

GAZA CRISIS: ICC'S ARREST WARRANTS AND THE QUEST FOR ACCOUNTABILITY

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Abstract

The International Criminal Court (ICC) issued arrest warrants for Israeli and Hamas leaders amid the Gaza crisis, sparking international reactions. The warrants followed Hamas' "Operation al-Aqsa Flood," based on self-determination rights, and Israel's "Operation Iron Swords" against Hamas in Gaza in October 2023. This led to hostage taking, civilian murders, and inhumane treatment of captives. The humanitarian crisis worsened with civilian casualties from airstrikes and ground operations. The ongoing violence raises questions about international law and ICC's authority to issue arrest warrants. The Prosecutor of the ICC is authorized to seek arrest of warrants on suspects of war crimes and crimes against humanity based on Articles 12(2)(a)(b), 13(c), 15(1)(3) and 58 of the Rome Statute. This article explores the legal positions of Israel and Palestine, the jurisdiction of the ICC, and the Prosecutor's role in ensuring justice and accountability. It also addresses the crimes committed in Gaza, the evidentiary standards required for the ICC to issue warrants, political tensions, and the lack of cooperation from governments, along with geopolitical factors and accountability challenges stemming from global polarization. Despite these considerable challenges, the ICC's efforts are vital for securing justice for the victims in Gaza. Thus, it underscores the urgent need for major changes in the global justice system.

Keywords: International Criminal Court, Rome Statute, Israel, Hamas, Conflict, Prosecutor, Arrest Warrants.

I. Introduction

A militant group called Hamas launched an operation named Operation: al-Aqsa Flood on October 7, 2023.¹ This synchronized attack caused the death of hundreds of civilians, about 245 hostages and the abuse of many others. This act was heavily criticized by most of the international community, including the ICC.² However, the United Nations Secretary-General recognized that not everything was done in a vacuum by Hamas. There have been many battles between Israel and Palestine since 1948 and to date, organisations like Hamas have emerged.³ After the attack of October 7, Israel claimed its right to self-defence and declared war on Hamas, which was initially regarded as a legitimate war according to Article 51 of the UN Charter.⁴ But the severity and brutality of the war have made it subject to international criticism. Gazans have been murdered or starved to death and into poverty. Blockage of aid to Israel initially was more damaging to women, children and doctors. The use of force in armed conflict (IHL) subjects all parties involved to the consequences of international humanitarian law. Wars should not violate IHL, which does not consent to direct civilian assaults, indiscriminate assaults, proportionality, discrimination, precaution, and military necessity. These are in the Geneva Conventions and Protocols. Oxfam estimates that 250 Palestinians have lost their lives every day in Gaza since the war erupted and thousands of others are threatened by famine, disease and cold.⁵ But the severity and brutality of the war have made it subject to international criticism. Gazans have been murdered or starved to death and into poverty. Blockage of aid to Israel initially was more damaging to women, children and doctors. The use of force in armed conflict (IHL) subjects all parties involved to the consequences of international humanitarian law. Wars should not violate IHL, which does not consent to direct civilian assaults, indiscriminate assaults, proportionality, discrimination, precaution, and military necessity. These are in the Geneva

Conventions and Protocols. Oxfam estimates that 250 Palestinians have lost their lives every day in Gaza since the war erupted and thousands of others are threatened by famine, disease and cold.⁶ The International Committee of Red Cross (1977) in the article titled "Israel and the Occupied Territories: Key Facts and Figures from October 7th to January 31st, 2024" reports many of the internally displaced Palestinians to be vulnerable.⁷ These concerns have been discussed by the UN General Assembly and UNSC, but a sustainable ceasefire has not been reached. ICC Prosecutor Karim and Khan (2024) if they are on the verge of commencing criminal charges and asking the ICC Pre-Trial Chamber to issue arrest warrants against the leading Israeli and Hamas leaders on grounds of violation of IHL and crimes in the Rome Statute.⁸ On July 17, 1998, the Rome Statute was adopted and became effective on July 1, 2002; so far, 120 countries have signed it. It seeks to foster international peace by prosecuting serious offences, such as genocide, war crimes, crimes against humanity and aggression.⁹ In this paper, we explore whether the Prosecutor can be able to issue arrest warrants against suspected Israeli and Hamas leaders who are accused of crime under the Rome Statute. It cites that on the basis of Articles 12(2)(a)(b)¹⁰, 13(c),¹¹ 15(1)(3)¹², and 58¹³, Articles warrant the Prosecutor to demand warrants on suspects of war crimes and crimes against humanity⁷¹⁴ and 8.¹⁵ The legal status of Israel and Palestine, the acts by Hamas under the Rome Statute, the jurisdiction of ICC, the role of the Prosecutor, the alleged crimes committed by Gaza, warrant terms, and obstacles are looked into. Therefore, this paper adopts a descriptive-analytical method to describe and discuss the statutory articles and international law opinions of ICC regarding its authority.

