



HREIT

HUMAN RIGHTS AND EQUALITY INSTITUTION OF TÜRKİYE



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Context of International Law

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JANUARY 2024







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I.

THE HUMANITARIAN CRISIS IN GAZA IN THE CONTEXT OF INTERNATIONAL LAW

THE HUMANITARIAN CRISIS IN GAZA IN THE CONTEXT OF INTERNATIONAL LAW

Prof. Dr. Muharrem KILIÇ*

For many years, human history has witnessed tragedies such as 'exile, ethnic cleansing, genocide and war crimes'. To prevent the recurrence of all these human tragedies, the first Article of the Universal Declaration of Human Rights (UDHR), declared to the world as an ideological discourse and universal collective value, articulates a humanitarian and moral command: *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."* Ultimately, UDHR was established as the basic reference text that normed the credo and basic principles of human rights in the twentieth century. The Declaration, declared by the United Nations (UN) to all nations worldwide in 1948, was enthusiastically welcomed as a significant principled step towards a more peaceful and just world, especially in the aftermath of the horrors of World War II. Because this historical step was taken after the tragedies of World War II was seen as a beacon of hope that, a more just world where everyone respects basic human rights could be possible.

When we look at the roots of human rights, we could see that the political background of the human rights acquis that emerged after the tragedies of World War II was formed by the colonial practices of the West. Indeed, the hegemonic powers of the world order built an overt colonial order over the Global South under the guise of protecting and promoting "democracy" and "human rights." Unfortunately, this conceptualization, which modern Western thought has appropriated as its intellectual property, has lost its meaning. The loss of meaning of the human rights rhetoric produced in the aftermath of the Holocaust in the Western world has reached alarming levels with "ethnic cleansings, genocides and wars".

Today, the world is witnessing an asymmetrical war situation, inhumane destruction, and tragedies taking place in Gaza. To share a few facts about this tragedy, we could say that, according to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), it is recorded that more than 85 percent of the population in Gaza, which has a population of approximately 1.9 million, has been displaced. More than 20 thousand people lost their lives and at least 53 thousand people were injured in the attacks carried out after October 7. This act of terror, which blockades Gaza, leads to a violation of the fundamental norms of humanitarian law. Besides, the deterritorialization of the Palestinian civilian population by exiling them from their lands constitutes a violation of universal human rights values and norms of international human rights law.

When we consider the ongoing conflicts between Israel and Palestine since 1948, we could see that it reveals fragilities in the exercise of fundamental human rights and freedoms. The situation resulting from Israel's blockade on Gaza has become even more dire and tragic. It is seen that the region has been turned into an "open-air prison" as a result of the restriction of access to vital resources such

* Chairman of Human Rights and Equality Institution of Türkiye

as basic food, water, medicine and medical supplies for millions of people, especially women, children and elderly people, in Gaza for 16 years. Unfortunately, in the face of asymmetrical state violence, the oppressed Palestinian people have been left outside the scope of the contractual and mechanistic protection guarantees of international human rights law. As a result of this marginalizing, hypocritical and exclusionary attitude, the Palestinian people have become the 'unprotected subject' of international law and humanitarian law norms.

Looking at the initiatives in Türkiye we come across the joint declaration published at the General National Assembly of Türkiye (GNAT) with the signatures of all political parties in the Parliament regarding the conflicts between Palestine and Israel. It was emphasized in the joint declaration that *"attacks directly targeting civilians through collective punishment methods deepen the never-ending humanitarian tragedy in Gaza."* Therefore, the severe human rights violations occurring before the eyes of the whole world need to be addressed with a global humanitarian and conscientious sensitivity in terms of "international human rights law, global human rights policy, and norms of humanitarian law."

When the current problem observed today, it can be considered a "moral responsibility" for world citizens, who are observers of attacks and wars taking place in other geographies beyond national borders, to describe the tragic events and announce them to the world public. In this context, the international community needs to take a more proactive role in eliminating this humanitarian crisis, taking into account the rights of the Palestinian civilian population.

Examining the international law rules regarding this tragedy, the Geneva Convention comes to the forefront. The rules of armed conflict emerged with the Geneva Conventions, ratified by UN member states and supported by decisions of international war crimes tribunals. The 'Law of Armed Conflict' or 'International Humanitarian Law' norms consist of a series of treaties that regulate the treatment of soldiers, civilians and prisoners of war. The civilian population and especially vulnerable groups, who should be kept away from the destructive effects of war within the scope of international humanitarian law rules, are witnessed as being the exact target of the conflict in Gaza. Mass bombings targeting civilian populations, disruptions of electricity and water supply, and the destruction of hospitals constitute clear violations of humanitarian law norms.

When the situation that the world encountered today is analyzed, it requires the prosecution of those responsible for the events in Gaza. The trial of Israeli officials at the International Criminal Court (ICC) for "genocide, war and crimes against humanity" regarding their actions towards Gazans is crucial for establishing international criminal justice. At this point, apart from arrest and prosecution, the ICC's investigations can also create a kind of "social deterrent" effect by causing reputational damage to the accused. The delegitimizing impact of an ICC arrest order and the fear of political scrutiny instead of criminal prosecution have the potential to deter actions contrary to human rights law. However, the global justice system has never been more than a disappointing rhetoric for the Palestinian people. At this moment, the statement of the UN Special Rapporteur on the Right to Housing, Balakrishnan Rajagopal, is crucial. According to him *"what has happened in Gaza is the result of 'institutionalized impunity'. Impunity for occupation. For a war of extermination. Genocide, war crimes and crimes against humanity. If the ICC does not act very soon, we need a special tribunal for Gaza and action by States."*

Relating the actions committed by the State of Israel in Gaza since 7 October 2023, the Republic of South Africa submitted an Application, on 29 December 2023, instituting proceedings to the International Court of Justice (ICJ) and requested from the Court to indicate provisional measures, “to protect the rights invoked herein from imminent and irreparable loss”.¹ These demands of South Africa are actually minimum demands for the protection of human life on the basis of dignity of the people there. This asymmetric massacre must be stopped as soon as possible, cooperation must be established, humanitarian aid must be delivered, and information and documents of these genocidal acts must be collected before they are destroyed. As UN Human Rights experts stated South Africa's case has broader implications for all States because “all are obligated both to refrain from committing genocide, and to prevent and punish it wherever it occurs”.² If a decision is taken as requested by South Africa, it will benefit the states, especially all the party states that signed the Convention, because if these fascist practices become accustomed, there is a possibility of setting a bad example for other countries. Although legal processes have weaknesses in terms of insecurity, the hope is that common sense prevails and decisions are made in the direction requested.

If the ICJ decides in line with South Africa's request, the pressure of the international community on Israel will be legally justified by a court. In addition, it will be shown once again that those who committed such a serious crime cannot escape judicial review, and at the same time, Israel's unforgettable position in the eyes of the international community will be legally condemned. In addition, Israel is no longer in the international arena only as a country that hosts individuals who are victims of genocide; it will also be seen as a perpetrator of genocide. At the same time, decisions in this direction will be beneficial for the victimized Palestinians to seek their rights in the future.³

As a result of these recent events, it appears that the commodification of universal judicial justice has undermined the belief in the possibility of global justice. It is obvious that the global system, fueled by conflict politics and nourished by the war industry constructed around a security-centric axis, must be revised based on criminal justice. Therefore, the construction of an international understanding of justice that ensures the cessation of systematic human rights violations against the oppressed Palestinians can rejuvenate the belief in instrumentalized human rights.

It seems to be very clear that the situation we are witnessing has broken the spell of human rights, produced as the most popular myth of the modern age. Human rights, which were seen as the “last utopia” of the West, as Samuel Moyn described it, ended in a dystopian and tragic scenario. Unfortunately, this modern utopia has evolved towards a global totalitarianism. The naive modern utopian imagination, shaped by the globalized and totalized climate of fear (phobia), has turned into a dystopia contaminated with tragedies.

