

Admissibility Clause and the Dilemma facing the ICC in the War of Gaza of 2014

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Abstract: *This researched article aimed to reveal some of the key legal challenges facing the international criminal justice system. The Arab-Israeli war, Israel Palestinian War, Israel-Hamas War, Israel versus Islam nations in the Middle East has been a historical event whose legal solution appear always to be dwindling. It is within the skills of the author to open up some of the critical areas that the development of international criminal justice should tackle. However, the article does not give illusion that this endeavour is going to be easy for the Permanent International Criminal Court to handle within the real time unless there is change in the state of affairs within the international community.*

Keywords: *Violence, international armed conflict, law of the international armed conflicts, humanitarian sense of war, veto powers, terrorism, jihadists, the ICC.*

BACKGROUND

Israeli-Palestinian conflict has been on much longer than the establishment of the International Criminal Court in 2005. The conflict has involved both belligerent sides in hostilities and use of aggression with each side blaming¹ it all on the other.² Reprisals, missile attacks, suicide bombing, illegitimate occupation of Palestinian territory by Israel authorities, target killing of Hamas, Al Fatah and other Palestinian leaders have been some of the alleged questions disturbing the conscience of the international criminal justice.

¹ 'Palestinians Accuse Israel of War Crimes, Push for ICC Trial Gets Support Online'

<<http://globalvoicesonline.org/2014/07/26/palestinians-accuse-israel-of-war-crime-push-for-icc-trial-gets-support-online/>> accessed 4 August 2014.

² 'Palestine Accuses Israel of Breaking Ceasefire Minutes after It Begins' (*Middle East Eye*)

<<http://www.middleeasteye.net/news/unilateral-israeli-ceasefire-begins-parts-gaza-1687761423>> accessed 4 August 2014.

This research is investigating the admissibility of the ICC to intervene and initiate the trial of the perpetrators of Gaza war including violations of military law.³ Basing our legal reasoning on the provisions of the Rome Statute⁴ and the United Nations Charter law, Human Rights law, Military Law of The Hague and International Humanitarian Law, can the ICC intervene and restore international justice in the region? Are there some hindrances that may make it hard for international criminal justice to bring remedial solution to the plights adversely and continuously affecting helpless civilians in the region? Can the office of the Prosecutor apply *proprio motu* under Art. 15(1) of the Rome Statute⁵ principle and provision to initiate criminal investigations in the war of Gaza? Why is the UNSC not acting promptly and effectively to apply the rule of law and human rights law? Neither Palestine nor Israel is signatory to the Rome Statute suggesting that they are not members of the Assembly of States Party to the ICC.

Hamis militia group is not the ruling party so does not represent the Government of Palestine whose title as a State has not enjoyed full recognition as required by the International Law.⁶

RECOGNITION OF THE STATE OF PALESTINE

It was on 27th of September 2013 that 69.4% of the 196 States members of the United Nations recognised the State of Palestine after many years in international limbo.⁷ Yet still the Government of President Mahmoud Abbas Al Fatah party and that of Hamas ruling the West Bank Strip (Gaza) are not operating as a unitary Government for the State of Palestine. Hamas started as a militant movement that used force and military attacks against Israel (the occupier) while Al Fatah preferred diplomatic negotiations with Israel. Palestinian Liberation Organization (PLO) has been recognised by some States as the representative of the Palestinian people and not the State of Palestine making it hard for the State of Palestine enjoy its de jure and de facto statehood within the international law.⁸ The PLO Executive Committee is empowered by the Palestinian National Council to perform the functions of the Government of the State of Palestine.

The State of Israel was created in 1948, barely 3 years following the United Nations Charter that ended the World War II. Merged with historical facts and several changes in the region covering the present Palestine, Strip of Gaza, West Bank and Israel, the statehood of the State of Palestine is still problematic in the international law. Yet Israel is a fully recognized State with its membership to the United Nations completely documented. In exercising its State powers, Israel has been occupying

³ 'MILITARY LAW'.

⁴ 'ROME STATUTE.pdf'.

⁵ Ibid.

⁶ 'Israel & Palestine: A Tragedy in Three Acts' <<http://rt.com/op-edge/177764-israel-palestine-tragedy-argentina/>> accessed 4 August 2014.

⁷ 'State of Palestine', , *Wikipedia, the free encyclopedia* (2014) <http://en.wikipedia.org/w/index.php?title=State_of_Palestine&oldid=619424093> accessed 4 August 2014.