II. Legal Framework

A. Working of the International Criminal Court (ICC)

ICC is based in The Hague, Netherlands and plays a significant role in the prosecution of major international law crimes, particularly those associated with armed conflicts.¹⁶ The jurisdiction of the court is limited to certain serious crimes required under its founding document like genocide, crimes against humanity, and war crimes. The International Criminal Court (ICC) generally possesses both territorial and personal jurisdiction over crimes committed in the territories of states that are signatories to the Rome Statute and over crimes committed by its nationals whether on its own territory or in a foreign country in line with article 12(2)(a) (b) of the Rome Statute.¹⁷ Article 4(2) is as follows; The Court shall have its functions and powers, within the territory of any State Party, as well as by special agreement within the territory of any other State. It has jurisdiction that applies solely to these heinous acts perpetrated by the nationals of states that have already ratified the Rome Statute or in the territory of such states. State parties are countries which have accepted and signed the Rome statute; thus, they show their submissiveness to the rules.¹⁸ The International Criminal Court applies to Israel and Hamas since Palestine is a signatory to the Statute. Article 13(a-c) comes into effect with the jurisdiction of the court when the UNSC takes an investigation under Chapter VII of the UN Charter, or when the Prosecutor is engaged in an investigation proprio motu. Article 17 of Rome Statute holds that complementarity is a critical element to the jurisdiction of the court. In no case of ICC is it possible that the crimes have not been investigated or prosecuted at national level.¹⁹ South Africa, Bangladesh, Comoros, and Djibouti were some of the countries that were concerned over Gaza conflict. The foundation required by the Pre-Trial Chamber in its investigation is a reasonable one. This is the same standard as the burden of proof of the Prosecutor. Note that the Pre-Trial Chamber is not obliged to insist on additional evidence and higher conviction rates. Such cases cannot simply be dismissed based on ICC policies.²⁰

B. Status of Hamas, Israel, and Palestine under International Law

Key players in the conflict in Gaza include Israel, Palestine and Hamas, each of whom have a different legal status under international law (and in particular under the Rome Statute). Allowing for the application of Articles 1 and 2 above, those states that fulfil the 1648 Westphalian criteria and Article 1 of the 1933 Montevideo Convention are recognised by other states.²¹

After the United Nations' partition plan of 1947 set out to establish separate Jewish and Arab states in the land (and the two Jewish states had different names), Israel's declaration of independence was issued on May 14, 1948.²² This decision led to a series of wars between Arabs and Israelis, which also received a lot of criticism from the leadership of the Palestinians and several Arab countries. Israel meets all four of the criteria contained in Article 1 of the Montevideo Convention for the definition of a state. It involves a "defined territory, a permanent population, a government, and the capacity to enter into relations with other states, even though its legitimacy and the implications of its creation continue to be contested."²³ However, Palestine is often described as a "quasi-state."²⁴ There is a UN General Assembly resolution (67/19) that recognizes that Palestine is a non-member observer state under Israeli occupation. In the face of continuing political upheavals, over 145 UN member states recognize Palestine.²⁵ Palestinian territory consists of the West Bank and the Gaza strip. The Palestinian Authority (PA) has the main authority to administer the West Bank. It is the foremost accepted representative of the Palestinian people in international affairs.²⁶ Hamas is a 20th-century Islamist militant group in control of Gaza. The two entities compete against each other with different government policies, and both are Palestinian. Palestinian sovereignty and recognition by the international community are impacted by the conflict between the PA and Hamas.²⁷ Although this paper is not concerned with their juridical status, we use this background to analyze their fitness to sign treaties, including the Rome Statute. In short, for the purposes of this paper, Israel and Palestine are states and Hamas is a non-state actor within Palestine.

