

# The Authority of the ICC to Institute Criminal Proceedings against Israeli and Hamas Leaders: The Gaza Conflict

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## Abstract

The recent announcement by the Prosecutor of the International Criminal Court (ICC) to seek arrest warrants for some Hamas and Israeli leaders in connection with the ongoing conflict in Gaza has garnered mixed reactions from the International Community. On the 7<sup>th</sup> of October 2023, Hamas and other Palestinian armed groups launched “Operation al-Aqsa Flood” against Israel, killing hundreds of civilians, abducting about 245 hostages and subjecting several others to cruel and inhumane treatment. Israel in response invoked its right to self-defense, declared war and launched “Operation Iron Swords” against Hamas militants in Gaza since the 8<sup>th</sup> October 2023. The ongoing war between Hamas and the Israeli Defense Forces (IDF) is argued to have resulted to several breaches of International Humanitarian law. This paper examines the jurisdiction of the ICC over such international crimes using the Rome Statute and relevant rules regulating armed conflict enshrined in the 1949 Geneva Conventions and its additional protocols as yardstick. Thus, the central question is whether the ICC Prosecutor has the right to institute criminal proceedings against Israeli and Hamas leaders accused to have committed crimes proscribed under the Rome Statute? It argues that pursuant to articles 12(2)(a)(b), 13(c), 15 (1)(3), and 58 of the Rome Statute, the Prosecutor is entirely within his jurisdiction in seeking arrest warrants against the persons suspected of committing war crimes and crimes against humanity prohibited by article 7 and 8 of the Rome Statute.

## Keywords

ICC, Prosecutor, Israel, Hamas, Conflict, Rome Statute, Geneva Conventions, Arrest Warrants

## 1. Introduction

On the 7<sup>th</sup> of October, 2023, Hamas, a Palestinian militant group based in Gaza launched a horrific encroachment into the state of Israel in what it termed operation “*al-Aqsa Flood*” (Flood, n.d.). This carefully planned attack resulted to the killing of hundreds of civilians, the abduction of about 245 hostages and subjecting several others to cruel and inhumane treatment. Indeed, this act was widely condemned by most actors in the international community including the ICC. However, as was stated by the United Nations secretary general, the attacks by Hamas did not happen in a vacuum (António Guterres, 2023). It is important to note that Israel and Palestine have had decades long disputes since the founding of Israel in 1948 resulting to the formation of resistant armed groups like Hamas. This is however not the focus of this paper. As would be imagined, after the October 7<sup>th</sup> attack, Israel invoked its right to self-defense and declared war on Hamas. This measure was initially deemed legitimate by several actors in the international community as it was in tandem with article 51 of the United Nations (UN) charter. However, the sustained, protracted, sometimes callous and disproportionate manner in which Israel has prosecuted this war has led to widespread condemnation around the globe (SC/15390, n.d.). The humanitarian toll of the war on civilians in Gaza has been gruesome with many either killed or subjected to inhumane treatment such as starvation and deprivation of basic necessities. Israel’s initial blockade of humanitarian aid in to Gaza exacerbated and indiscriminately brought untold suffering to non-combatants, many of them women, children and medical personnel (Whyte, 2024). Under international Humanitarian law, the outbreak of the armed conflict has significant consequences on the legal obligations of those fighting in the conflict, especially as concern their use of force (Lachenmann & Wolfrum, 2016). International humanitarian law sets out those minimum standards that must be respected by belligerent forces during armed conflict. Among the rules that parties to an armed conflict must respect when conducting hostilities is the prohibition of direct attacks against civilians; the prohibition of indiscriminate attacks; the obligation to respect the principle of proportionality, distinction, precaution and military necessity during attacks (Fleck, 2013). The Geneva Conventions and its relevant Protocols clearly set out these restrictions. According to data from Oxfam the daily death rate of Palestinians in Gaza is higher than any conflict of the 21<sup>st</sup> century averaging to nearly 250 persons killed per day since the conflict started with many more at risk from hunger, disease and cold (Oxfam, 2024). The UN agency for Palestinian refugees (UNRWA) also reported that according to local health authorities more than 31,184 Palestinians have been killed and 72,889 injured. Its data also showed that more children have been killed in Gaza in recent months than in four years of conflict worldwide. As of 12th March 2024, 247 Israeli soldiers have been killed in Gaza with 1,475 injured since the start of the ground operation (Gaza: Number of Children Killed Higher than from Four Years of World Conflict, n.d.). According to the International Committee of the Red Cross (1977), about 308518 Palestinians have been internally