1 “Application Instituting Proceedings”, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>

2 <https://www.ohchr.org/en/press-releases/2024/01/un-human-rights-experts-welcome-start-icj-genocide-hearings-hague-reiterate>

3 Yücel Acer, “İsrail'e Karşı Soykırım Davası ve Yansımaları” (“Genocide Case Against Israel and Its Reflections”), SETA Perspektif, January 2024, Issue: 386, p.4-5, <https://setav.org/assets/uploads/2024/01/P386.pdf>

As we come to the end, it would be appropriate to say that the abandonment of some geographies or regions, where socio-cultural and socio-economic wealth is exploited and collected, to a severe subalternity reveals a tragic picture for humanity. The national and regional subordinations of nations must exist and represent themselves without the mediation of elitists shaped based on the interests of the imperial power centers. At this point, the need to establish fair representation on a national and regional basis should be emphasized. It is crucial to structure a mechanism that prevents the invasion of belligerent forces that have been violating the socio-political, identity and territorial integrity of nations since Westphalia. The necessity of an institutional structure that allows a consensus-based world order to evolve into an equal and effective mechanism is evident.

In conclusion, building a global order on a reference framework that can generate the language, ethical codes, laws, and practices of living together and coexistence despite differences is essential for competently resolving global challenges to human rights. The state of insensitivity in the face of severe humanitarian tragedies targeting the common value space of humanity causes a stalemate that hurts the global conscience. This situation leads to the destruction of values that erodes humanity's belief in foundational values. Undoubtedly, the remedy for this state of destruction lies will be possible by strengthening the global moral stance.





II.

ISRAEL'S RECENT ATTACKS IN GAZA AND VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

ISRAEL'S RECENT ATTACKS IN GAZA AND VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Prof. Dr. Cüneyt YÜKSEL*

Since October 7, Israel has been carrying out very heavy attacks on Gaza. It is wreaking death on civilians in Gaza from the air, sea and land. As of first week of December 2023, as a result of Israel's attacks, 17 thousand 700 Palestinians, including 7 thousand 112 children and 4 thousand 885 women, have lost their lives and more than 48 thousand have been injured. More than 44 thousand houses were completely destroyed and more than 233 thousand were partially destroyed in Israeli attacks. More than 6 thousand children and women, are still under the rubble. More than 200 healthcare workers, 100 the United Nations (UN) employees, dozens of civil defense workers and journalists have been killed so far in Israel's attacks. The world has been faced with an indescribable brutality. In the air strikes, Al-Ehli Baptist Hospital, Şifa Hospital, Indonesian Hospital, Turkish-Palestinian Friendship Hospital and other hospitals; the densely populated Jibaliye, Burayj and Megazi refugee camps and the schools where people took shelter were directly targeted. *There is no doubt that; Israel commits genocide, crimes against humanity and war crimes in violation of international law and international humanitarian law.*

A. Attacks on Civilian Populations Through Reprisals

In accordance with Article 51 (6) of the Additional Protocol No. 1 of 1977 to the Geneva Conventions of 1949 and Article 8-2/b (ii) of the Rome Statute, which are fundamental documents of international humanitarian law, attacks against the civilian population or civilians through reprisals are prohibited. Moreover, pursuant to Article 51 (2) of the same Protocol "*civilian population as such, as well as individual civilians, shall not be the object of attack*". Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are strictly prohibited.

Parties must distinguish civilians during armed conflicts; should not target civilian infrastructure such as houses, schools and hospitals, and should warn civilians in the vicinity of military targets in advance.

However, Israel ignores this most basic rule and recklessly bombards densely populated areas without discrimination against civilians which is a patent violation of Article 51 (6) and 51 (2) of the Additional Protocol No. 1 of 1977 and deemed as a war crime and crimes against humanity.

B. Deliberate Attack on Hospitals and Civilian Infrastructure

Article 8-2/b (ii) of the Rome Statute, which constitutes the constitution of the International Criminal Court (ICC), regulates war crimes. "*Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick*

* Chairman of the Justice Commission of the Grand National Assembly of Türkiye

and wounded are collected" are regulated as war crimes. Civilians have been massacred for days, and many hospitals and schools have been targeted during these attacks.

Likewise, international humanitarian law prohibits collective punishment, as set out in Common Article 33 of the Geneva Conventions and Article 6 of the Additional Protocol No. 2. Accordingly, *"No protected person may be punished for an offence he or she has not personally committed"*. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Parties must ensure civilian discrimination during armed conflicts; they should not target civilian infrastructure such as homes, schools and hospitals. However, Israel insists on not complying with these rules and is committing war crimes.

C. Acts Constituting Genocide

In addition to the foregoing, acts constituting genocide are regulated in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. According to this, *"the killing of members of a national, ethnic, racial or religious group with the aim of destroying it in whole or in part constitutes an act of genocide"*.

The attacks that Israel has been carrying out for a while should be evaluated within this framework. In particular, the bombing of Al-Ahli Baptist Hospital shows us that Israel actually acts with the intention of destroying an entire nation rather than continuing the military conflict with Hamas and carries out actions aimed at this.

D. Blockade-War Crime and Genocide

Israel imposes a blockade on Gaza, which constitutes a clear violation of international humanitarian law. However, Article 54 of the Additional Protocol No. 1 dated 1977 contains the provision that *"starving civilians as a method of warfare is prohibited"*. The Rome Statute likewise defines this situation as a war crime and makes it clear that blocking aid supplies will also be considered within this scope.

In fact, this blockade, which has been implemented for a long time and has now been completely tightened, also coincides exactly with the act of *"deliberately changing the living conditions of the group in order to eliminate the physical existence of the group"*, which is one of the acts that constitute genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.

Israel wants to legitimize its practices against civilians by citing Hamas members as a justification. However, it should be pointed out that the majority of Gaza's population consists of civilians. As a matter of fact, one million children live in this region. As stated in Article 50 (3) of the Additional Protocol No. 1 dated 1977, *"the presence of people among the civilian population who do not meet the definition of civilian does not eliminate the civilian nature of the population"*. In fact, the rejection by civilians of the policy which Israel is currently trying to implement and involves the civilian population moving to the south of Gaza, and the fact that these civilians continue to stay in their current places will not eliminate their civilian status.

Additionally, Amnesty International has documented Israel's use of phosphorus bombs in dense civilian settlements in Gaza. The use of such bombs, which are indiscriminate and cause painful deaths to civilians, in civilian settlements will also expose a war crime.

E. The Issue of Illegal Settlements

Another issue, which is one of the biggest obstacles to peace, is the issue of illegal settlements. In the UN Security Council Resolution No. 242, which is a well-known decision determining Israel's status as an occupying state, it is clearly stated that territorial acquisition through annexation is against the law.

Despite this, Israel continued its lawless attitude and settled more than 200 thousand Jewish settlers in East Jerusalem and more than 400 thousand in the West Bank. Israel's illegal settlements policy is linked to widespread and systematic attacks that lead to war crimes and crimes against humanity committed against Palestinians. We cannot read the evacuation scenarios of Gaza discussed today separately from this. As a matter of fact, this illegal settlement policies, which is implemented in a way that causes genocide, is currently one of the main obstacles before the peace.

F. Prevention of Violations and Prosecution of Those Responsible

The first mechanism that the international community should exercise is the adjudication of the ICC mechanism. In its application dated 2018, as a party state, Palestine requested an investigation into crimes committed in the past on the territory of the State of Palestine. The Pre-Trial Chamber of the Court also announced that it could exercise the Court's jurisdiction in the West Bank and Gaza, including East Jerusalem, in 2021. Currently, since 2021, the Court has been continuing its investigations in these regions.

The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Pursuant to Article 25 (3) of the Statute, ICC has the authority to prosecute persons who commit crimes within its jurisdiction, who order, request or encourage them to be committed, who assist or participate in the commission of a crime, or who participate in the commission or attempt of a crime in any way, and in relation to the crime of genocide, who directly and publicly encourage this crime.