C. ICC's Jurisdiction in the Gaza Conflict

According to Article 125(3) of the Rome Statute, only States Parties to the United Nations may become Parties to the treaty. As the State of Israel has not signed the Rome Statute, ICC is generally not empowered to try crimes committed on its territory or against its nationals except in certain circumstances. These conditions will be described later in the section.²⁸ On January 2, 2015, Palestine submitted its accession documents to the UN Secretariat pursuant to Article 125(3) - despite not being a proper UN State. The Pre-Trial Chamber of the International Criminal Court has established Palestine as a state in 2021 under the Rome Statute. In its Decision on the Prosecution's Request for a Ruling on the Court's Territorial Jurisdiction in Palestine, the Pre-Trial Chamber concluded that Palestine had taken the appropriate accession process and was able to become a State Party to the Rome Statute as of February 5, 2021.²⁹ Thus, ICC has jurisdiction over crimes committed in Palestine, including in the West Bank, East Jerusalem and Gaza. For this paper, the jurisdiction of the crimes committed in Gaza since 13 June 2014 is defined by Article 12(2) (a) of the ICC Statute. Under Article 12(2), ICC has jurisdiction to prosecute crimes committed by Palestinians in Palestinian territory and elsewhere. The Expert Panel pointed out that the ICC has jurisdiction over crimes committed in Gaza or the West Bank by Israeli, Palestinian or other nationals. It also has jurisdiction over the crimes committed by the Palestinian nationals within Israel, although Israel is not a party to the ICC.³⁰

D. Role of the ICC Prosecutor

Under the Rome Statute, the ICC Office of the Prosecutor is the entity that starts investigations and prosecutions. The Act has a clear definition of its jurisdiction, particularly in para 13(c)³¹ and 15(1).³² Article 15(1-3) gives the Prosecutor a right to investigate crimes *proprio motu* if there is reasonable proof that the Court has jurisdiction.³³

With this extensive jurisdiction, the Prosecutor has opened investigations relating to the conflict in Gaza, involving possible violations of the Rome Statute during the hostilities. In an extensive investigation that built probable cause to arrest suspects, the Prosecutor obtained arrest warrants from the Pre-Trial Chamber against individuals who allegedly had personal responsibility for authorizing or supervising violations of the Rome Statute.³⁴ The initiation of these investigations does not mean that the individual is guilty; all suspects are presumed innocent until proven guilty in a court of law. This point needs to be highlighted. As provided by articles 15(4-5), 57 and 58 of the statute, the Prosecutor's requests are to be considered and decided by the Pre-Trial Chamber.³⁵ These articles set out the requirements and evidence required for an application for arrest-warrants to be granted or refused. Articles 58(1)-(2) set out in considerable detail the circumstances in which arrest warrants may be issued.³⁶

If the evidence supports what the Prosecutor has accused as war crimes or crimes against humanity, Hamas and leaders of Israel could be the subjects of arrest warrants issued by the International Criminal Court. Overall, the ICC Prosecutor is empowered to pursue these warrants, and he has been doing so, the details of which will be explained below.³⁷

Table 1: Timeline for ICC's Jurisdiction in Gaza Conflict.³⁸

Investigation	Application and Investigation timeline
Year 2015: Palestine Joins the Court	Article 12(3) of the Rome Statute the Palestinian Authority submitted a declaration and accepted ICC jurisdiction. Palestine also submitted its instrument of accession to the UN Secretary-General to join the Rome Statute. As a result, the Rome Statute took effect for Palestine on April 1, 2015.
Year 2018: Opening an Investigation and Request for Ruling on Jurisdiction.	Palestine has requested that the Prosecutor's Office investigate both historical and ongoing offenses throughout all regions of Palestine, as specified in Articles 13(a) and 14 of the Rome Statute. In 1967, Israel took control of the West Bank, East Jerusalem, and the Gaza Strip, in accordance with the 1949 Armistice Line.
Year 2019	Following a comprehensive, independent, and objective review, the Prosecutor determined that all criteria under the Rome Statute for initiating an investigation are satisfied. The jurisdiction suspects war crimes in the West Bank, including East Jerusalem and Gaza.
Year 2020	Given the complex legal and factual issues involved, the Prosecutor asked Pre-Trial Chamber I to clarify the Court's jurisdiction.
Year 2021: Opening of Investigations	After reviewing the Prosecutor's Application and submissions from victims' legal representatives, States, organizations, and scholars, I, by majority, determined that the Court's territorial jurisdiction in Palestine includes Gaza, the West Bank, and East Jerusalem—areas occupied by Israel since 1967.
Year 2023: Report of ICC	Karim Khan, ICC Prosecutor, reported on Palestine and Israel.
Year 2024	Chief Prosecutor Karim Khan of the ICC sought arrest warrants for Netanyahu, Gallant, and Hamas leaders Yahya Sinwar, Mohammed

	Deif, and Ismail Haniyeh.
Year 2024.	War crimes arrest warrants for Netanyahu, Gallant, Yahya Sinwar, Mohammed Deif, and Ismail Haniyeh by ICC.