displaced, many of them being vulnerable (*Israel and the Occupied Territories: Key Facts and Figures from October 7th to January 31st 2024*, n.d.). Several Institutions like the UN General Assembly, the United Nations Security Council (UNSC) have deliberated on the issue but have not been successful in instituting an effective and long-lasting ceasefire. Recently, the Prosecutor of the ICC, *Karim & Khan (2024)*, decided to initiate criminal proceedings and seek arrest warrants from the ICC's Pre-Trial Chamber against some Israeli and Hamas leaders that it identified as having breached international humanitarian law and committed crimes clearly proscribed by the Rome Statute (*Sinwar et al.*, n.d.). The Rome Statute which created the ICC was established on the 17<sup>th</sup> of July 1998 with 120 countries signing and adopting this treaty. On the 1<sup>st</sup> July 2002, it came into force with the mandate to maintain peace and security in the international system by investigating and prosecuting crimes of serious concern to the international community. These crimes as enunciated in article 5(5) of the Rome Statute included: genocide, war crimes, crimes against humanity and the crime of aggression (*United Nations, 1998*). Pursuant to article 25(1), the court shall have jurisdiction over persons alleged to have committed any or all of these crimes of international concern aforementioned (*United Nations, 1998*). The creation of a global international criminal justice system was with the believe that individuals guilty of gross atrocities and human rights violation will be investigated and prosecuted. This was a glaring distinction from other courts such as the International Court of Justice (ICJ) that dealt rather with state responsibility and not individual criminal responsibility for international crimes (*Stahn, 2019*). However controversial, on the 2<sup>nd</sup> of January 2015, Palestine acceded to the Rome Statute. This singular act as will be discussed later, granted the ICC jurisdiction to investigate crimes committed on its territory, including in Gaza where Hamas is based. Israel however is not a party to the Rome Statute. The various ways through which the ICC can ignite criminal proceedings are spelled out in Art. 13(a-c). Sub section C clearly states that the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if “the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.” (*United Nations, 1998*). The legal issue sort to be analyzed in this paper is whether the Prosecutor has the right to institute criminal proceedings including seeking arrest warrants against Israeli and Hamas leaders suspected to have committed crimes prohibited under the Rome Statute? The paper argues that pursuant to articles 12(2)(a)(b), 13(c), 15(1)(3), and 58 of the Rome Statute, the Prosecutor is entirely within his jurisdiction in seeking arrest warrants against the persons suspected of committing war crimes and crimes against humanity prohibited by article 7 and 8 of the Rome Statute. This paper will examine the status of Israel and Palestine and the effect of the latter on actions of Hamas under the Rome Statute. It will also elaborate on the nature of the war under international humanitarian law, the jurisdiction of the ICC and the role of its prosecutor, the alleged international crimes committed in Gaza, the criteria for issuing arrest warrants

and its applicability to Israeli and Hamas leaders. It will conclude with the challenges surrounding this process.

## 2. Status of Belligerent Parties under the Rome Statute

The main parties involved in the ongoing war in Gaza are Israel, Palestine and Hamas, each having a peculiar status under international law broadly and the Rome Statute in particular. Under international law, for an entity to be considered a state, it must satisfy the Westphalian requirements of 1649 and those further established in Article 1 of the Montevideo Convention of 1933 (Grant, 1998). These requirements are: it must have a clearly defined territory, population, an effective government and more importantly capacity to enter into relations with other states. It is important to address this now because under international humanitarian law, there is a distinction in the rules regulating international armed conflict and non-international armed conflict as will be discussed later. Also, only states can accede to the Rome Statute, consequently granting jurisdiction to the ICC over alleged crimes committed on its territory or by its citizens.