ICC has complementary jurisdiction. Therefore, if a crime envisaged in the Statute has been the subject of investigation or prosecution in the competent state, the ICC is obliged to make a decision of lack of jurisdiction, except in cases where the relevant state is not willing and able to pursue it.

In fact, an independent and fair criminal trial process should have been operated within Israel's own domestic legal mechanisms. However, the Israeli Minister of Defense's statement that he lifted all restrictions on his soldiers during the armed attacks and implying that criminal prosecution will not be carried out shows that expectations in this regard may not be realistic. Therefore, the ICC should exercise its jurisdiction directly without using this procedure.

G. Prevention of Violations - Shortcomings of the United Nations Decision-Making Mechanism

The UN Security Council, which is the primary authorized body in maintaining international peace and security, requires Israel to both stop its attacks and lift the blockade, pursuant to Article VII of the UN Charter. It must take a binding sanction decision within the scope of this section. However, to date, resolutions involving an immediate permanent ceasefire and the delivery of continuous humanitarian aid have not received sufficient positive votes and have been vetoed by the permanent members, especially the United States of America. It is pity to say that the UN, which was established for the purpose of establishing international peace and security and protecting human rights, appears to be far from fulfilling the duties entrusted to it by the founding charter.

It is obvious that in order to eliminate global injustice and inequality, a new regulation should be made regarding the veto power of the UN, especially the permanent members of the Security Council, and the UN should be reformed.

H. Conclusion

In conclusion; peace will not come to the region without the establishment of an independent, sovereign State of Palestine with geographical integrity, on the 1967 borders, with East Jerusalem as its capital. At this point, Türkiye, as it has done so far, will continue to take every necessary step to solve the problem both before the countries of the region and before international organizations such as the Organization of Islamic Cooperation and the UN. As a matter of fact, aside from the deep sensitivity towards these lands, such as Jerusalem, which host the first qibla of Muslims and important structures of other religions, the international community has no right to remain silent any longer in the face of the fact that tens of thousands of civilians including innocent children and women have been killed due to conflicts over the decades.





III.

FOOD AS A WEAPON OF WAR: CRIME OF STARVATION IN GAZA

FOOD AS A WEAPON OF WAR: CRIME OF STARVATION IN GAZA

Prof. Dr. Hilal ELVER*

On October 8, 2023, the day after Hamas' attack on Israeli civilians, the Minister of Defense, Yoav Gallant, announced a "complete siege" on the already besieged Gaza that has often been described as the "largest open-air prison" in the world. 2.2 million people are squeezed into a small tract of land that had been further stressed by a crippling blockade imposed by 2007. All life support in the Gaza Strip, such as, electricity, food, fuel, clean water, and medicine that was coming from outside Gaza before the war, were cut off by government decree. Gallant did not hesitate to use genocidal language, dehumanizing Gazans, calling them "human animals." He added: "No humanitarian aid will be allowed into Gaza." Since then several high level governmental officials did not hesitate to use similar language, warning Gazans that their life support will not be restored unless Hamas surrenders or is completely eliminated, an unacceptable goal.

This collective punishment of Gazans constitutes a war crime. The Palestinian civilian population was utterly unprotected, squeezed into a small, crowded place with nowhere to go, no safe place to shelter, no food, no clean water, while bakeries, hospitals, United Nations (UN) Buildings and schools were being constantly bombed.

The death toll is now over 21,000 and about half of Gaza's 2.2 million people are children. As of December 17 over 7,800 Palestinian children have been killed in Gaza, thousands remain missing, and over 9,000 are injured. It is estimated that one Palestinian child is killed every 15 minutes. Young children that are still alive, those between zero and two unable to survive lengthy periods of hunger are most at risk.

Since the war started, more than 85% of the population in Gaza has been **forcefully removed** from the North to the South. The massive destruction of basic necessities contributed to what has become an irreversible **humanitarian catastrophe**. The Secretary General of the UN, Antonio Guterres calls it: "humanities' catastrophe, not humanitarian catastrophe" making a point that the international community has failed to discharge its responsibility to do all in its power to stop the Israeli onslaught. Gazans are living in tents, partly destroyed school buildings, or on streets without any shelter in the cold and wet weather. When rain arrived, broken sewage canals spilled over streets and floors of buildings. Life threatening water-borne infectious diseases started to take a toll on children and the elderly. Even before the war, **access to water** was very limited in Gaza, and now it severely constrained, as only one aquifer is providing potable water. People are surviving on less than 2 liters per person per day, falling short by 15 liters of the basic survival level water requirement as per the World Health Organization (WHO) Sphere Standards.

* UN Special Rapporteur on Right to Food (2014-2020)

One of the Gaza residents explaining their condition in these words: "If we don't die from bombing, for sure, we will die from starvation, or diseases." In late November, **a spokesperson for the World Health Organization**, repeated the same dire prediction: "Without urgent action to repair the Gaza Strip's rapidly collapsing health system, more people would soon die from diseases than from Israel's bombings. There are no medicines, no vaccination activities, no access to safe water and hygiene and no food." The UN World Food Program (WFP) **reported** on December 6 that 9 out of 10 households in Northern Gaza and 2 out of 3 households in Southern Gaza had spent at least one full day and night without food."

The most recent report of the WHO shows that as the **humanitarian crisis unfolds in Gaza** an unprecedented 93% population is now grappling with crisis level hunger characterized by insufficient food and alarming rates of malnutrition and dire consequences predicted for the health of the population, especially among vulnerable groups such as children, pregnant and breastfeeding women, and the elderly. The recent estimates from the **Integrated Food Security Phase Classification (IPC)** reveals that the risk of famine looms larger each day, underscoring the urgent need for immediate intervention. The WHO staff reports a heartbreaking scenario that people come to hospital not for the medicine but hoping for food. Ironically in the digital age, we are watching daily the horrors of the war in real-time in our living rooms.

Crime of Starvation

There are sufficient international law norms to prosecute Israel's action in Gaza including war crimes, crimes against humanity, crimes of starvation and specifically the widely ratified Genocide Convention of 1948 are available to hold individuals accountable for the indiscriminate attacks on civilians, bombing hospitals, and schools.

More specifically, Israel's action clearly and squarely constitutes a **"crime of starvation"** by way of blocking access to food and clean water as a weapon of war, denying and blocking humanitarian aid, bombing bakeries, food distribution places, depriving the civilian population of objects indispensable to their survival, and even destroying Gaza's agricultural land reducing it to mere dirt, result confirmed by **Human Rights Watch** satellite images.

In conflict zones, more civilians were killed because of hunger and diseases than by weapons. In Gaza, there is either no battleground, or everywhere is battleground, the latter sentiment being expressed by one of the Israeli military leaders who said: "There are no innocent civilians in Gaza!" This statement itself carries an 'intent' to eliminate the entire Gazan population that constitutes the crime of genocide.

Starvation kills people slowly. Besides the immediate impact of the war on civilians while the hot war is still going on, there is also, the deeper and longer impact of starvation on young children, pregnant women, elderly people, and persons who are already sick or have underlying conditions. It is also a crime that has a traumatizing impact on the generation to come. The UN WHO report shows that the impact of a short period of severe hunger (two or three weeks) on children under 2 years old has a long-lasting effect on physical, emotional and intellectual development. Even if the war ends today, the impact of destruction of Gaza's food systems on the current and generations to come will have devastating impacts on young generation. We might not observe immediately the importance of a deeper impact of severe malnutrition

on vulnerable groups resulting from the sustain violence since early October. The current situation is dire and bloody, making any precise assessment of longer run effects unreliable. Under such circumstances it is not surprising that many governments and people's movement are rallying in support of the urgent need for immediate seize fire. It seems helpful to articulate the Israeli crime of starvation against Gaza people while it is happening, with the hope of changing Israeli behavior, which could stop the devastation responsible for this grave violation of human rights, and a severe threat to life that seems certain to have lasting effect on the collective physical and mental health of all Gazans, and for generations to come. Documenting the Israeli tactics of starvation during the war is also vitally important to collect proof to enable post-conflict adjudication and accountability.