III. Alleged Crimes Cited in the Arrest Warrants

The Chamber expressed the view that there is sufficient evidence to establish that the suspects were responsible for serious breaches of the Rome Statute. Arrest warrants have been issued for the last Hamas leader and leading Israeli officials who have been involved in fighting. The Chamber accepted the Prosecutor's position on the hostilities in Gaza and considered the situation to be an international as well as a non-international conflict. This is why the war has been categorized as that fought between Israel and Palestine, but also fought between Israel and Hamas, leading to the double categorization.³⁹ It allows the Court to use the applicable IHL rules for each of the conflict types and to prosecute all war crimes under its jurisdiction.⁴⁰

A. Specific Allegations Against Hamas Leaders

In view of the techniques used during the October 7, 2023, operation, the Chamber emphasized that there are sufficient grounds to consider the crimes allegedly perpetrated against Al-Masri as part of a comprehensive and systematic attack of Hamas, and other elements, against the civilian population of Israel.⁴¹ This discovery provides grounds for finding that such acts fall within the ambit of Article 7 of the Statute of the International Criminal Court and may properly be called crimes against humanity. The actions of this group in the commission of mass murders in various Israeli communities and during the Supernova festival, among others, may be classified as extermination (Article 7(1)(b)), and murder (Article 7(1)(a)). Further, there is a plausible basis to view these acts as the war crime of targeting civilians deliberately (Article 8(2)(b)(i)). In relation to the detention of large numbers of civilians, there may be evidence that the war crime of hostage-taking was also committed (Article 8(2)(a)(viii)).⁴² There was, therefore, the subjective element also demanded, namely, the conduct which was alleged to be aimed at forcing the release of the Palestinians held in Israel in return for the hostages. Finally, the Chamber concluded that there were reasonable grounds to believe that the following crimes were perpetrated in connection with the treatment to which the hostages allegedly have been subjected:⁴³

- Torture (articles 7(1)(f) and 8(2)(a)(ii));
- Rape and other forms of sexual violence (articles 7(1)(g) and 8(2)(b)(xxii)); cruel treatment (article 8(2)(b)(xxii));
- Outrages upon personal dignity (article 8(2)(b)(xxi)).

Al-Masri's criminal liability would be established on the basis that he directly committed the offences referred to above, or directly ordered the commission of the offences, or, if he was commander of the armed group, that he failed to prevent the commission of the offences.

B. Specific Allegations Against Israeli Leaders

The Chamber began by emphasising that Netanyahu and Gallant's conduct must be assessed from both sides regarding the arrest-warrants. In addition to fighting Hamas and Palestine, Israel occupies the Palestinian territories. The Chamber argued that the two suspects intentionally restricted access to humanitarian aid and failed to use all available channels to facilitate relief, substantially impairing humanitarian organisations' ability to deliver essential supplies to Gazans. As a result, access to hospitals, water, and food has become catastrophic. Such severe restrictions on humanitarian relief cannot be justified by military necessity or any other principle of international humanitarian law.⁴⁴ In particular, the Chamber also noted

that the deliberate and protracted deprivation along with specific statements by Netanyahu would establish a clear nexus between the suspension of humanitarian aid and objectives of warfare. For these reasons it may be considered plausible that:⁴⁵

- Netanyahu and Gallant are responsible for war crimes of starvation as a method of warfare (article 8 (2) (b) (xxv)).
- The deaths and extreme suffering caused by depriving all Gazans of food, water, and medicine provide sufficient grounds to believe that the two individuals committed murder (article 7(1) (a)), inhumane acts (article 7(1) (k)), and persecution.
- The war crimes of intentionally directing attacks against the civilian population in Gaza can be plausibly attributed to Netanyahu and Gallant (articles 8(2) (b)(i) and 8(2)(e)(i) of the Statute).