### 2.1. Israel, Palestine and Hamas under International law

Israel as a state was founded on the 14<sup>th</sup> May 1948 when it proclaimed its independence pursuant to the 1947 UN partition plan. Its creation was widely resisted by Palestine and other Arab states, culminating to numerous Israeli-Arab wars since 1948. However controversial the manner in which the state of Israel was created, it has managed to remain a state with all the four criteria of article 1 of the Montevideo Convention.

Palestine on the other hand can be deemed a “quasi state” as it is still considered a UN observer state under Israeli occupation by virtue UN General Assembly resolution 67/19. It however enjoys broad recognition by more than 145 UN member states. Palestine is made up of two disjointed territories to wit the West Bank and the Gaza Strip with different governing structures. The Palestinian Authority is broadly recognized internationally as the legitimate government of Palestine but is based in the West Bank. Hamas on its part is a militant group governing the Gaza Strip. The relationship between the two governing structures is generally frosty but both consider themselves as Palestinians (Jamshidi, 2024). The focus of this paper is not to discuss the status of these entities under international law in detail which is deserving of a separate article in its own merit. This background information regarding their status is to lay a foundation to understanding their capacity to enter into treaties like the Rome Statute, which is to an extent the focus of this writeup. Summarily, for the purpose of this paper, Israel and Palestine are considered states whereas Hamas is a militant non state entity in Palestine.

### 2.2. Status of Parties Under the Rome Statute

Regarding their status under the Rome Statute, article 125(3) clearly establishes the fact that only UN member states can accede to the Rome Statute. Israel is not

a party to the statute and technically the ICC has no jurisdiction over alleged crimes committed on its territory or by its citizens unless under certain conditions as will be explained subsequently. Palestine on the other hand, though not being a typical UN member state, deposited its documents of accession on January 2<sup>nd</sup> 2015 in tandem with article 125(3) at the United Nations secretariat. On February 5<sup>th</sup> 2021, while issuing its decision on the “Prosecution’s Request for a ruling on the Court’s territorial jurisdiction in Palestine,” the Pre-Trial Chambers among other things ruled that Palestine had followed the procedures for accession could be deemed a party to the Rome Statute on a technical criterion. It also ruled in its majority decision that the territorial jurisdiction of Palestine extends to all of the territories of the West Bank, East Jerusalem, and the Gaza Strip (Sweers, n.d.). It follows therefore, that, the ICC has jurisdiction to investigate the international crimes committed by Hamas militants either on Palestinian territories or in other states based on territorial and personal jurisdiction of the court. This jurisdictional basis allows the ICC to investigate actions by Israeli military and political leaders within Gaza and the West Bank. Hence, the ICC Prosecutor is now able to pursue his investigation regarding potential violations of the Rome Statute. This explains why it approved the preliminary examination by the Prosecutor in 2015 of alleged violations of the Rome Statute on the territory of “the State of Palestine” in the context of the Israeli-Palestinian conflict since June 2014. The next part will explain in greater detail the jurisdiction of the ICC in context of the Gaza war and the Prosecutor’s application for arrest warrants for certain individuals alleged to have committed crimes prohibited by the Rome Statute. There is a symbiotic relationship between international criminal law and international humanitarian law. Indeed, it is the commission of certain crimes in contravention of international humanitarian law that led to the development of international criminal law. It’s only logical therefore to discuss the nature of the war in Gaza under International Humanitarian Law.

