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International Courts and the Israel-Palestine Conflict: Issues of Jurisdiction in a Consent Based Legal Order

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Abstract

International law is built on the foundation of sovereignty, a pillar of which is state consent. A state's legal obligations are overwhelmingly, though not exclusively, based on its consent to be bound. The ICJ and ICC, in all likelihood, will be ineffective to provide justice to the Palestinian people. However, all hope is not lost for Palestine when it comes to redressal through international law. Palestine has done so in the past and should continue to look towards the various specialized United Nations committees established under different multilateral instruments and bodies.

Key Words: Palestine, Israel, ICJ, ICC, Jurisdiction

Executive Summary

Issue

In retaliation to the attack by Hamas, Israel declared war on the Gaza Strip, indiscriminately bombing the area. According to the newspaper reports, more than 21,000 Palestinians have been killed in Gaza since 7 October including, women, children and international aid workers. The indiscriminate killing and unproportionate use of force by Israeli forces amount to violations of international law. Considering the situation of hostilities in Palestine, it is undisputed that international humanitarian law is applicable in the region.

Recommendations

The two main international courts, the ICJ and ICC have limited jurisdiction on the matter as evidenced by the Advisory Opinion pending before the ICJ and the investigation initiated by the ICC. Israel has not accepted the jurisdiction of the ICJ and is not a Party to the Rome Statute of the ICC. Hence, these recourse to these two judicial bodies remains limited.

Palestine has done so in the past and should continue to look towards the various specialized United Nations committees established under different multilateral instruments and bodies. Treaty bodies of the UN that can be approached by Palestine and the international community include:

1. Human Rights Committee
2. Committee on the Elimination of Racial Discrimination
3. Committee on the Elimination of Discrimination against Women
4. Committee on the Rights of the Child
5. Committee on Economic, Social and Cultural Rights
6. Committee against Torture
7. Committee on Migrant Workers
8. Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
9. Committee on the Rights of Persons with Disabilities
10. Committee on Enforced Disappearances

I) Background to the Dispute

More than 100 years ago, on 2 November 1917, the Balfour Declaration committed the British government to “the establishment in Palestine of a national home for the Jewish people” and to facilitating “the achievement of this object”. This resulted in mass migration of Jewish people in Palestine, where Palestinian Arabs made up more than 90 percent of the population.

This migration continued and in 1947 the United Nations approved a plan to partition Palestine into a Jewish and Arab state, with the Arabs strongly opposing the partition. In May 1948, Israel was officially declared an independent state with David Ben-Gurion, the head of the Jewish Agency, as the prime minister. Following the announcement of an independent Israel, five Arab nations—Egypt, Jordan, Iraq, Syria, and Lebanon—immediately invaded the region in what became known as the 1948 Arab-Israeli War. Numerous wars and acts of violence between Arabs and Jews have ensued since the 1948 War. The Israeli-Palestinian Conflict has claimed tens of thousands of lives and displaced millions till date.

On 7 October 2023, Hamas, the Islamic Resistance Movement and a Palestinian Sunni Islamist political and military organization, launched an unprecedented surprise attack on Israel and infiltrated the country by air, land and sea. Hamas’s attack on Israel resulted in a loss of an estimated 1,200 people.

In retaliation to the attack by Hamas, Israel declared war on the Gaza Strip, indiscriminately bombing the area. Israel has responded with a relentless campaign of airstrikes and an expanding ground invasion on Gaza, destroying entire neighborhoods and displacing more than two-thirds of the population. According to the newspaper reports, more than 21,000 Palestinians have been killed in Gaza since 7 October. While there is no breakdown between fighters and civilians, a large portion of the dead are women, children and international aid workers including doctors.

II) International Law Violations in Palestine

The indiscriminate killing and unproportionate use of force by Israeli forces amount to violations of international law. Considering the situation of hostilities in Palestine, it is undisputed that IHL is applicable in the region.

IHL, rooted in the Geneva Conventions of 1949 and customary international law, is designed to safeguard civilians and those no longer active in combat, such as surrendered soldiers, and to restrict weapons and combat tactics. Its provisions, which are binding on all states and non-state armed groups in a conflict, prohibit indiscriminate attacks, targeting civilians, and collective punishment, regardless of military disparities. It is important to note that the rules of law and war are non-reciprocal, meaning that they apply irrespective of what the other side has done. The main violations of international law by Israel are discussed below.