⁸ Ibid.

strategic historical after the UN partition plan adopted by the General Assembly in 1948. Jewish State was given some part of Jerusalem, with Jerusalem-Bethlehem under international protection. The headquarter of the State of Israel is Tel Aviv while it has its strongholds in some territories that remain contentious between Israel and Palestine.

HOSTILITIES AND INHUMANE TREATMENT OF THE VICTIMS

The war of Palestine of 1948 left many dead and several casualties. The war is known as Arab-Israeli War of 1948 which ended with the Armistice Agreements of 1949. The agreement brought many changes, Transjordan took control over West Bank, Strip of Gaza was under control of Egypt and Syria took the control of Himmah area. Fierce war erupted in 1967 between Israel and Arab States that lasted 6 days. Israel managed to claim Sinai Peninsula from Egypt, West Bank from Transjordan, and Golan Heights from Syria seizing control over Gaza strip. After this war experience Palestinian leadership broke ranks with Jordan in 1970 and in 1974 Palestinian Liberation Organization was initiated and at Rabat Summit Conference, PLO was declared the representative authority of the Arab Palestinians. Palestinian Declaration of independence then came up in 1988 with PLO as the recognized authority representing the voice of the Palestinian people. UN General Assembly Resolution 181 (Partition Plan of 1947) supported rights of Palestinians and Palestine.

In 2007 there was historical split between Fatah and Hamas. The separation involved violations of humanitarian law and many casualties were reported. The battle field was mainly in the Gaza Strip which broke the government of national unity between the two rival movements. Hamas that present itself as a militant group and Fatah that appears to be more diplomatic and in favour of negotiations stand at the centre of the cause of violence with Israel keeping on the occupation and use of violence to oppress the rivals.⁹

THE LEGALITY OF ISRAELI OFFENSIVE IN GAZA

In the Middle of July 2014, after Hamas had fired their missiles into Israel, the offensive and defensive from both warring parties intensified with Israel using air and land means to destroy Hamas and its networks in the Gaza Strip.¹⁰ A militant group emerging in Iraq that call themselves as Islamic State (IS) is threatening to join Hamas and fight the Jews.¹¹ World international media is full of this information as the International Community is making effort through diplomatic mediations conducted by the United Nations, USA and the UK. Both Israel and Hamas are blaming each other for war crimes, crimes against humanity, crimes of aggression and so on. The tragedy is huge as none of

⁹ Ibid.

¹⁰ 'Israel & Palestine: A Tragedy in Three Acts' <<http://rt.com/op-edge/177764-israel-palestine-tragedy-argentina/>> accessed 4 August 2014.

¹¹ 'Israel & Palestine: A Tragedy in Three Acts' (n 6).

the warring parties seem cede the ground despite the call to stop humanitarian catastrophe facing many civilians and their objects in the region.

If Hamas is fighting on behalf of the State of Palestine then the armed conflict meets the threshold of the International Humanitarian Law as an International Armed Conflict. The scene of war crime is majorly within the Gaza Strip, or the stronghold of the militant Hamas.¹² It is not yet clear within the international law whether Hamas is recognized as part of the Government of the State of Palestine and if their use of force is legitimate or it is considered as an insurgent within the free Palestine.

Considering the history of this war the *casus belli* is extensively wide but the interest of this research is on *jus in bello* rather than *jus ad bellum*.¹³ The concern here is the rules of international law and domestic laws applicable during the hostilities and if such use of force is within the law. Children¹⁴, women¹⁵ and all other category of protected persons are not spared in this brutal war as already stipulated in the Customary International Humanitarian Law.¹⁶ Secretary-General Ban Ki-moon called the school shelling "outrageous" and "unjustifiable," and demanded an immediate humanitarian cease-fire.¹⁷

Asked about their opinion about this war, Palestinians still believe that this war is legitimate even if does not meet the grounds of legality principle.¹⁸

"Today there is a national consensus on the resistance as Israel continuously attacks. I refer to a group of Palestinian military factions who brought hope and spirit to occupied Palestinians, and Arabs alike. The Palestinian resistance has the ability to crack down on the Israeli occupation known 'as the army never defeated,' one of the most strategic and powerful military forces in the world. - See more at: <http://www.middleeasteye.net/news/what-do-gazans-think-hamas-abbas-and-israels-strikes-670465287#sthash.Cff5SwMZ.dpuf>

In the eyes of high profile personalities this is a barbaric war that must be considered as one of the war crimes and crimes against humanity that the ICC was established to defend. It beats all logic to argue that the ICC does not have jurisdiction over the Gaza Strip or Israel or over perpetrators. At the same time it is not in order for the United Nations Security Council to peg its decision to intervene

¹² Ibid.