Plenty of crime, but no remedy

Although since the beginning of the war, international law principles were mentioned by all parties, it is rather confusing for non-legal experts to grasp the significance of such issues, and evaluate their effectiveness when it comes to the restraint of belligerent behavior. There are various legal remedies to hold perpetrators accountable for their role in causing severe human rights violations, and refusals to provide protection of civilians during the conflict. In an ideal world, international humanitarian law is designed to regulate war, protect civilians, stop war crimes. International human rights law obliges states to protect peoples' livelihood, including the right to food, housing, health and education, in times of peace and war. As an occupying power, Israel is obligated to respect, protect, and fulfill all peoples' rights who live under their authority during the period of occupation. International criminal law prosecutes and punishes perpetrators of war crimes, and grave violations of human rights by recourse to judicial institutions. Nevertheless we are not living in a world where all these rules are properly and indiscriminately implemented, and perpetrators punished.

As Palestinian legal scholar, and human rights activist Noura Erakat said in an interview that: "There are plenty of crimes unfolding in Palestine, especially the crime of apartheid: a sustained 75 years of settler colonial removal, 56 years of occupation, and 16 years of siege. Apartheid is and will continue to be, the greatest crime against humanity." But the reality is these criminal allegations in the absence of the political will not allow those with authority to pursue the remedy. Since the Gaza conflict started, the UN Security Council was not able to have a resolution of ceasefire to avoid humanitarian catastrophe in this one-sided, disproportionate, illegal reoccupation and unfolding genocide in the 21st century because of the obstacles of the United States (US) veto power. Moreover, the US and the United Kingdom (UK) should be accountable along with Israel in these crimes, complicit in providing weapons, intelligence, and funding of \$3.6 billion a year as bolstered by an additional \$14.3 earmarked for this Israel's genocidal attack. However, all these international law remedies remain a distant dream not a remedy, despite the fact that majority governments and people in the world aside with Palestine and have for many weeks called for a ceasefire.

In concluding, starvation and famine are large-scale violations of the right to food that can adversely affect entire societies while at the same time severely harming individuals and their families. Considering the current condition in Gaza heading toward a famine, there is a need for a global binding convention that gives States and international community clear legal mandates to prevent famine. Formal recognition of famine as a crime will impede the tendency of governments "to hide behind the curtain of necessity of military operations, self-defense, or state sovereignty to use hunger as a genocidal weapon."¹

1 The report of the UN Special Rapporteur on Right to Food, Mrs. Hilal Elver to 72 session of the UN General Assembly, A/72/188, 21 July 2017, p.22





IV.

GAZA OBSERVED - GENOCIDE AS COUNTERTERRORISM

GAZA OBSERVED - GENOCIDE AS COUNTERTERRORISM

Prof. Dr. Richard FALK*

The 'humanitarian pause' that lasted for a week starting on November 24 is six weeks later best interpreted as a brief and ineffectual, misleadingly labeled in the course of the genocidal onslaught of Gaza commenced on Oct 8. This was the day after the Hamas attack on several communities in southern Israel. Israel's Prime Minister along with other leaders of Israel's unity government never hid their intention to resume their attack on the population of Gaza as soon as the pause ended. Their resolve to achieve its declared objectives of destroying Hamas and exercising control over at least northern Gaza remained unchanged.

We, the public, were never informed told about the attitude of Hamas toward the pause but we can be confident that even a few days of relief from Israel's devastating 24/7 attacks was welcome, however short its duration. Throughout it was accompanied by no sign that Hamas and most Gazans were willing to surrender to Israel's oppressive tactics of occupation of Gaza, which during the first weeks of the onslaught exhibited a cruel, unlawful, and shocking scenario of unrestricted violence and ethnic cleansing highlighted by the *permanent* forced evacuation of more than a million Gazan civilians from their northern Gaza residences.

Israeli bombardments damaged or destroyed 80% of Palestinian homes in northern Gaza leaving those displaced with nothing to return to but the rubble caused by weeks of sustained attack with indiscriminate advanced weaponry. Israel reinforced the impressions of dispossession and national expulsion by openly seeking to persuade, and even bribe, neighboring Egypt to accept Palestinian refugees in exchange for Israel's willingness to pay of its public debt. As with other Palestinian refugees those from Gaza would almost certainly be denied the exercise of their international law right of return. West Bank settler leadership openly pushed for the reoccupation of Gaza with the intention of establishing permanent Jewish settlements along the Gaza strip.

Contrary to Israeli assurances displaced to and resident Palestinians in southern Gaza remained totally dependent on United Nations (UN) relief efforts, which were obstructed by rigid Israeli controls over all entry to Gaza of food, medical supplies, water, and fuel. Relief efforts were dependent on funding that mainly comes from those 'humanitarian' European Union and North American governments pushed by their citizenry and quietly guilt-ridden by their positive diplomatic and economic entanglements with Israel's genocidal policies that incredibly continued for more than eleven weeks.

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Anyone familiar with sustained military combat is familiar with 'the fog of war,' its hidden motivations, its devious methods and justifications, and its subtle unacknowledged change of combat goals, but most of us rely on mainstream media despite its intentional spread of 'discourse fog,' that is, the partisan use of language, the sage assessments of retired military/intelligent experts, and 'facts' to twist 'the hearts and minds' of viewers and readers in directions that are manipulated by governments and elites.

The media indoctrinates the citizenry of formally democratic societies when, as during this period since October 7th, the events, images, and Israeli official acknowledgements confirm beyond reasonable doubt the launch of an Israeli military campaign guided by the ideological postulates of state terrorism, featuring deliberate, repeated, systemic attacks on areas densely populated by innocent civilians and on legally prohibited targets as hospitals, schools, UN shelters, refugee camps.

In the foreground is a deliberate, unacknowledged, perhaps impulsive effort to create perceptions and international discourse of ethical asymmetry between antagonists, demonizing Hamas as a terrorist entity and Israel as a legitimate government struggling to defend itself against a barbaric enemy. Such a generalized demonization of Hamas, while inconsistent with an objective appraisal, is interpreted in ways that free Israel from the normal restraints of international humanitarian law, minimal morality, and even UN authority. Israeli government spokespersons also invoke self-serving 'war is hell' rationalizations of evil in which both sides are locked in a death dance during which the normal restraints of law, morality, and prudence do not apply.

The rhetoric of 'humanitarian pause' was illustrative of a much broader media disinformation campaign designed to affirm certain attitudes while stigmatizing others. For instance, the Israeli pledge to resume the war after this brief interlude of relative combat calm rarely includes critical comments on the sinister nature of an unabashed commitment to reengage Hamas by further recourse to genocidal warfare. In contrast, when released hostages report humane treatment by their Hamas captors this important testimony is either belittled or blacklisted in Western media, whereas if released Palestinian prisoners were to make analogous comments about how well they were treated in Israeli prisons their words would be prominent and accorded utmost respect. We can only imagine the harsh response of Western media outlets to Russia's participation in a comparable behavior in the Ukraine War. Humanitarian pretensions by Moscow would surely be interpreted as cynical state propaganda and those that disseminated such views would be derided as 'dupes.'

Unless properly addressed the whole provenance of 'humanitarian pause' is misunderstood. Remember that Israel's political leaders went ahead with this combat pause only after it was made clear that Israel had no intention of converting the pause into a longer-range ceasefire, and that to be followed by 'day after' negotiations as to the viability of continuing Israeli occupation and a new agreement put in place for the governance of Gaza.