Collective Punishment

The use of collective punishment, defined as the imposition of sanctions or deprivations on a particular group—political, ethnic, religious or otherwise—for acts committed by individual members of that group, is strictly prohibited by Article 33 of the Fourth Geneva Convention. This comports with the modern legal principle that individuals alone are responsible for their acts, not the groups to which they belong.

Historically used as a deterrent tool by occupying powers to prevent attacks from resistance movements, collective punishments for acts committed by individuals during an armed conflict are prohibited by IHL against prisoners of war or other protected persons. IHL posits that no person may be punished for acts that he or she did not commit. Collective punishment is prohibited, based on the fact that criminal responsibility can be attributed only to individuals.

Indiscriminate bombing by Israel, under the guise of rooting out Hamas, amounts to collective punishment. Moreover, cutting off food, water, electricity, and fuel for the entire population residing in Gaza, including innocent civilians, is strictly prohibited by international law.

Use of Prohibited Weapons

Specific types of weapons are banned by international law entirely, such as anti-personnel landmines, and biological and chemical weapons. Other weapons are subject to limits – such as those that cause indiscriminate suffering. The way weapons are used can be as important as what they do. For example, incendiary weapons, designed to spread fire or to burn, are prohibited in all circumstances against civilians. But lawful use against soldiers is possible. Some weapons may be lawful for use against buildings or enemy tanks but not if directed at combatants.

There are serious allegations that Israel has used white phosphorus in Gaza, a substance with devastating effects on human tissue. In war, white phosphorus can only be used for illumination or marking targets. The problem is, the chemical easily burns anything. Israel has used white phosphorus in densely populated areas of Gaza. Every time white phosphorus is used in densely populated areas, it poses a high risk of severe burns and lifelong suffering.

Occupation and Settlement Issues

Several recent decisions by international courts have also confirmed that the occupying power is obliged to comply with its human rights obligations in occupied territories and in respect of people placed under its effective control as a result of occupation or detention.

The United Nations has reiterated the longstanding international view that Israel's settlement activities in the West Bank and East Jerusalem, and the displacement of civilians, potentially constitute war crimes. Despite Israel's withdrawal from Gaza in 2005, the United Nations maintains that Israel's effective control over the area continues and this mandates Israel to fulfill its obligations under IHL to provide for the basic needs of the population.

Ethnic Cleansing

Ethnic cleansing or racial cleansing is the systematic forced removal of ethnic, racial, or religious groups from a given area, with the intent of making a region

ethnically homogeneous. Along with direct removal, extermination, deportation or population transfer, it also includes indirect methods aimed at forced migration by coercing the victim group to flee and preventing its return, such as murder, rape, and property destruction. It constitutes a crime against humanity and also falls under the definition of genocide under the Genocide Convention.

United Nations human rights experts have warned that Palestinians are in grave danger of mass ethnic cleansing. Since 7 October 2023, Palestinians have been killed, including women and children, numerous injured, and over 423,000 people have been displaced as a result of the Israeli strikes. This fate befell a population which has already experienced five major wars since 2008 in the context of an unlawful blockade imposed by Israel since 2007. Moreover, on 12 October 2023, Israeli forces issued an order for 1.1 million Palestinians in north Gaza to move to the south within 24 hours, amidst ongoing airstrikes. The next day, Israeli forces reportedly began to enter Gaza in order to “clear” the area. Palestinians have no safe zone anywhere in Gaza, with Israel having imposed a “complete siege” on the tiny enclave, with water, food, fuel and electricity unlawfully cut off. Rafah, the only border crossing that remained partially open to the Gaza strip, was closed after damage caused by Israeli airstrikes.

War Crimes

War crimes are serious violations of the laws of war committed by individuals with criminal intent, that is, deliberately or recklessly. War crimes include deliberately attacking civilians, taking hostages, and collective punishment during active hostilities.

Anyone who commits a war crime is criminally liable, as are those responsible for ordering, assisting in, or facilitating a war crime. Commanders and civilian leaders may be criminally liable, under the principle of command responsibility, if they knew or should have known about crimes their subordinates committed and failed to adequately prevent the crime or punish those responsible.