### **3. Nature of the Conflict Under International Humanitarian Law**

Generally, International Humanitarian Law refers to “international rules established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict” (Pilloud et al., 1987). In the *Prosecutor v. Duško Tadić case*, it was stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” (Henckaerts & Alvermann, 2005). The law of armed conflict is often divided into two groups. The first dealing with instruments restricting the conduct of hostilities and governed by the Hague Law (Bruderlein, 1991). The second deals

with the provisions protecting victims of armed conflict including combatants on the field and those at sea or shipwrecked, prisoners of war and civilians. These rules are largely enshrined in the four Geneva Conventions of 1949 and subsequently the two additional protocols of 1977 relating to International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC). It goes without saying therefore that IHL makes a distinction between international and non-international armed conflicts. This distinction is important to highlight because the application of international humanitarian law rules depends on the nature of the conflict. According to the Expert Panel of lawyers convened by the Prosecutor of the ICC, the ongoing war in Gaza is both an international armed conflict (IAC) as well as a non-international armed conflict (NIAC) (*Panel of Experts in International Law, 2024*).

### 3.1. The War in Gaza as an International Armed Conflict

In order to determine whether the war in Gaza has satisfied the threshold of an international armed conflict as argued by the Expert Panel of Lawyers, it's imperative to look at what the law says.

Pursuant to Common article 2 of the 1949 Geneva Conventions, "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Also, by virtue of article 1(4) of the Additional Protocol 1 (API), "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." Israel and Palestine are both high contracting parties to the Geneva Conventions and the latter has accused the former of illegally occupying its land, and implanting racist policies against its people necessitating an armed resistance. Hence, having satisfied the conditions of CA article 2 of the Geneva Conventions and article 1(4) of API, we can safely classify the war as an international armed conflict. An international armed conflict also exists by the mere fact that Israel launched an attack on Hamas on Palestinian territory without the latter's consent.

### 3.2. The War in Gaza as a Non-International Armed Conflict (NIAC)

Under Article 3 common to the Geneva Conventions of 12 August 1949, non-international armed conflicts are armed conflicts in which one or more non-State armed groups are involved (*Dinstein, 2021*). Depending on the situation, hostilities may occur between governmental armed forces and non-State armed groups or between such groups only. The definition of a non-international armed conflict poses political as well as legal questions. Such conflicts feature a very strong political, legal, and military asymmetry (*Bouchet-Saulnier, 2013*). Indeed, it is generally

confrontations between, on one side, the army and national law enforcement apparatus and, on the other, individuals and dissident or non-state armed groups, who are more or less organized with an effective command structure. As was decided by the ICTY in *the Prosecutor v. Limaj, Bala and Musliu*, for an armed conflict to fall under the purview of NIAC, three essential elements must be satisfied; the group involved in Conflict must possess a degree of Organization, the hostilities must reach a minimum level of intensity and there must be some form of territorial control by the group (Chifflet, 2006). Also, they must be considered as “parties to the conflict”, meaning that they possess organized armed forces. According to the ICTY, the following indicators ascertain whether a group meets the requirements of an Organized group: “the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords (Prosecutor v. Ramush Haradinaj et al.). Regarding the degree of intensity, it may be the case, for instance, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces. To this effect, pursuant to Article 1 of Additional Protocol II, Situations of internal disturbances or tensions such as riots, isolated and sporadic acts of violence, and other analogous acts are not considered armed conflicts (Cross, 2010). Also, as an addendum to these requirements, Additional Protocol II develops and supplements common Article 3 without modifying its existing conditions of application, by introducing a requirement of “territorial control”. It provides that non-governmental parties must exercise such territorial control “as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups.

As earlier stated, Hamas is a highly organized non-state militant actor with complete administrative and territorial control of the Gaza Strip (Milton-Edwards, 2008). Its decision to launch war against the state of Israel adds a non-international armed conflict dimension to the conflict. As stated by the Expert Panel, the war is both subject to the rules of International Armed Conflict and Non-International Armed Conflict. (Report, 2024) Hence warring parties must adhere to the principles of distinction, precaution and military necessity as they prosecute the war. For instance, article 51(1) of the API, aiming to protect the civilian population from the effects of hostilities notes the primacy of the *principle of distinction* during conflict. This principle is to the effect that, parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their

operations only against military objectives.” (Cross, 2010). Having contextualized the war, we can proceed to examine the role and authority of the ICC to investigate and prosecute crimes proscribed by the Rome Statute alleged to have been committed in this war.