Rather than sustaining their nationalist extremism by dismissing Hamas as 'terrorists' the security of Israel could have been enhanced by treating Hamas as a legitimate political entity, and although guilty of serious violations of international humanitarian law, a political actor far less guilty than Israel if a fair

evaluation is made, and credence given to Hamas' long-term ceasefire diplomacy that seems a far more preferable security alternative than future reliance on periodic military incursions, referred to internally by Israeli security specialists as 'mowing the lawn' in Gaza. Such punitive incursions 2008-09, 2012, 2014, 2021, 2023 have killed large numbers of women and children in Gaza while strengthening support for Hamas and the inevitability of recourse to armed resistance. The Zionist Project of Greater Israel has long dispensed with any show of a credible willingness to accept a political compromise as embedded in viable versions of the two-state approach, and so has needed to keep Hamas as a 'terrorist' adversary to obscure its resistance role and to give a certain reasonableness to Israeli efforts, intensified since Netanyahu's extremist coalition took over in January 2023, to extend its sovereign control over the West Bank and portions of Gaza.

In retrospect, I understand better the rationale behind Hamas' apparently genuine ceasefire diplomacy, which I received first-hand evidence of due to extended conversations with Hamas leaders then living in Doha and Cairo during the period when I was UN Special Rapporteur for the Occupied Palestinian Territories a decade ago. Israel refused to take seriously what appeared to be beneficial from a security perspective of such Hamas initiatives or the much earlier 2002 Arab Peace Proposal issued in Mecca. Both Hamas and the Arab proposal conditioned peace on Israel's withdrawal from the Occupied Territory of the West Bank, which has long been in the gun sights of Israeli settler communities and other far right proponents of grander delimitations of the Zionist Project, a territorial claim that was given priority over Israeli security by its leaders. Such territorial ambitions were coupled with policies designed to dispossess the Palestinians long before Netanyahu's Coalition made such a vision of Israel's future unmistakably clear when it took over a year ago. The continuity of settlement expansion demonstrated for all with eyes to see that Israel never accepted the internationally presumed consensus that a Palestinian state would include the West Bank and have its capital in East Jerusalem.

It is this unwillingness to take account of the master/slave structure of prolonged occupation that gives a specious plausibility to 'the both sides' narratives embodying the delusion that Israel and Occupied Palestine are formally and existentially equally responsible for. Such narratives equate, or invert, the Hamas attack with the Israeli genocidal onslaught that followed, regarding the former as 'barbaric' while the latter is generally sympathetically described by leading Global West governments and media as Israel's reasonable and necessary entitlement to defend itself as it saw fit. Such a politics of diversion is designed to shift the diplomatic discussion away from its genocidal character and to a focus on Israel's renewed security challenge after the October 7 attack. If security has been the motivation, Israel would have investigated and corrected its own supposed security failure in an apartheid structure that had long successfully dealt with Palestinian armed challenges to its prolonged occupation. If Israel was genuinely worried it would have also been selective in identifying and dealing with Hamas leadership by counterterrorist methods it had long tested and applied, and not predictably enraged Palestinians as a people by resorting to genocide.

The reactions of the Arab World and the Global South, including BRICs, possess the potential to challenge the United States (US) one-sided role in mediating the conflict over the decades and to use its economic and political leverage to induce an abandonment of the Greater Israel undertaking and to encourage a peace diplomacy respectful of Palestinian rights, above all the inalienable Palestinian right

to self-determination. Without such adaptations the Palestinian ordeal will persist, and Israel will face an uncertain, embattled, and insecure future, as well as a worldwide populist backlash against such an overt embrace of genocide. Facing the frustrations of such an endgame scenario, Israel's only option to change perceptions would be to widen the conflict by engaging Iran militarily, and more actively enlisting the West in this most dangerous and destructive 'clash of civilization.' Such an enlargement of the zone of disaster must be avoided by all legitimate means as a priority second only to ending the Gaza genocide.



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INTERNATIONAL COURT OF JUSTICE

V.

PALESTINE AND THE INTERNATIONAL COURT OF JUSTICE: RECENT DEVELOPMENTS

PALESTINE AND THE INTERNATIONAL COURT OF JUSTICE: RECENT DEVELOPMENTS

Assoc. Prof. Ali Emrah BOZBAYINDIR*

In this brief note, we shall be providing an outline of ongoing proceedings concerning Palestine. In doing so, we shall commence with the most recent South African Application to the International Court of Justice (ICJ), which is a highly significant development in the context of ongoing conflict in Palestine. Following an overview of this Application, we shall also provide brief information concerning the advisory opinion proceedings before the Court.

I. The South African Application

On 29 December 2023, South Africa filed an application instituting proceedings against Israel before the ICJ concerning alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in relation to Palestinians in the Gaza Strip. The ICJ is the principal judicial organ of the United Nations (UN), also known as the World Court, and deals with disputes among the states. As a rule, a state should accept the Court's jurisdiction in a particular case. Yet, the Genocide Convention sets out an exemption, and any State Party could institute proceedings against a Member State before the Court. In the recent past, Gambia has brought genocide charges against Myanmar. The 84-page, very detailed South African Application commences with the following remarks:

This Application concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023. South Africa unequivocally condemns all violations of international law by all parties, including the direct targeting of Israeli civilians and other nationals and hostage-taking by Hamas and other Palestinian armed groups. No armed attack on a State's territory, no matter how serious – even an attack involving atrocity crimes – can, however, provide any possible justification for, or defence to, breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'Convention'), whether as a matter of law or morality. *The acts and omissions by Israel complained of by South Africa are genocidal in character because they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip ('Palestinians in Gaza'). The acts in question include killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. The acts are all attributable to Israel, which has failed to prevent genocide and is committing genocide in manifest violation of the Genocide Convention, and which has also violated and*

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is continuing to violate its other fundamental obligations under the Genocide Convention, including by failing to prevent or punish the direct and public incitement to genocide by senior Israeli officials and others.

The South African Application makes an important point crystal: the importance of putting the single events into a proper context. In the Palestinian case, it would only be possible to grasp or classify matters legally if one does comprehend the lengthy practice of occupation and prolonged blockade on Gazans. On this matter, the Application states the following:

[...] it is important to place the acts of genocide in the broader context of Israel's conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza, including the serious and ongoing violations of international law associated therewith, including grave breaches of the Fourth Geneva Convention, and other war crimes and crimes against humanity. However, when referring in this Application to acts and omissions by Israel which are capable of amounting to other violations of international law, South Africa's case is that those acts and omissions are genocidal in character, as they are committed with the requisite specific intent (*dolus specialis*) to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group.

Furthermore, the South African Application makes reference to the acts and statements of the Israeli state apparatus, which in combination express a genocidal intent:

Repeated statements by Israeli State representatives, including at the highest levels, by the Israeli President, Prime Minister, and Minister of Defence express genocidal intent. That intent is also properly to be inferred from the nature and conduct of Israel's military operation in Gaza, having regard *inter alia* to Israel's failure to provide or ensure essential food, water, medicine, fuel, shelter and other humanitarian assistance for the besieged and blockaded Palestinian people, which has pushed them to the brink of famine. It is also clear from the nature, scope and extent of Israel's military attacks on Gaza, which have involved the sustained bombardment over more than 11 weeks of one of the most densely populated places in the world, forcing the evacuation of 1.9 million people or 85% of the population of Gaza from their homes and herding them into ever smaller areas, without adequate shelter, in which they continue to be attacked, killed and harmed. Israel has now killed in excess of 21,110 named Palestinians, including over 7,729 children – with over 7,780 others missing, presumed dead under the rubble – and has injured over 55,243 other Palestinians, causing them severe bodily and mental harm. Israel has also laid waste to vast areas of Gaza, including entire neighborhoods. It has damaged or destroyed in excess of 355,000 Palestinian homes, alongside extensive tracts of agricultural land, bakeries, schools, universities, businesses, places of worship, cemeteries, cultural and archaeological sites, municipal and Court buildings, and critical infrastructure, including water and sanitation facilities and electricity networks, while pursuing a relentless assault on the Palestinian medical and healthcare system. Israel has reduced and is continuing to reduce Gaza to rubble, killing, harming and

destroying its people, and creating conditions of life calculated to bring about their physical destruction as a group.