Airstrikes and rocket attacks by Israel, that target civilians or are indiscriminate, violate the laws of war, and, when committed with criminal intent, constitute war crimes.

III) Jurisdiction in a Consent-Based System

International law is built on the foundation of sovereignty, a pillar of which is state consent. A state's legal obligations are overwhelmingly, though not exclusively, based on its consent to be bound. This focus on consent offers maximal protection to individual states. This means that if a country feels that a proposed addition or change in international law does not serve its interests, it can avoid that change by withholding its agreement. This commitment to consent preserves the power of states but it also creates a serious problem for the international system. This is because any state can object to any proposed rule of international law, and only changes that benefit every single affected state can be adopted universally. This creates a cumbersome status quo bias.

Consent is important because a significant feature of international law is the lack of coercive enforcement by the system. Imposing rules or decisions on states without their consent creates the risk that the rules will be ignored. The consent requirement promises to reduce the frequency of non-compliance by limiting international law rules to those that states have already agreed to accept.

International courts work on the same principle of consent. States have to agree to the jurisdiction of the court and only then can a court adjudicate a matter relating to a particular state and have enforcement powers over that state.

IV) International Court of Justice

The International Court of Justice ("ICJ") is the principal judicial organ of the United Nations. It is responsible for the adjudication of disputes between state parties. According to Article 34 of the ICJ Statute, only states may be parties in cases before the court. Individuals do not have access to the court.

The ICJ's jurisdiction is twofold: it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (contentious jurisdiction); and it gives advisory opinions on legal questions at the request of the organs of the

United Nations, specialized agencies or one related organization authorized to make such a request (advisory jurisdiction).

Contentious Jurisdiction

Contentious cases may come before the ICJ under Article 36 of the Statute of the ICJ. The ICJ is only competent to entertain disputes between States that have accepted its jurisdiction, which can be done in any one of the three following ways:

After a dispute arises, the disputing states may, by special agreement, submit the dispute to the Court.

States may accept the jurisdiction of the Court with respect to the interpretation of a treaty by including an appropriate clause in the treaty. States have been reluctant to submit to the ICJ's jurisdiction in this way, usually by placing reservations on the dispute resolution provisions of the treaty they are signing.

A state may make a declaration accepting the compulsory jurisdiction of the Court over international law disputes with other states that have made a similar declaration. Furthermore, states accepting this general jurisdiction generally have reservations in force that limit the practical effect of this jurisdiction.

Advisory Jurisdiction

Advisory opinions by the ICJ are judicial statements on legal questions submitted to the Court by organs of the United Nations and other international bodies so authorized.

As to formal authority, advisory opinions do not constitute a "decision" within the meaning of Articles 59 of the ICJ Statute and 94(1) of the United Nations Charter, even where the Request for an Opinion relates to a legal question actually pending between States. As explained by the ICJ in the Peace Treaties case: "The consent of States, parties to the dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings, [where] the Court's reply is only of an advisory character: as such, it has no binding force".

Israel-Palestine Dispute and the ICJ

With regards to contentious jurisdiction, Palestine will not be able to proceed in litigation against Israel. Initially, in the 1950s, Israel informed the United Nations of its acceptance of the compulsory jurisdiction of the ICJ, subject to a number of caveats. However, on 21 November 1985, Israel notified the United Nations Secretary-General, that it no longer accepts the compulsory jurisdiction of the ICJ.

With regards to an Advisory Opinion, public hearings have been set for February 2024 by the ICJ on the “legal consequences arising from Israel’s policies and practices in the Occupied Palestinian Territory, including East Jerusalem,” within the framework of a request for an advisory opinion prior to the current conflict, emanating from the United Nations General Assembly.

The two specific questions posed by the United Nations General Assembly to the ICJ are as follows:

(1) “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?”

(2) “How do the policies and practices of Israel 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?”

Israel disputes the ICJ’s jurisdiction over this matter. The request for an advisory opinion stems from a report published in October 2022 by a commission of inquiry mandated by the United Nations Human Rights Council, led by South African judge and international law expert, Navanethem Pillay. The report concluded that “There are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law due to its permanence and the Israeli Government’s de-facto annexation policies”. The document was described as “partial and biased, disqualified by its hatred for the State of Israel” by the Israeli Ministry of Foreign Affairs.