Once these presumed charges are compared to the facts of the conflict, some gaps are revealed. The formalised allegations do not identify any specific instances which could be considered within the jurisdiction of the Court.⁴⁶ The general prohibition on indiscriminate or disproportionate attacks also encompasses the conduct of attacks against civilians and war crimes pursuant to Article 8. In particular, attacks against persons or objects engaged in a humanitarian assistance or peacekeeping mission (paragraph (2)(b)(iii)); the initiation of an attack while aware of the disproportionate nature of the attack (paragraph (iv)); and the wilful direction of attacks against civilians (paragraph (ix)) are all included.⁴⁷

Attacks have now risen following May 20, 2024, and there was a large number of events taking place during the warrant review process. This raises questions as to the completeness of the allegations and the standards used to determine relevant behavior, especially in a legally complex context where violations of international humanitarian law are concerned as defined in the Court's Statute.⁴⁸

IV. Justification for Arrest Warrants

A. Evidence and legal basis for Hamas leaders

Terrorists, combatants or members of non-state armed groups are properly investigated and prosecuted for acts that could qualify as terrorist acts and violations of IHL.⁴⁹ In this regard, such persons cannot claim to be shielded by international humanitarian law. All parties to the conflict (state and non-state armed groups, as well as hybrid groups that merge aspects of the two) are required to respect basic principles of humanitarian protection.⁵⁰ Many IHL commentators recognize that States Parties have a legal obligation to ensure the application of IHL to members of non-state armed groups, regardless of whether they consent, based on the obligations the parent State of the group has undertaken under IHL. As a result, the ability for individual members to be criminally responsible for breaches of IHL may result in accountability for their entire organisation.⁵¹ The Prosecutor has the power to issue arrest warrants against Hamas leaders who are suspected of committing war crimes, including Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri and Ismail Haniyeh. In the Prosecutor's application, the Prosecutor alleges that Sinwar, Deif and Haniyeh are co-perpetrators pursuant to article 25(3)(a) of the ICC Statute because of their alleged shared intention to murder civilians, capture hostages, and attack Israeli military bases.⁵²

However, it is important to note that Israel has killed these people since then during hostilities and therefore prevented their trial at the ICC. However, the jurisdiction of the ICC in these types of cases can be best understood by looking at the previous actions of the Prosecutor. It was stressed by the Prosecutor that these persons are criminally responsible under other modes of liability under article 25(3) and as superiors for failing to take the necessary and reasonable steps within their authority to "prevent or repress" the crimes or to

"refer the matter to the competent authorities for investigation and prosecution" under article 28 of the ICC.⁵³

The international panel of lawyers agreed that the prosecutor was right to issue arrest warrants for Hamas suspects. They confirmed reliable evidence that these crimes form part of an organized and systematic attack against Israeli civilians, which is consistent with Hamas's organizational policy.⁵⁴ It was the opinion of the panel that Sinwar, Deif, and Haniyeh took roles in planning and, through their words and activities, accepted responsibility.⁵⁵ Hamas leaders could not control their subordinates from committing crimes even though they could control hostages. We assume that the suspects are alive, and that there is enough evidence to convict. If that happens, these leaders can be arrested and tried to break the Rome Statute and laws of armed conflict, including the use of hostages as human shields and the targeting of civilians.⁵⁶

B. Evidence and Legal Basis for Israeli Leaders

This is an important step, because the Pre-trial Chamber ruled that the Gaza conflict is indeed an IAC. The whole indictment of Netanyahu and Gallant is because starvation is used as a military tactic. Given the greater responsibilities of the occupying powers to assist protected persons, it is possible that the PTCC's finding that the suspects hindered humanitarian relief "contrary to international humanitarian law" was triggered by its conclusion that the Gaza Strip was occupied territory.⁵⁷

According to reports, IAC is allegedly committing the war crime of starvation, by imposing a siege on Gaza and closing Rafah, Kerem Shalom, and Erez border crossings on October 8, 2023. When the crossings reopened, essential supplies were limited and water pipes from Israel to Gaza were cut off on October 9, 2023. Because of the death toll on aid workers and civilians, agencies had to limit their presence in Gaza. Another war crime: intentional serious bodily harm or distress.⁵⁸

Netanyahu and Gallant are indicted for extermination and murder. According to the Rome Statute, extermination consists of "the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population." Mass killings may be direct or indirect. As has been noted elsewhere, starvation is a war crime. However, if all the other components are present, then the explicit reference to deprivation of food and medicine makes it a crime against humanity of extermination.⁵⁹ Extermination requires a "mass killing," but the Expert Panel cites a judgment that extermination can involve killing 60 or more civilians. This standard appears more straightforward to meet based on publicly available data on hunger-related deaths.⁶⁰

