/news/india-supports-ceasefire-in-west-asia-favours-two-state-solution-eam-124112500744_1.html Accessed Dec 3rd,2024

¹²⁴ Sharma.K., India Votes In Favour Of UN Resolution Demanding Gaza Ceasefire, Dec.13th, 2023, NDTV, *available at*: <https://www.ndtv.com/india-news/india-votes-in-favour-of-un-resolution-demanding-gaza-ceasefire-4663824> Accessed Dec 3rd,2024

¹²⁵ Humanitarian Assistance, Multifaceted Indian Position, WHERE DOES INDIA STAND ON ISRAEL-HAMAS WAR?, Universalinstitutions, *available at*: <https://universalinstitutions.com/where-does-india-stand-on-israel-hamas-war/> Accessed Dec 3rd,2024