The international community, particularly those that support Palestine, eagerly await the outcome of the Advisory Opinion by the ICJ. In response to an Order by the ICJ, dated 3 February 2023, multiple states and international organizations have submitted written comments and statements on the matter pending before the international court. States and organizations that have joined the proceedings through these comments include: Jordan, the Organisation of Islamic Cooperation, Qatar, Belize, Bangladesh, the observer State of Palestine, the United States of America, Indonesia, Chile, the League of Arab States, Egypt, Algeria, Guatemala, Namibia, Pakistan and most recently, Indonesia.

However, the request to the ICJ was made prior to the eruption of the current conflict and so will most probably not touch upon the human rights abuses by Israel in Palestine since October of this year.

V) International Criminal Court

The International Criminal Court (“ICC”) is an intergovernmental judicial forum. The ICC investigates and, where warranted, tries individuals charged with crimes under the jurisdiction of the Court.

The ICC can only investigate and prosecute “natural persons” who are over the age of 18. The ICC cannot investigate or prosecute governments, corporations, political parties, or rebel movements, but may investigate individuals who are members of such groups. Also, the ICC can only exercise jurisdiction over nationals from a state within the Court’s jurisdiction (e.g. State Party; non-State Party that consents to jurisdiction or was referred by the United Nations Security Council (“UNSC”)).

The Rome Statute of the ICC (“Rome Statute”) is a multilateral treaty that serves as the ICC’s foundational and governing document. States which become Party to the Rome Statute become Member States of the ICC. Currently, Palestine is a State Party to the Rome Statute but Israel is not.

Jurisdiction & Functioning of the ICC

The ICC has jurisdiction to prosecute individuals for crimes listed in Article 5 of the Rome Statute. Article 5 states that, “the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide

This includes all acts committed with the intent to destroy a national, ethnic or religious group.

(b) Crimes against humanity

These include acts committed as part of a widespread or systematic attack directed against any civilian population, such as murder, deportation, torture and rape. The ICC prosecutes the perpetrators even if the crimes were not committed in times of war.

(c) War crimes

This includes torture, mutilation, corporal punishment, hostage taking and acts of terrorism. This category also covers violations of human dignity such as rape and forced prostitution, looting and execution without trial. War crimes, unlike crimes against humanity, are always committed in times of war.

(d) The crime of aggression

This includes crime against peace and includes the planning, initiation, or execution of a large-scale and serious act of aggression against a sovereign state using state military force.

The jurisdiction of the ICC is intended to complement existing national judicial systems and it may therefore exercise its jurisdiction only when certain conditions are met, such as when national courts are unwilling or unable to prosecute criminals or when the UNSC or individual States refer situations to the Court.

Under Article 13 of the Rome Statute, there are four ways the exercise of the ICC's jurisdiction can be triggered where crimes under the Court's jurisdiction appear to have been committed:

- i. Under Article 5 of the Rome Statute, any State Party may request the Prosecutor to carry out an investigation. This was done in the cases of the Democratic Republic of the Congo, Uganda, Central African Republic on two occasions, and Mali;
- ii. The UNSC may also refer a situation to the Prosecutor. To date, this possibility has materialized with respect to the situations in Darfur and Libya. UNSC referrals may also give the Court jurisdiction over States not Party to the Rome Statute;
- iii. The Prosecutor may open an investigation on her own initiative after the authorisation of the judges; this was the case for Kenya, Côte d'Ivoire, Georgia, Bangladesh/Myanmar and recently, Afghanistan. The Prosecutor cannot, on her own motion, initiate investigations with respect to States not Party to the Rome Statute unless the matter involves nationals of States Parties allegedly involved in committing Rome Statute crimes on the territory of the Non-State Party in question.
- iv. Exceptionally, States may accept the jurisdiction of the Court on an ad hoc basis, by submitting a declaration pursuant to article 12(3) of the Rome Statute. A State not party to the Rome Statute can also accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals, and request the Office of the Prosecutor to carry out an investigation.