Following the doctrine of *egra omis*⁶¹ and the Rome Statute, the Prosecutor issued arrest warrants for Benjamin Netanyahu, Israel's Prime Minister, and Yoav Gallant, the Minister of Defense, accusing them of war crimes for 'intentionally using starvation of civilians as a method of warfare' under article 8(2)(b)(25) of the ICC Statute.⁶² In Rafah, the attacks on refugee camps and hospitals, which were supposed to be directed at armed groups, led to civilian casualties and constituted a violation of international law, in particular the principles of precaution and distinction.⁶³ In view of the military benefit sought by the attack, these actions may be seen to be disproportionate under Article 57 of the API because they resulted in excessive collateral damage to civilians. As a result, the prosecutor considered the possibility of obtaining arrest warrants and criminal indictments against Israel's leaders in question.⁶⁴

V. Potential Outcomes and Implications

A. Legal Consequences

The ICC rulings mark a significant moment in the historical context of justice for the Palestinians, carrying numerous legal consequences, the most crucial of which are:

1. The Court's decision requires States Parties to the ICC (124 States so far) to, in accordance with their subsequent legal obligations, execute the arrest warrants in line with the provisions of the Rome Statute on extradition of persons sought by the law on their territory.⁶⁵
2. According to the arrest warrants, Netanyahu and Gallant are charged of committing serious offences. In the Gaza Strip, Israel has used starvation as a tool against civilian populations, cutting off their access to water, food, medicine, fuel, electricity and other necessities. In addition, the occupation has made the entry of aid conditional, a breach of international humanitarian law. Away from this military aggression, the Court has convicted both Netanyahu and Gallant for ordering the extensive attacks against civilians.⁶⁶
3. The ICC is an important breakthrough in the quest for justice for Palestinians, and it has far-reaching implications for the law. These decisions also lay the basis for further possible investigations and prosecutions, which would recognize the jurisdiction of the International Criminal Court over alleged crimes committed in Palestinian territories. The internationalization of the Israeli-Palestinian conflict via the ICC regime has the potential to change the dynamics of international engagement with the conflict due to the difficulties and challenges it presents to established political and legal constraints.⁶⁷
4. International events might lead to an enhanced scrutiny of the Israeli and Palestinian authorities and formal investigations of war crimes and crimes against humanity. This may help to avoid regional international law breaches. The decisions could also have implications on foreign aid, diplomatic relations and the Israeli Palestinian conflict. In other words, as parties try to avoid prosecution, the involvement of the ICC may motivate renewed attempts to comply with international law and pursue a peaceful solution.⁶⁸
5. The decision also allows the court or the International Court of Justice to use this ruling to support genocide charges in future trials.⁶⁹ The court said there are reasonable grounds to believe that the destitution of food, water, electricity, fuel, and certain medical supplies has produced living conditions that threaten the destruction of part of Gaza's civilian population and the death of civilians, including children, by deprivation and thirst. As defined by article 6 of the Rome Statute, "genocide" is "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." It is this intention to "destroy part of the civilian population in Gaza" that is central to defining genocide.⁷⁰

B. Political Implications

The Court's decision has important political implications, including:

1. The ICC arrest warrants for Benjamin Netanyahu and Yoav Gallant limit their travel to ICC member-states. The ICC has no enforcement mechanisms, and therefore state parties to the Rome Statute must enforce ICC arrest-warrants.⁷¹ Any of the Court's 125 member states must arrest and surrender Netanyahu and Gallant if they enter their territory. They are at risk of arrest in any member state of the International Criminal

Court, which limits their mobility. Some countries have invited Netanyahu and Gallant despite their ICC wanted status, violating the Rome Statute.⁷²

2. Due to Netanyahu and Gallant's leadership of the Israeli occupation, restricting weapons transfers to Israel puts the state in a difficult political and legal position.⁷³ Distributing weapons may also enable crime. Under Article 25/3(a), “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”⁷⁴
3. The ICC ruling could well help rein in Israeli aggression in the Gaza Strip. The criminal responsibility of Israel as a state and of the individuals in question may be further highlighted as the war progresses, as the magnitude of the crimes becomes more apparent.⁷⁵

VI. Challenges Faced by the ICC

Despite the ICC's defined jurisdictional boundaries, numerous significant obstacles impede justice efforts in the Israeli-Palestinian conflict.