#### 4. Jurisdiction of the ICC and the Role of the Prosecutor

As earlier established, there is a symbiotic relationship between International Humanitarian law and International Criminal Law (Posse, 2006). In fact, the latter was developed to prosecute the violations of IHL that led to the commission of crimes such as genocide, war crimes, crimes against humanity and the crime of aggression. These crimes happen to be those proscribed by the Rome Statute as listed in Article 5. In the context of the war in Gaza, it is alleged that some of these crimes have been committed (Hasan & Buheji, 2024). For instance, the International Court of Justice (ICJ) is currently hearing the South African led case alleging the commission of genocide by the state of Israel in contravention to IHL. As was earlier indicated, while the ICJ focuses on settling disputes between state parties, the ICC has a somewhat peculiar role as it investigates, prosecutes and hold criminally liable individuals suspected to have committed any the international crimes proscribed by IHL and the Rome Statute. It is therefore important to begin establishing the Jurisdiction of the ICC, the Role of the Prosecutor especially with regard to his recent application for arrest warrants from the Pre-Trial Chambers against some individuals suspected to have breached the laws of war in the ongoing Gaza conflict.

##### 4.1. Jurisdiction of the ICC

By virtue of article 12(2)(a)(b) of the Rome Statute, the ICC generally has territorial and personal Jurisdiction over crimes committed on the territories of state parties to the Rome Statute and crimes committed by their nationals at home or abroad (United Nations, 1998). Pursuant to article 4(2), “The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.” As earlier established, by virtue to the Pre-Trial Chamber’s decision of 2021, Palestine for the purpose of the Rome Statute is considered a State. Hence, the ICC has jurisdiction in relation to crimes committed on the territory of Palestine, notably in the West Bank, East Jerusalem and the Gaza Strip. In the context of this paper jurisdiction for crimes committed in Gaza since 13 June 2014, under article 12(2)(a) of the ICC Statute. Also, the ICC has jurisdiction over crimes committed by Palestinian nationals inside or outside Palestinian territory under *article 12(2)(b)* of the Statute. As was stated by the Expert Panel, the ICC therefore has jurisdiction over Israeli, Palestinian or other nationals who committed crimes in Gaza or the West Bank. It also has jurisdiction over Palestinian nationals who committed crimes on the territory of Israel, even though Israel is not an ICC State Party.

Furthermore, in line with article 13(a-c), the court shall be seized either when a

matter has been referred to it by a state party, the UNSC acting under Chapter VII of the UN Charter or by the Prosecutor initiating an investigation *proprio motu*. The focus of this paper is with regard to 13(c). A further condition for the exercise of the courts' jurisdiction is the principle of complementarity as stated in article 1 of the Rome Statute. This refers to the fact that a case cannot be heard by the ICC if it was "genuinely" investigated or prosecuted by the relevant national criminal jurisdiction of the state. Neither Palestine nor Israel have satisfactorily investigated the crimes committed in the ongoing war. It was only logical then for the ICC to step in.

#### **4.2. The Role of the Prosecutor**

A very important institution at the ICC responsible for the initiation of investigations and prosecutions against persons alleged to have committed any of the crimes forbade in the Rome Statute is the office of the Prosecutor. His powers are clearly stipulated in relevant provisions of the statute including but not limited to article 13(c) earlier mentioned and article 15(1).