The Application then describes in great detail the single acts which would constitute genocide as well as expressions of genocidal intent the Palestinian People by Israeli State Officials and others. Although it has been difficult to prove the genocidal intent before the ICJ, the South African Application is quite significant with regard to obtaining a provisional measures order, which is rather more likely to be obtained in due course. Indeed, South Africa has requested such an order from the World Court:

[...] South Africa requests that the Court indicate provisional measures. In light of the nature of the rights in issue, as well as the ongoing, extreme and irreparable harm being suffered by Palestinians in Gaza, South Africa requests that the Court address this request as a matter of extreme urgency.

Provisional measures are necessary in this case to protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention, which continue to be violated with impunity.

It is of note that, if issued, a provisional measures order it will be legally binding. The Court can proceed if it finds the South African claims well-founded in both fact and law.

On 11 and 12 January 2024, the Court held public hearings on the request for the indication of provisional measures submitted by South Africa at the Peace Palace in the Hague, the seat of the Court. On the first day, the South African legal team presented a compelling case, and the South African legal team showed the Court that the plausibility test for issuing provisional measures orders had been satisfied. On the next day, the Israeli legal team presented its defence. In doing so, it focused on the events of the 7th of October 2023 rather than addressing the principal factual and legal issues raised by the South African legal team. Although there is no fixed date for the Court, it is expected that the Court shall announce its decision regarding provisional measures within two to three weeks.

II. Advisory Opinion Proceedings

In addition to the proceedings outlined above, there is another ongoing proceeding before the ICJ within the ambit of its advisory opinion jurisdiction. This proceeding has been initiated months earlier than the 7th October events by the UN General Assembly. The General Assembly has requested from the Court an advisory opinion on the following questions:

(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

The ICJ shall hold public hearings on the present request for an advisory opinion, which will open on Monday, 19 February 2024. Despite having no binding force, the Court's advisory opinions nevertheless carry great legal weight and moral authority. Indeed, the Court issued an influential opinion in 2004 concerning the legal consequences of the construction of a wall in the occupied Palestinian territory.



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VI.

DIFFERENT APPLICATION OF THE INTERNATIONAL CRIMINAL COURT'S (ICC) INTERNATIONAL LAW CRITERIA FOR ISRAEL

DIFFERENT APPLICATION OF THE INTERNATIONAL CRIMINAL COURT'S (ICC) INTERNATIONAL LAW CRITERIA FOR ISRAEL

Assoc. Prof. Hakan Hakkı ERKİNER*

The International Criminal Court (ICC) has the authority to judge people alleged to have committed genocide, crimes against humanity, war crimes and crimes of aggression. The establishment of the ICC is an extremely significant step towards the promotion of the rule of law and universal human rights. Humanity has placed its hope in the ICC in terms of preventing the most severe and serious crimes against individuals and even generations of people, ensuring accountability, and establishing universal international justice.

The establishment of the ICC by putting an end to immunities and holding individuals criminally responsible on an international level, and ensuring global justice for humanity and the dignity of individuals, serves a complementary function in addressing the absence of criminal sanctions in certain areas of international law before the creation of the ICC.

ICC, through the Rome Statute, serves as the sole permanent court in the hands of humanity and the only international legal instrument in this direction and framework to ensure the punishment of grave and serious international crimes and to provide deterrence through international law to prevent similar crimes from being committed repeatedly. In this respect, its function is of extraordinary and irreplaceable importance. However, for this function to be implemented, the ICC must fulfill its duty. Otherwise, the ICC will not be a great hope for international justice, but another great disappointment. Just like the United Nations Security Council. For this reason, the ICC must fulfill its duty in accordance with fairness, equality and justice. As stated by the ancient and universal principle of international law *ex aequo et bono* (fairness and justice), the ICC must also judge according to law, justice and equity. In this way, the ICC can show all people and humanity that the ancient and universal command to *neminem laedere* (not to harm anyone) has a counterpart in international criminal law.

The ICC initiated an investigation process into Russia's attack on Ukraine, which started on February 24, 2022. If it does not undertake a similar investigation for Israel's attack on Gaza, which started on October 7, 2023, it will not be possible to talk about the impartiality of the ICC. The perception that the ICC is influenced by political interests and is not impartial will certainly and substantially arise. However, if the ICC does what is necessary for the international crimes committed in Gaza as of October 7, 2023, the credibility of the Court will rise to a high point in the name of justice.

The ICC has been able to act with extraordinary urgency when the victims in question were Ukrainians and not Palestinians, or, to put it another way, when the accused were Russians and not Israelis. On February 28, 2022, the ICC prosecutor announced that, based on the initial results arising from the preliminary examination conducted by the Prosecutor's Office and encompassing new allegations of crimes falling under the jurisdiction of the Court, they would request authority from the Pre-Trial Division to open an investigation into the situation in Ukraine.

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On February 28, 2022, ICC Prosecutor Mr. Karim Asad Ahmad Khan made a statement saying, "This investigation will also encompass any new alleged crimes falling within the jurisdiction of my Office that are committed by any party to the conflict on any part of the territory of Ukraine." This statement of the ICC Prosecutor also indicates the violations committed by both parties in Ukraine. Thereupon, on March 2, 2022, an investigation was launched to investigate the alleged genocide, war crimes and crimes against humanity committed in Ukraine.

Following the investigation, the ICC issued an arrest warrant for Russian President Vladimir Putin. It was stated that the arrest decision was taken due to the "unlawful deportation of Ukrainian children". In the statement made by the ICC, it was reported that Putin was held responsible for the illegal deportation and illegal transfer of children from the occupied regions of Ukraine to the Russian Federation. In the statement, it was reported that an arrest warrant was also issued for Lvova-Belova, the Representative of the Child Rights Office under the Presidency of the Russian Federation, due to the same accusations. In the statement, it was stated that both suspects participated in the crime of illegally taking Ukrainian children to Russia, and that Putin was held responsible for not preventing people under his control from committing this crime. The statement conveyed that there is sufficient suspicion that Putin and Lvova-Belova committed war crimes by unlawfully deporting Ukrainian children, and the arrest warrant was issued based on the ICC Prosecutor's request dated February 22, 2023. While an arrest warrant for the unlawful deportation of Ukrainian children was issued against Russian President Vladimir Putin, the ICC's failure to take action for the thousands of children killed in Gaza will fundamentally and entirely undermine its *raison d'être*.

On May 22, 2018, the Government of the State of Palestine submitted an application to the ICC. This marked the fourth application by Palestine to the Court regarding crimes against humanity and war crimes committed by Israeli civilians and soldiers. Three years later, in the decision given by the Pre-Trial Chamber on February 5, 2021, upon the referral of the ICC Prosecutor, it was ruled that the Court was authorized to conduct trials in the lands mentioned in the application of the Palestinian side. The ICC has determined that, given Palestine's status as a "State Party" to the Rome Statute and its recognition as a "state" under Article 12(2)(a) of the Statute, with the right to self-determination, the Court has jurisdiction to conduct trials in Palestine. With the Prosecutor's announcement of conducting an investigation in a fair, impartial, and independent manner, this development is crucial for paving the way for the ICC to adjudicate crimes committed and ongoing in East Jerusalem, Gaza, and the West Bank since 2014. These crimes include allegations of genocide, crimes against humanity, war crimes, and crimes of aggression claimed to have been committed during the Gaza War in 2014, war crimes related to settlement activities in Palestinian territories, and all heinous crimes committed since October 7, 2023. However, the slow progress of the investigation sends a message to all Israeli authorities that they enjoy extraordinary comfort and absolute immunity to commit any international crimes they wish. Indeed, they continue to commit all the horrendous crimes they have committed.

However, as ICC Prosecutor Mr. Karim Asad Ahmad Khan said, referring to Putin, "No one should think that they will commit genocide, crimes against humanity or war crimes and remain unpunished." Therefore, ICC Prosecutor Mr. Karim Asad Ahmad Khan must apply the same legal standard to Israeli Prime Minister Benjamin Netanyahu and, as Prosecutor Khan rightfully stated, "No one who commits genocide, crimes against humanity, or war crimes should think they will remain unpunished."