A. Principle of Complementarity

Israel may challenge the case's admissibility on grounds of complementarity.⁷⁶ Article 17 of the Rome Statute (Article 17) states that a case shall not be tried by the Court unless the State is unwilling or unable to investigate or prosecute.⁷⁷ As laid down in the Informal Expert Paper on complementarity and adopted by the Appeals Chamber in the Katanga case, the ICC draws a distinction between two operational scenarios.⁷⁸ Failure to act is when no State takes domestic action. Such cases are permissible without considering unwillingness or incapacity: In the second case, an investigation or prosecution is being pursued at the domestic level.⁷⁹ For the court to rule on admission of the case, it must be shown that the state is unwilling or unable to investigate or prosecute. Complementarity is a useful concept but can be exploited by powerful states to get away with impunity for international crimes.⁸⁰

B. Non-cooperation from Israel

As a result of its status outside of the Rome Statute, Israel will not cooperate with the Court's request to investigate and apprehend the suspects. This makes them accountable to no one. The Rome Statute does not allow for any derogation in relation to formal cooperation with Israel, as noted in Article 12 of the Statute, but it does provide that the ICC may exercise jurisdiction over alleged offenses committed in Palestinian territories or involving Palestinians, regardless of the high-ranking Israeli officials involved.⁸¹ Article 27 also states that the treaty is binding on all persons, without distinction of any kind, such as may be made between the official and the private, the governing and the governed, the ruler and the ruled, the high and the low. ICC prosecutions of Omar Al Bashir for the crimes in Darfur demonstrate that impunity does not save one from prosecution.⁸²

C. Practical Obstacles in Investigation and Evidence Gathering

It is also difficult to carry out conflict research in unstable areas because of practical reasons. In the process of collecting reliable evidence, witness and investigator safety are compromised during violent incidents. The insecurity in Gaza also makes it extremely difficult to gather evidence and once again to ensure cooperation with local authorities and communities, especially in cases where distrust or fear exists. The absence of international peacebuilding efforts by the UN Security Council to call for a ceasefire or tackle the underlying causes of the conflict has been another factor delaying peace. This impasse has restricted the impact of the Security Council as mandated under UN Charter Articles 39, 40, and 41, relating to Resolution and Reconciliation of Conflicts.⁸³

D. Political and Diplomatic Hurdles

The theoretical approach, in turn, impacts the decision-making process of the ICC in the sense that geopolitical considerations, particularly the backing of Israel by influential allies such as the United States, influence the decision-making of the ICC. As noted above, in 2021, the ICC launched an inquiry concerning alleged war crimes and crimes against humanity in the framework of the Israeli-Palestinian conflict.⁸⁴ Because Israel did not sign the Rome Statute, the U.S. and EU actively opposed this action on the grounds that the ICC did not have jurisdiction. Making a rare exception, the Trump administration approved a letter to ICC officials, including then-Prosecutor Fatou Bensouda, accusing the court of unfairly singling out U.S. allies and excluding other international crimes.⁸⁵ The Biden administration has rolled back these sanctions but expressed opposition to the ICC's investigation into Israel, indicating that the US opposition to international judicial accountability is of a political nature. The West's endorsement of ICC prosecutions against African and Middle Eastern leaders exerts diplomatic pressure on the ICC and its state parties, an approach which restricts the court's capacity to prosecute Israeli officials.⁸⁶ Arrest warrants against Israel could unravel peace process, Middle East. Such biased decisions could have an adverse effect on the credibility of the ICC's role in international dispute settlement. It may also deepen Israel-Palestine tensions, throwing peace negotiations in the region off balance.

VII. Conclusion and Way forward

In the context of the Israeli/Hamas conflict, the ICC's request for arrest warrants for Israeli and Hamas leaders represents an important step in the process of seeking accountability for alleged war crimes and crimes against humanity. The present proceedings of the ICC Prosecutor conducted pursuant to Articles 12(2)(a)(b), 13(c), 15(1)(3) and 58 of the Rome Statute are illustrative of the jurisdictional commitment of the court to the way of finding answers to the most severe regimes of disregard for international law. Yet the ICC faces tremendous challenges in its quest for justice. There are also significant political and diplomatic hurdles, practical challenges to gathering evidence within conflict affected regions, and non-cooperation by Israel. Geopolitical factors, of which Israel's powerful ally the United States are only its most prominent example, are another constraint on the effectiveness of the court. Though it cannot be denied that the ICC has contributed to the development of international law norms, it is equally important to note that the ICC processes are often affected by the inconsistent application of international laws and the selective enforcement of laws. Testing the limits of what a truly impartial court can be, global skepticism about the court is increasingly rooted in the idea that it is an instrument of Western influence rather than a justice-neutral institution of law in the Global South. With regard to the ICC, for it to truly become a central pillar of global justice, sweeping reforms will have to be affected. Indeed, its structures need to be fundamentally reformed if the ICC is to continue to operate free from political interference. The ICC must increase its jurisdiction so that it applies to all States, including the most powerful. Currently, there is no way for the ICC to prosecute people from non-signatory states unless the UNSC refers bills to the ICC. In other words, this policy de facto acknowledges a legal immunity on the part of officers of the United States, China, Russia, and Israel. All the formalism of universal justice is transformed into a meaningless construct because of this structural weakness. One obvious way to ensure that the ICC has the potential to operate as a valid court rather than a selective sword of the law is to allow the ICC to prosecute all war crimes and crimes against humanity, regardless of the identity of the State party. In addition to structural changes, stronger guardrails need to be implemented if there is to be no political interference with ICC cases. It