Under article 15(1-3), the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. It was by virtue of these powers that the prosecutor launched investigations into the war in Gaza and the alleged violations of the Rome Statute. Based on the enormity of evidence collected and the establishment of probable cause, the Prosecutor later applied for arrest warrants from the Pre-Trial Chamber for certain individuals suspected to have directly authorized or supervised the commission of crimes prohibited by the Rome Statute. It's important to note here that investigations do not in any way imply guilt and the general principles of law relating to presumption of innocence applies to suspected persons until the contrary is proven by the ICC's trial chamber. In fact, article 15(4-5), 57 and 58 rest powers with the Pre-Trial Chambers to either authorize or reject the application based on evidence submitted to it by the Prosecutor. Article 58 (1)(2) clearly establishes the powers of the Pre-Trial Chamber to issue arrest warrants when certain conditions are made. Both Israeli and Hamas leaders could potentially be subject to ICC arrest warrants if the Pre-Trial Chamber is convinced that there is sufficient evidence to support allegations of war crimes or crimes against humanity as alleged by the prosecutor. From the foregoing, it could easily be established that the Prosecutor of the ICC is acting within the confines of his powers under the statute in seeking arrest warrants for certain suspects as will be discussed below.

#### **5. Alleged International Crimes Committed in Gaza and the Rational for Arrest Warrants**

Under international humanitarian law, while the right to self-defense is inherent and absolute, the means and methods of warfare are not (Crawford & Pert, 2024). Common article 1 of the 1949 Conventions clearly states that, "the High Contracting Parties undertake to respect and to ensure respect for the present Convention

in all circumstances.” The logical interpretation of this provision is to the effect that the application of the Convention does not depend on the character of the conflict. Whether a war is “just” or “unjust”, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected. Under article 5(5) of the Rome Statute, the ICC shall have jurisdiction over the crimes of genocide, war crimes, crimes against humanity and crime of aggression. As was noted by the Prosecutor of the ICC in its application for an arrest warrant from the Trial Chamber, the suspects, either by their explicit or implicit conduct authorized the commission of *war crimes and crimes against humanity* in the course of the ongoing war. These two crimes are covered in detail in article 8 and 7 of the Rome Statute respectively.

The Rome Statute refers to war crimes as comprising grave breaches of the Geneva Conventions of 1949, as well as other serious violations of the laws and customs applicable in international armed conflict as well as non-international armed conflicts. Acts which specifically amount to war crimes are listed in article 8 (United Nations, 1998). Like most crimes, there are two essential elements of a crime that must be present for a war crime to occur. These are the criminal intent (*mens rea*) and the act (*actus reus*) (Cryer, 2009). For instance, bombarding civilian infrastructures like hospitals or churches will hardly be by accident or through negligence though this could be the case in some instances. Hence, in order to be convicted for the war crime of an unlawful attack on civilians or of civilian infrastructure under article 8(2)(b)(i) of the ICC Statute, the suspect must have directed such an attack, must have done so with civilians as object, must have done so intentionally, the attack must have taken place in the context of an international conflict and the suspect must have been aware that the conflict was going on. Unlike war crimes which require a nexus to armed conflict, Crimes against humanity do not require a nexus to an armed conflict but need to be committed in the context of a “widespread or systematic attack directed against any civilian population”, pursuant to a State or organizational policy. Under the Rome Statute, crimes against humanity involve a number of acts (murder, extermination, rape, sexual slavery, torture, enforced disappearance and a host of other acts) that form part of “a widespread or systematic attack directed against any civilian population” (Akhavan, 2008). It must be stated that the rules regulating international armed conflict as enshrined in numerous instruments like the Hague Conventions of 1908, the Geneva Conventions of 1949 and its additional protocols clearly define the means and methods of warfare. What then are suspects in the Gaza war accused of?

### 5.1. Rational of Arrest Warrants for Hamas Leaders

Persons who have joined a non-state armed group, participated in terrorist activities, or otherwise directly participated in hostilities during an armed conflict could rightfully be investigated and prosecuted for acts that cannot only be considered terrorism but violations of International Humanitarian Law (Bruderlein, 1991). These persons cannot claim protection under IHL in such a context. The