¹³ Naorem Sanajaoba, *A Manual of International Humanitarian Laws* (Regency Publications 2004).

¹⁴ 'Deadly Israeli Strikes Hit UN School, Market Area' (*Yahoo News*) <<http://news.yahoo.com/deadly-israeli-strikes-hit-un-school-market-area-215854095.html>> accessed 4 August 2014.

¹⁵ E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Asser Press 2003).

¹⁶ International Committee of the Red Cross and others, *Customary International Humanitarian Law* (Cambridge University Press 2005).

¹⁷ 'Deadly Israeli Strikes Hit UN School, Market Area' (n 14).

¹⁸ 'What Do Gazans Think of Hamas, Abbas and Israel's Strikes?' (*Middle East Eye*) <<http://www.middleeasteye.net/news/what-do-gazans-think-hamas-abbas-and-israels-strikes-670465287>> accessed 4 August 2014.

and restore peace and security on the veto powers¹⁹ that are always divided and influenced by their interests.

Bombing schools²⁰, hospitals and places of worship are all prohibited by the international law of war and the law of Geneva. Destroying civilians and their objectives in such a ruthless manner has been adversely condemned not only by World civilized nations but also the UN Office of the High Commissioner for Human Rights that has alleged to call for prosecution of Israel. UN High Commissioner Navi Pillay has criticized both Israel and Hamas for the violations of human rights law.²¹

*Israel's airstrikes and military actions in the Gaza Strip could amount to war crimes, the UN's high commissioner for human rights said in Geneva on Wednesday. Navi Pillay cited cases of Israeli airstrikes or shelling hitting houses and hospitals in Gaza.*²²

UN Secretary-General Ban ki-Moon call for diplomatic negotiations while Israel and Hamas trade blame.²³ It is not acceptable. In this case negotiations and mediations seem to have failed and the international community can only apply international criminal justice as the alternative.

A French lawyer has moved to the ICC on behalf of the Government of Palestine to bring justice to the Palestinian population.²⁴The charges are on the counts of war crimes against Israel and the response of the ICC shall be vital.

THE LEGAL PERSONALITY OF HAMAS

Before establishing any judicial process it is necessary to examine in details the legal identity of Hamas. Is it an incorporated body that can stand charges at the ICC?²⁵ Does the ICC gave jurisdiction over insurgent groups, terrorist entities²⁶, Governments, or any corporate? ICC is concerned with individual physical persons that have been recommended for investigation. Meaning that neither Israel

¹⁹ 'Gaza: Law of War Needs Testing at International Criminal Court' (*The Sydney Morning Herald*) <<http://www.smh.com.au/comment/gaza-law-of-war-needs-testing-at-international-criminal-court-20140801-zzaxa.html>> accessed 4 August 2014.

²⁰ 'Deadly Israeli Strikes Hit UN School, Market Area' (n 14).

²¹ 'UN's Pillay: "Strong Possibility" of Israeli War Crimes | News | DW.DE | 23.07.2014' (*DW.DE*) <<http://www.dw.de/uns-pillay-strong-possibility-of-israeli-war-crimes/a-17801640>> accessed 4 August 2014.

²² Ibid.

²³ Ibid.

²⁴ 'Middle East - French Lawyer Files Complaint against Israel at ICC' (*France 24*) <<http://www.france24.com/en/20140725-israel-icc-war-crimes-gaza-complaint-filed/>> accessed 4 August 2014.

²⁵ 'ROME STATUTE.pdf' (n 4).

²⁶ 'LIVE UPDATES: Violent Clashes Resume across Israel; IDF Strikes Gaza - Diplomacy and Defense' (*Haaretz.com*) <<http://www.haaretz.com/news/diplomacy-defense/.premium-1.603274>> accessed 4 August 2014.

nor Hamas can be charged at the ICC for criminal offenses except their perpetrators who are individuals with criminal responsibility or liabilities according to the Rome Statute.