VII.

ON THE POSSIBLE PROSECUTION IN TÜRKİYE
OF THE CRIMES COMMITTED IN GAZA

ON THE POSSIBLE PROSECUTION IN TÜRKİYE OF THE CRIMES COMMITTED IN GAZA

Assoc. Prof. Murat ÖNOK*

This brief note intends to explain the available bases of jurisdiction for the investigation and/or prosecution in Türkiye of the crimes committed in Gaza. Türkiye can neither rely on territorial jurisdiction nor on the active or passive personality principles in order to assert jurisdiction over crimes committed abroad (in Gaza) by non-Turkish nationals against non-Turkish nationals. However Türkiye could rely, both under international law and its domestic criminal law, on two grounds of jurisdiction: universal jurisdiction and substitute jurisdiction.

Turkish Penal Code (TPC) Art. 13(1)(a) allows Türkiye to assert universal jurisdiction over, *inter alia*, the crime of genocide (Art. 76 TPC) and crimes against humanity (Art. 77 TPC). However Art. 13(2) requires the 'request' of the Minister of Justice for a prosecution to be possible. In fact, upon request of the Minister of Justice, it is possible to conduct a prosecution in Türkiye even where the defendant has already been acquitted or convicted abroad for the same acts. However, by virtue of TPC Art. 16, any time spent under detention on account of the same act shall be deducted from the sentence in Türkiye. Furthermore, the Turkish criminal procedure system does not allow, in principle, trials *in absentia*. Therefore, the suspects/defendants would need to be in Turkish territory. Their presence might be obtained voluntarily or through coercive legal measures (such as extradition to Türkiye).

War crimes – with the exception of a very limited set of crimes in the Military Penal Code – are not regulated in Turkish criminal law, and no reference is made to war crimes under Art. 13. For acts that constitute war crimes Türkiye may rely on TPC Art. 12(3) which deals with 'substitute jurisdiction'. According to this provision, *any* crime committed abroad by a foreigner against a foreigner may be tried in Türkiye provided that the lower limit of the applicable punishment is no less than three years of imprisonment. Therefore, the 'underlying acts' of war crimes committed in Gaza, such as murder, intentional wounding, torture, etc. may be tried under the relevant provisions of the TPC as ordinary crimes. Of course, ordinary crimes committed in Gaza may also be tried under this head of jurisdiction. Again, there must be a request by the Minister of Justice. Second, according to comma (b) of the provision, there must be no extradition agreement applicable, and Türkiye's offer to extradite the suspect must have been refused by the state on the territory of which the crime was committed or the state of nationality of the perpetrator. Because of this requirement Art. 12(3) does not seem to be a feasible option: Türkiye would be expected, under this provision, to try to extradite Israeli suspects to Israel first. Whereas it may be argued, under international law, that universal jurisdiction is not necessarily a last resort option, precisely because of the 'substitute' nature of Art. 12(3), resort to substitute jurisdiction must undoubtedly be

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subsidiary to other available bases of jurisdiction, meaning that a jurisdiction that is in connection with the alleged crimes must not be available to conduct criminal proceedings¹. Further, the authority under Art. 12(3) only arises where the same act has not already been tried abroad.

On the other hand, the effect on possible investigations and prosecutions of some immunities arising from international law must be borne in mind.

First, some high-ranking state officials enjoy 'personal immunity' from the jurisdiction of foreign courts as long as they are serving (incumbent). Personal immunity provides complete immunity of the person of certain office-holders. Personal immunity uncontestedly applies to Heads of State, Heads of Government, Foreign Ministers. The International Court of Justice (ICJ) judgment in the *Arrest Warrant case*² would seem ready, very controversially, to extend it to other ministers as well. However, according to the draft articles of the International Law Commission on the Immunity of State Officials from Foreign Jurisdiction (Art. 3) it would only apply to the three officials mentioned above. Personal immunity does not prevent criminal liability, but only creates an obstacle to prosecution. The nature of the offence makes no difference as confirmed by the ICJ³. This obstacle is temporary as it comes to an end after cessation of the official functions.

In conclusion, the Head of State, Head of Government and Minister of Foreign Affairs of a third State cannot be arrested and/or tried in Türkiye (or in a third state) as long as they are in office.

Second, 'functional immunity' may also represent an obstacle before trial by the national courts of a third state. All official acts committed on behalf of a state draw this immunity, including *ultra vires* acts, and even criminal ones. This immunity, contrary to personal immunity, does not cease at the end of the discharge of official functions, in other words the immunity is permanent.

Whether *international crimes* constitute an exception to this immunity is the subject of ongoing academic debate. The International Criminal Tribunal for the Former Yugoslavia⁴ asserted that functional immunity may not apply to international crimes before domestic or international courts. Indeed since WWII many international documents and (some) national case-law have made it clear that functional immunities do not apply to state officials accused of international crimes⁵. Many authoritative scholars are also of this opinion⁶.

1 Tezcan D., Erdem M.R. & Önk R.M., *Uluslararası Ceza Hukuku* (7th ed., Seçkin Yayıncılık: Ankara, 2023), 159-160.

2 *Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v. Belgium)*, 14 February 2002.

3 *Arrest Warrant Case*, para. 56.

4 Appeals Chamber judgment of 29 October 1997 in *Blaškić* (Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997), para. 41.

5 Cryer R., Robinson D. & Vasiliev S., *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge: Cambridge University Press, 2019), 514-515.

6 Cassese A. & Gaeta P., *Cassese's International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013), 20; Werle G. & Jessberger F., *Principles of International Criminal Law* (4th ed., Oxford: Oxford University Press, 2020), mn. 830, 832; Bassiouni M.C., 'Principles of Legality in International and Comparative Criminal Law', in *International Criminal Law - Volume I: Sources, Subjects, and Contents* (ed. M. Cherif Bassiouni) (3rd ed., Martinus Nijhoff Publishers, 2008), 173.

Yet, an analysis of customary international law reveals that the answer is not so clear as there does not seem to be conclusive evidence of a general and consistent state practice rejecting the application of functional immunity in case of international crimes. Indeed, there have been – even recent⁷ – instances where courts declined to exercise jurisdiction by upholding the applicability of functional immunity. Further, the 2012 judgment by the ICJ in the *Jurisdictional Immunities Case (Germany v Italy, Greece intervening)*, which upheld state immunity even in case of breach of *jus cogens* rules, may be taken to indicate that functional immunity also applies in such cases as the latter is a result and corollary of state immunity. In conclusion, the situation seems to be unsettled under customary international law⁸.

In conclusion, theoretically, it would be possible for the Republic of Türkiye to conduct investigations and prosecutions in Türkiye, particularly on the basis of Art. 13(1)(b) of the Penal Code. However, Türkiye would need to secure the physical presence of the suspects – which, considering the political realities of the situation, will be difficult to say the least. In addition, personal immunities would ‘shield’ some of the top-level Israeli politicians from, *inter alia*, arrest and detention, and trial as long as they are in office. Finally, the applicability of functional immunities to any and all Israeli perpetrators acting on behalf of Israel will also come up as a legal issue.

7 The courts of the Netherlands have decided in a civil lawsuit arising from the bombing by the Israeli army of Gaza in July 2014 that there is no customary law exception to immunity in case of crimes against humanity or war crimes (Appeal judgment of 07/12/2021 and Supreme Court judgment of 25/08/2023).

8 Cryer, *Robinson & Vasiliev*, 516. For the view that customary international ‘appears to continue to support the upholding [of functional immunity] in the face of allegations of internationally criminal conduct’ see O’Keefe R., *International Criminal Law* (Oxford: Oxford University Press, 2015), mn. 10.103. Cfr for a more nuanced opinion Guilfoyle D., *International Criminal Law* (Oxford: Oxford University Press, 2016), 405: ‘the evidence that national courts consistently hold functional immunity to be inapplicable is, at best, ambiguous’.