obligation to comply with fundamental rules of humanitarian protection binds all parties to the conflict, including state actors, non-state armed groups and “hybrid” groups (combining characteristics of both non-state armed groups and terrorist organizations) engaging in belligerent activities (Clapham & Gaeta, 2014). It is widely posited by IHL scholars that non-state armed groups, and their members, are bound by the rules of IHL because their “parent” State has, by nationality or territory, legislated obligations derived from international law, regardless of whether the group has consented (Kleffner, 2011). Thus, individual members of a non-state armed group, including terrorist organizations may incur individual criminal responsibility for violations of IHL, which may also entail a degree of accountability for the group to which they are a members (Kleffner, 2011). The Prosecutor could be deemed justified in seeking arrest warrants for Hamas leaders alleged to have committed war crimes and crimes against humanity. He specifically identified the following persons as suspects: *Yahya Sinwar, the Head of Hamas in the Gaza Strip; Mohammed Diab Ibrahim Al-Masri, known more commonly as Mohammed Deif, the Commander-in-Chief of the al-Qassam Brigades of Hamas; and Ismail Haniyeh, the Head of Hamas’ Political Bureau.* The Prosecutor’s application also charged Sinwar, Deif and Haniyeh as co-perpetrators under article 25(3)(a) of the ICC Statute on the basis of a common plan to attack military bases in Israel, to attack and to kill civilians, and to take and detain hostages. It must however be stated here that Israel has since assassinated these individuals as part of the ongoing war. Hence, eliminating the possibility of them being tried by the ICC. However, for the purpose of establishing the locus of the ICC in such cases, this paper proceeded to explain the rationale for the Prosecutor’s prior actions. The Prosecutor noted that they were criminally responsible under other modes of liability under *article 25(3)* and as superiors for failing to take all necessary and reasonable measures within their power to “prevent or repress” the crimes or to “submit the matter to the competent authorities for investigation and prosecution” under article 28 of the ICC Statute.

As noted by the expert Panel of International lawyers in their support of the Prosecutor’s decision to file for arrest warrants for the Hamas suspects, they stated that “The Panel also considers that there are reasonable grounds to believe that the crimes were committed in the context of a widespread and systematic attack against the civilian population of Israel, pursuant to an organizational policy of Hamas.” The Panel also concurred with the Prosecutor’s view that Sinwar, Deif and Haniyeh made essential contributions to this plan and that they had through their own words and actions admitted to their responsibility. For instance, they acknowledged their control over the hostages’ detention and release but failed to prevent or to punish the commission of the crimes by their subordinates, although it is clear that they could have done so as senior leaders of the military and political arms of Hamas. Presuming that the Hamas suspects were still alive and that the Pre-Trial Chambers could establish probable cause, Hamas leaders could be arrested, investigated and prosecuted for actions deemed to violate the Rome Statute

and more broadly the laws of armed conflict such as the targeting of civilians or using fellow comrades as human shields.

## 5.2. Rational of Arrest Warrants for Israeli Leaders

Israel like most states have obligations erga Omnes to adhere to some minimum standards, and it is the role of its leaders to ensure compliance. The doctrine specifically determines obligations that states have towards other countries or to the international community as a whole. Notable erga omnes obligations include the outlawing of acts of aggression, the outlawing of genocide, protection from slavery, and protection from racial discrimination. This doctrine was well enunciated by the ICJ in the *Barcelona Traction case* (*Barcelona Traction, Light & Power Co., Ltd. Case BT-ICJ Rep, 1970*). In line with this doctrine and other provisions of the Rome Statute, the Prosecutor sought arrest warrants against Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Israeli Minister of Defense, on the basis that they committed the war crime of ‘intentionally using starvation of civilians as a method of warfare’ prohibited under article 8(2)(b)(25) of the ICC Statute. The Prosecutor intends to charge the two suspects with other war crimes and crimes against humanity associated with the use of starvation of civilians as a method of warfare under articles 7 and 8 of the ICC Statute. These include the war crimes of “willfully causing great suffering, or serious injury to body or health” or cruel treatment, willful killing or murder, and intentionally directing attacks against the civilian population. The proposed charges also include the crimes against humanity of murder, extermination, other inhumane acts and persecution with respect to deaths and injuries resulting from or associated with the systematic deprivation of objects indispensable to the survival of Palestinian civilians in Gaza. The Panel notes the Prosecutor’s statement that other alleged crimes, including in connection with the large-scale bombing campaign in Gaza, are actively being investigated.