ADMISSIBILITY PROVISION OF THE ROME STATUTE

Any member state of the Rome Statute can refer a situation to the ICC office of the Prosecutor for investigation.²⁷ The State can invite the Chief Prosecutor to investigate in the alleged criminal situation as has been the case in the DRC, Ivory Coast and few others. United Nations Security Council can as well make a request to the ICC to intervene in a situation of crime as has been the case of Sudan and Libya. The other option is that the Chief Prosecutor can use the discretion of the office and the principle of *proprio motu*²⁸ to open an investigation in any State where criminal offense has taken place with the condition that the State concerned is unable or unwilling to prosecute as in Kenyan situation.²⁹

*International law seems eyeless in Gaza. For more than two weeks the world has watched war crimes apparently committed by both sides: lethal attacks on schools and hospitals, rocket showers aimed at civilians, tunnels chillingly lined with syringes and ropes, and always, the dead and dying children. Now the call goes up from politicians and prelates and the UN Secretary-General for "accountability" and "responsibility" and "justice". That should mean a proper forensic investigation with criminal charges against commanders if the evidence warrants, heard in an international criminal court. It is important to understand why this could happen and why it probably will not.*³⁰

Read more: <http://www.smh.com.au/comment/gaza-law-of-war-needs-testing-at-international-criminal-court-20140801-zzaxa.html#ixzz39QgmVyxI>

*There is, after all, an International Criminal Court in The Hague, with a prosecutor equipped to investigate and to charge (under article 8 of the ICC statute) precisely those crimes that seem to be occurring in the present conflict. But her power to act arises only in two relevant circumstances. First, by a reference from the Security Council, which is sure to be blocked by one – if not all – of the five permanent members. By the US (always protective of Israel), by Russia (afraid of where a criminal investigation of MH17 might lead), and by China (obsessed with state sovereignty)...*³¹

Read more: <http://www.smh.com.au/comment/gaza-law-of-war-needs-testing-at-international-criminal-court-20140801-zzaxa.html#ixzz39QhYDlpl>

CHALLENGES FACING THE ICC

²⁷ 'ROME STATUTE.pdf' (n 4).

²⁸ Ibid.

²⁹ 'RulesProcedureEvidenceEng.pdf'.

³⁰ 'Gaza: Law of War Needs Testing at International Criminal Court' (n 19).

³¹ Ibid.

A part from the unwillingness of the veto powers in the United Nations Security Council Israel is not a signatory to the Rome Statute neither Palestine. Another challenge is between Hamas that commands the Gaza Strip and the PLO and the Government of the State of Palestine under Al Fatah. Another eminent danger is the regional stand on the matter, that is the opinion of the Arab League on the question of Israel and Palestine.

The UN Partition plan of the two – State option appears not to be accepted by some UN member States. The erection of protection wall around the Israel territory on the principle of legitimate self defence and the continuation of the military occupation are all regimes that keep on creating more questions than answers from both sides of political divide.

Then there is the alternative basis for empowering the ICC prosecutor: a state party to the ICC treaty (and there are presently 122) may require the prosecutor to investigate international crimes committed on its territory or by its people. Israel has refused to ratify the treaty, thereby depriving itself of a means to hold Hamas to account for rocket attacks and leaving the territory of Gaza (which it dubiously claims not to "occupy") an open question. Can the State of Palestine, were it to ratify the treaty, invoke an ICC investigation into war crimes in Gaza? In 2009 it attempted to do just that in seeking a remedy for "Operation Cast Lead", but the prosecutor refused to accept that it was enough of a state to be entitled to become a party to the treaty. However, in November 2012 the General Assembly accorded Palestine the status of statehood – as a non-member observer state, but a state nonetheless. It has since been permitted to become a state party to 13 international treaties. Might it now – today – accede to the ICC treaty and with the appropriate declarations under that treaty invite the prosecutor to investigate war crimes committed in the territory of Gaza since November 29, 2012?³²

Read more: <http://www.smh.com.au/comment/gaza-law-of-war-needs-testing-at-international-criminal-court-20140801-zzaxa.html#ixzz39QkUrT18>

VIOLATIONS OF HUMANITARIAN AND HUMAN RIGHTS LAW

Despite all the attempts to stop the armed conflict in the Gaza Strip and the Middle East, the situation remains volatile as many casualties are reported.³³ Death toll keeps on rising whereas hospitals are running out of drugs and facilities. Members of the ICRC are putting possible efforts to assist the victims of war as provided for by the IHL. If the situation is not stopped in time then human disaster

³² Ibid.

³³ 'Gaza Death Toll Higher than Thought: Palestinian Envoy' (*Middle East Eye*) <<http://www.middleeasteye.net/news/gaza-death-toll-higher-thought-palestinian-envoy-2061424487>> accessed 4 August 2014.

shall be great and many more militant groups such as ISIS³⁴ and perhaps some sympathising States such as Iran may join Hamas to tame Israel. At the same time, Israel will not be isolated and her alliances may as well pile pressure in support of the Jews people living in the region, a situation that may bring crisis in the international intercourse of States after the Second World War.