VIII.

**THE APPROACH OF INTERNATIONAL COURT
OF JUSTICE AND INTERNATIONAL CRIMINAL
COURT TO PALESTINE: HISTORICAL PROCESS
AND CURRENT AFFAIRS**

THE APPROACH OF INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL CRIMINAL COURT TO PALESTINE: HISTORICAL PROCESS AND CURRENT AFFAIRS

Atty. Dr. Filiz DEĞER*

The United Nations (UN) which produces policies by mediating between states and societies and fulfills this function via its two main bodies, General Assembly and Security Council is a central actor of the global governance providing stability.

With the increase on supranational and internal conflicts and hybrid activities, the threats against the global governance also increased. According to the Uppsala Conflict Data, conflicts reached a record high in 2022. The humanitarian governance in global governance gradually came into prominence due to the humanitarian crises experienced in cases of situations where the states could not protect or did not want to protect. For this reason, consistency in humanitarian aid, mobilizing the global support in cases of great humanitarian crises are among the 2030 Sustainable Development Goals of the UN.

According to the UN Charter, the Security Council which has the power to take binding decisions has an important role in protecting international peace and security. However, the UN sometimes cannot fulfill this role because the five permanent member use their right to veto in cases of disturbance of peace, threats to the peace and aggression where sanctions and intervention are necessary. The mission of Human Rights Council established by the UN General Assembly and Economic and Social Council to protect human rights is essentially very closely related to protecting peace and humanitarian crises of great scales caused as a result of human rights violations also disturb international peace. In the protection of international peace and security, Security Council has a protection mechanism starting with negotiation, continuing with diplomatic and economic sanctions and finally escalating to coercive intervention. In cases where gradual intervention system of the Security Council does not work due to right to veto, General Assembly has to step in with the uniting for peace function. In addition to security and peace policies, the UN also has judicial actions toward compliance with the rules of the international law. Within this context, International Court of Justice (ICJ) and International Criminal Court (ICC) which was established under the leadership of the UN operate as important rule enforcement institutions of the system.

ICJ established with the adoption of Rome Statute prepared as a result of the works and recommendations of UN International Law Commission and ICC which is one of the main bodies of the UN have an important place in the global system due to solving disputes through judicial remedies via judicial activities and punishing the criminals. While investigations regarding persons are carried out in and ICC regarding 4 categories of crimes included in Rome Statute, investigations regarding state liability borne from ignoring international rules are carried out in ICJ.

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State of Israel which commits international persecution, unlawful blockade, apartheid, de facto annexation in the territories of Palestine as an occupier, colonizer, settler has been carrying out acts of aggression targeting especially women and children and resulting in hundreds of civilian losses since 7 October 2023. Tens of thousands of civilians lost their lives in Gaza under blockade due to indiscriminate attacks exceeding the limits of proportionality and necessity.

Israel's isolation and containment policy concerning Gaza began in 1991 when people of Gaza were not allowed to freely enter and leave the region. Behind Israel's removing its soldiers and settlers from Gaza in 2005 lies the idea of eliminating the international pressure to do the same thing in the West Bank. Because Weissglas which was the advisor of the then Prime Minister of Israel, Ariel Sharon described disengagement from Gaza as "the amount of formaldehyde that is necessary so there will not be a political process with the Palestinians."

After Hamas seized the power in 2006, Israel blockaded the entire population and this caused economic devastation, extreme poverty and imprisonment of 2 million civilians. Israel continued its policy to keep the violence at a manageable level in a way that would not force Palestine to take any important political decisions using military deterrence with the idea that Gaza Strip can be subjected to a different treatment than the rest of Palestine until October 7. Using collective punishment method in Gaza before October 7, Israel has been committing acts for mass destruction following October 7.

After 7 October, Israel has bombed civilian settlements and infrastructure including with chemical weapons and deprived the people of Gaza of everything necessary for human life including water, food, electricity, fuel, and medicine. When mass killings are combined with total blockade and containment which result in living conditions likely to cause serious bodily and mental harm and lead to the physical destruction of the group, evidence of the crime of genocide emerges, along with other crimes included in the Rome Statute. Nevertheless, much "silent harm" and psychological damage which are not immediately detected caused by the erosion of economic, social, and cultural rights continue.

If we look at the fundamental legal approaches of UN and ICJ to occupying, colonizing acts of Israel on Palestine territory; "The 2004 Wall Advisory" of ICJ mentions that Israel is an occupying power in the territory of Palestine, Israel does not have the right to self-defense enshrined in the Article 51 of the UN Charter against a threat coming from the land under its control, is committing a de facto annexation, is obliged to respect right to self-determination of Palestinian people, the wall which was built violates the right to education, health, and work of the people living in the region.

With the Security Council Resolution No. 1860 (2009), reminding the importance of the Arab Peace Initiative, it was determined that Israel and Palestine, should live in peace with safe and recognized boundaries as stipulated in the Resolution No. 1850 of the Security Council (2008), and most importantly that the Strip Gaza was an integral part of the Palestinian State, which was occupied in 1967, and that the Gaza people were in the status of civil protection in accordance with the 4th Geneva Convention of 1949.

In 2021, ICC has accepted that it has jurisdiction in crimes committed in Palestine which became party to Rome Statute in 2015 and the investigation is currently ongoing. The attacks targeting civilians,

which have been committed openly before entire world public since October 7, is yet to be considered a reasonable cause for the arrest of those responsible for these crimes against humanity.

When using the power vested in Article 99 of the UN Charter, the UN Secretary-General stated these grave violations threaten international peace and security for the first time however the UN Security Council still did not reach a decision to take coercive measures.

Violations of international law such as colonialism through unjust occupation, oppression, racial discrimination, violation of the obligation to respect the right to self-determination happening in Palestine which has been under occupation since 1967 have become topic of investigation and examination of both judicial bodies. In order to assess the violation during the violation process which began with the occupation, the Resolution in which the General Assembly defined act of aggression is of importance.

UN General Assembly Resolution No. 3314 in which aggression was defined; the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity was reaffirmed. Additionally, the fact that the territory of a State cannot be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof was also reaffirmed. In accordance with the Article 3 (a) of the Resolution No. 3314; *"The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"* and in accordance with the Article 3 (c), *"The blockade of the ports or coasts of a State by the armed forces of another State"* are defined to be acts of aggression.

According to the Resolution which considers unlawful occupation and blockade within the scope of aggression, acts of aggression constitutes a crime against international peace and aggressor state has international liability.

The rules regarding the acts counted as aggression does not affect the right to self-determined of people referred to in the Declaration on Principles of International Law concerning friendly relations and co-operation among States in accordance with the Charter of the UN. Especially, people under colonizing or racist regimes or other types of foreign domination have the right to combat and seek and get aid.

The destruction and losses Israel causes in Gaza are in violation of the Article 2 of the Genocide Convention to which Israel is a party. States Parties have obligations to prevent and punish genocide whether it be committed during times of war or peace. Therefore, any State Party to the Genocide Convention (not only an affected State) has the right to determine the allegation of not obeying *erga omnes partes* obligations and resort to the right of another State Party in order to end this violation.

Within this context, in the appeal of South Africa dated 29.12.2023 against Israel in which it demands interim measures from ICC for contradicting Genocide Convention, the Court has to decide to hold an emergency convention in accordance with the Article 74 of the Statute.

Considering the vulnerability of the civilian population in Gaza and the fact that damage continues to occur every day, it is extremely important to take injunctions against irreparable damage in order to put an end to actions which even at first glance meet the definition of genocide.

Although in its ideal form, international law is about reciprocity and protection of all states, current international system fails to uphold this principle fairly and equally.

When it comes to Palestine, the international security and peace mechanism cannot properly function due to an oppression system which includes a discourse equating anti-Zionism with anti-Semitism and deliberately using it and the abuse of law.



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