Under 51 API, the indiscriminate bombings on hospitals in Rafah, refugee camps etc in an attempt to eliminate armed elements resulting to the death of civilians violated the principle of distinction as well as that of precaution, amounting to war crimes under international law. It could also be argued that this attack violated the principle of proportionality. Article 57 API, prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” (Cross, 2010). Breaking into hospitals and refugee camps and firing at the crowd in the search of armed elements could be considered excessive and nonproportional. The prosecutor thus found these acts weighty enough to initiate criminal proceedings and seek arrest warrants for the aforementioned Israeli leaders.

## 6. Possible Challenges

Despite the ICC’s jurisdictional reach, several challenges complicate the pursuit

of justice in the Israeli-Palestinian conflict. One significant obstacle is the lack of cooperation from Israel, which has consistently rejected the ICC's authority over its actions, arguing that it is not a party to the Rome Statute. This non-cooperation can hinder investigations and the enforcement of arrest warrants. As established earlier, Israel may not be a party to the Rome Statute but the alleged suspect can be subjected to the jurisdiction of the ICC for committing alleged violations on Palestinian lands and against Palestinian citizens in tandem with article 12 of the Statute. Also, since the allegation concerns incumbent leaders in Israel, it could also argue that its leaders enjoy immunity from criminal prosecutions. However, this argument may not be entirely tenable as article 27 of the Rome Statute explicitly states that the treaty shall apply to equally to all persons without distinction based on official capacity. Immunities whether national or international shall not bar the court from exercising its jurisdiction over such persons accused to have committed international crimes. This position was held in the case of Omar Al Bahir in connection with the crimes committed in Dafur. (*Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal BT-OA, 2019*) Additionally, there are practical challenges related to gathering evidence in conflict zones and ensuring the safety of witnesses and investigators. The volatile security situation in Gaza can impede the ICC's efforts to collect reliable evidence and secure the cooperation of local authorities and affected communities. The inability of institutions like the United Nations Security Council to pressure both sides to adopt a ceasefire and eventually address the root causes of the problem has seriously jeopardized the prospects for peace and questioned its role as enunciated in articles 39, 40 and 41 of the United Nations Charter.

## 7. Conclusion

Finally, as argued in this paper, the ICC Prosecutor has the broad legal authority under articles 15(1)(3) and 58 of the Rome Statute to apply for arrest warrants against Israeli and Hamas leaders in connection with the war in Gaza. The accession of Palestine to the Rome Statute in 2015 provides the necessary jurisdictional basis for such actions. The Pre-Trial Chamber therefore has the lofty task of deciding whether to approve or dismiss the Prosecutor's application. However, this process is fraught with legal and practical challenges. Ensuring accountability for alleged crimes in the Israeli-Palestinian conflict requires navigating a complex web of non-cooperation, geopolitical influences, and on-the-ground obstacles. Despite these difficulties, the ICC remains a crucial mechanism for pursuing global justice and upholding international law in conflict situations like Gaza. The International criminal Court has often been accused of selective Justice and deliberately targeting leaders of the global south without similar attention to investigating and prosecuting atrocities committed by leaders in other regions of the world. The hysteria surrounding the to the Prosecutor's investigations against the aforementioned leaders, including an incumbent prime minister is hypocritical and unwarranted considering the numerous trial precedents set by the court. If

the ICC were to stay silent in the face of these crimes, it would have opted for political expediency rather than executing its pivotal role in global criminal justice. With the elimination of the Hamas leaders specifically mentioned in the prosecutor's application, there is keen attention on how it will proceed with the cases of Israeli leaders identified in his application. Important stakeholders like the United Nations must continue to advocate for an end to the conflict, and at the same time caution parties involved to respect and cooperate with the ICC in its investigations.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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