The dilemma expressed by the ICC may become a recipe to another world war since the international community does not share the same political ideology. Another probable consequence may be the unfolding jihadist war that likewise must be tamed by all means.³⁵ The new insurgence alludes that the war is about Islam and Judeo-Christian Religions seeking to define another aspect of the Gaza crisis.³⁶ Should this latter be the case then the world opinion³⁷ may hypothetically realigned towards inter-religious polarization and yield into war of religion as been witnessed in Nigeria and Central African Republic where Muslims and Christians have been killing each other.

The International Criminal Court was not designed to deal with war of ideologies especially the war of religion. Palestine – Israeli war should not take the direction of religious warfare which may be difficult to stop. At the same time, religious leaders fear talking about the jihadist conflict.³⁸ Failure to act or *laissez faire* is a crime of omission that may not add value to the world effort to maintain world peace and security through criminal justice process.

Another challenge facing the ICC and its jurisdiction in the world criminal justice is the terrorism and counter terrorism measures.³⁹ “Terrorism”⁴⁰ has not been well defined and its interpretation in the international law is never clear. States are aware of the tragedies caused by the crime of terrorism⁴¹ but have not agreed on its interpretation and how to bring it to international justice system. What is known is that every single State tends to enact laws that would deal with crimes of terrorism but with more-or-less violations of human rights law. At the same time the use of drone and modern technology to destroy the adversary. Such are areas that render criminal justice somehow cumbersome.

REMARKS

³⁴ ‘Islamic State to Join Palestine to Fight the “Barbaric Jews”’ (*Breitbart News Network*) <<http://www.breitbart.com/Big-Peace/2014/08/01/Islamic-State-to-Join-Palestine-to-Fight-the-Barbaric-Jews>> accessed 4 August 2014.

³⁵ ‘Iraq Jihadists Seize Another Town from Kurdish Forces’ (*Yahoo News*) <<http://news.yahoo.com/jihadists-seize-iraqi-town-sinjar-kurds-110159527.html>> accessed 4 August 2014.

³⁶ ‘Islamic State to Join Palestine to Fight the “Barbaric Jews”’ (*Breitbart News Network*) <<http://www.breitbart.com/Big-Peace/2014/08/01/Islamic-State-to-Join-Palestine-to-Fight-the-Barbaric-Jews>> accessed 4 August 2014.

³⁷ ‘Palestinians Accuse Israel of War Crimes, Push for ICC Trial Gets Support Online’ (n 1).

³⁸ ‘Iraq Jihadists Seize Another Town from Kurdish Forces’ (n 35).

³⁹ ‘TERRORISM.pdf’.

⁴⁰ Gregory E Maggs, *Terrorism and the Law Cases and Materials (American Casebook)* (West Group Publishing 2005).

⁴¹ ‘HUMAN RIGHTS TERRORISM.pdf’.

The role of the ICC in the current on-going armed conflicts is very low. The typology of armed conflict has dramatically changed as the theatre of warfare has shifted from battle fields to sacred places of worship, private residential areas, supermarkets, hospitals, hospitals, refugee camps and certainly to civilians. Hamas combatants camouflage themselves and even use civilian objects as means of weakening their adversaries. The ICC though respects the admissibility provision of the Rome Statute still requires more research and how to best deal with criminal justice meant for the modern warfare including crimes of terrorism and counter terrorism measures.⁴²

The ICC may not deliver on its mandate if not fully supported by State members of the UN. The continuous sentiment that the Court is ineffective and only targets States that are to be punished by their counterparts is not adding much value to the development of the international criminal justice. The failure of the United Nations Security Council Permanent Members to share the same vision and work together is a critical circumstance within the international community that may not add up well.

Certainly, this research work is not meant to provide any conclusive solution to the on-going situation in Gaza but to open debates on the effectiveness of the international criminal law. Do the treaties in place capable of prosecuting terror attacks, insurgents, targeted killings, and inhuman destruction of humanity as has been witnessed in the Arab rising in the Middle East and North Africa? Still more research is required on how to best deal with violence caused by hatred based on religious creeds? The recent take-over of some Iraq towns by the so called Islamic State (IS) is sending signals of war of religion or jihad and the declared caliphate by the militant is not the right signal towards permanent peace in the region.⁴³

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⁴² ‘COUNTER TERRORISM MEASURES VERSUS HUMAN RIGHTS.pdf’.

⁴³ ‘Iraq Jihadists Seize Another Town from Kurdish Forces’ (*Yahoo News*) <<http://news.yahoo.com/jihadists-seize-iraqi-town-sinjar-kurds-110159527.html>> accessed 4 August 2014.

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