Israel-Palestine Dispute and the ICC

The ICC has been identified as a potential avenue for prosecuting severe violations by Israeli individuals, like war crimes and genocide. Despite Israel's contention that the ICC lacks jurisdiction and questions surrounding Palestine's statehood, the ICC's mandate has garnered considerable international support. Palestine's accession to the ICC in 2015 and subsequent calls for investigation into Israeli settlements underscore the gravity of the situation.

On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the Court over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. On 3 March 2021, the Prosecutor announced the opening of the investigation into the Situation in the State of Palestine. This followed Pre-Trial Chamber I’s decision on 5 February 2021 that the Court could exercise its criminal jurisdiction in the Situation and, by majority, that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.

If there is probative evidence that war crimes, crimes against humanity and even genocide have been committed by Israeli officials, then the ICC would have jurisdiction over these crimes in the occupied Palestinian territory. This is based on a February 2021 ruling by the Pre-Trial Chamber of the ICC that its jurisdiction extends to Gaza and the West Bank, including East Jerusalem.

The ICC's current chief prosecutor, Karim Khan, stated at a press conference in Cairo that the situation in Israel and Palestine remains a high priority for his office. However, critics of Khan's record at the ICC have argued that he has been too slow in pursuing his office's formal investigation of war crimes in Palestinian territory, which was opened back in early 2015. Furthermore, Karim Khan visited Israel to meet with victims of attacks by Hamas but he did not meet with victims of Israel's occupation and settler terrorism or their families. This in itself does not inspire a lot of confidence in the ICC under Khan’s leadership.

VI) Conclusion

In 2005, Israel evacuated its military and its 8,000 settlers from Gaza, and claimed that its occupation had ended. It subsequently defined Gaza as an “enemy entity”, a concept unknown in law. However, the United Nations continues to consider Gaza to be territory occupied by Israel, and therefore governed by international humanitarian law. This is because Israel has maintained a comprehensive air, sea and

land blockade that has been in place since 2007. Under international law, an occupation does not depend on whether a foreign power has direct ground troop presence in a territory, but whether it asserts “effective control”.

In 2009, the UNSC affirmed the status of Gaza in Resolution 1860, which stated that “the Gaza Strip constitutes an integral part of the territory occupied in 1967.” As a result, the Palestinians of Gaza are still “protected persons” under the Fourth Geneva Convention and entitled to the extensive protections guaranteed to them under the laws of war and IHL.

VII) Recommendations

All hope is not lost for Palestine when it comes to redressal through international law. Palestine has done so in the past and should continue to look towards the various specialized United Nations committees established under different multilateral instruments and bodies.

For instance, in 1975 the United Nations General Assembly established the “Committee on the Exercise of the Inalienable Rights of the Palestinian People”, and requested it to recommend a programme of implementation to enable the Palestinian people to exercise their inalienable rights to self-determination without external interference, national independence and sovereignty; and to return to their homes and property from which they had been displaced.

Treaty Bodies

Moreover, the plight of the Palestinian diaspora can be highlighted before treaty bodies. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty.

There are ten human rights treaty bodies composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed

renewable terms of four years by State parties. The treaty bodies meet in Geneva, Switzerland. All the treaty bodies receive support from the Human Rights Treaties Division of OHCHR in Geneva.

Treaty bodies of the UN that can be approached by Palestine and the international community include:

1. Human Rights Committee- monitors implementation of the International Covenant on Civil and Political Rights.
2. Committee on the Elimination of Racial Discrimination- monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination.
3. Committee on the Elimination of Discrimination against Women- monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women.
4. Committee on the Rights of the Child- monitors implementation of the Convention on the Rights of the Child.
5. Committee on Economic, Social and Cultural Rights- monitors implementation of the International Covenant on Economic, Social and Cultural Rights.
6. Committee against Torture- monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.
7. Committee on Migrant Workers- monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
8. Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment- established pursuant to the Optional Protocol of the Convention against Torture. The Committee visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
9. Committee on the Rights of Persons with Disabilities- monitors implementation of the International Convention on the Rights of Persons with Disabilities.
10. Committee on Enforced Disappearances- monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance.

Israel has signed and ratified most of the international instruments listed above. Hence, raising the issue before these committees remains a viable option under international law. Although the recommendations or decisions of these committees are usually not legally binding, they fall under the category of soft law and have strong persuasive value.