is therefore clear that the ICC needs such reforms if it is to regain its credibility and achieve its mandate of providing impartial justice on an international level. In conclusion, while the actions of the ICC during the Gaza conflict are an important step towards accountability, it also highlights the need for significant reform of the international justice system. Also, it envisages developing a more realistic and just criminal law at the international level where we need to find a delicate balance between the drive to translate justice into a legal regime and the need to negotiate the mess of geopolitical reality.

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- ⁷ “Israel and the Occupied Territories: Key Facts and Figures from October 7th to January 31st 2024”, <https://www.icrc.org/en/document/israel-and-occupied-territories-key-facts-and-figures-october-7th-january-31st-2024>
- ⁸ Ninda Soraya1, Ali Muhammad, Suyatno Ladiqi, “ICC Jurisdiction: Against Israeli War and Humanitarian Crimes Targeting Palestinian Civilians 2023” 30, no. 1(2023): 59-77.
- ⁹ William A. Schabas, *an Introduction to the International Criminal Court* (Cambridge University Press, 2001), 1-21.
- ¹⁰ Article 12(2)(a) and (b) of the Rome Statute defines the International Criminal Court's (ICC) jurisdiction, stating it can investigate crimes when the State Party that commits the crime is either the one on whose territory the act occurred (territorial jurisdiction) or the one of which the perpetrator is a national (personal jurisdiction). For details see, “Commentary Rome Statute » Commentary Rome Statute: Part 2, Articles 11-21”, available at, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21>.
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- ¹² Article 15(1) (3) of the Rome Statute addresses the Prosecutor's power to initiate investigations proprio motu (on their own initiative), requiring the Prosecutor to seek authorization from a Pre-Trial Chamber to begin an investigation into a situation. This provision acts as a compromise, balancing the need for the Prosecutor to investigate crimes against the concern that politically motivated prosecutions could arise from unchecked prosecutorial discretion, available at, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-15>.
- ¹³ Article 58 concerns warrant of arrest or a summons to appear vis-à-vis the suspect which corresponds to the "indictment" in common law jurisdictions. It applies to persons who are "suspected", but not yet "accused" to have committed a crime under the jurisdiction of the Court. The status of "accused" is reserved to the stage

where the Pre-Trial Chamber has confirmed the charges. William A. Schabas, *the International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010), 695-701.

¹⁴ Article 7 of the Rome Statute defines "crimes against humanity" as specific acts, such as murder, extermination, enslavement, torture, rape, and persecution, when committed as part of a widespread or systematic attack directed against any civilian population, with the attacker's knowledge of the attack. These acts also include deportation, forced imprisonment, enforced disappearance, apartheid, and other inhumane acts of similar character. William A. Schabas, *the International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., (Oxford University Press, 2016), 153-172.

¹⁵ Article 8 of the Rome Statute defines and outlines jurisdiction over war crimes. It covers violations of international humanitarian law committed during both international and non-international armed conflicts, including grave breaches of the Geneva Conventions and their Additional Protocols, as well as other serious violations. Specific war crimes listed in Article 8 include sexual violence, the use of child soldiers, and attacks on protected objects like schools and hospitals. Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 380-381

¹⁶ Victor Tsilonis, *the Jurisdiction of the International Criminal Court* (Springer, Hague, 2019), 1.

¹⁷ United Nations (1998). Rome Statute of the International Criminal Court. *Treaty Series*, 2187.

¹⁸ See Rome Statute of the International Criminal Court, 17 July 1998, available at, <https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-1998/article-13>

¹⁹ Victor Tsilonis, *the Jurisdiction of the International Criminal Court* (Springer, Hague, 2019), 207-236.

²⁰ Ibid.

²¹ 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. For details see, Daniel Benoliel, Ronen Perry, "Israel, Palestine and the ICC," *Michigan Journal of International Law* 32, (2010):73-127, 2010, <https://ssrn.com/abstract=1391963>.

²² Ibid.

²³ See generally Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

²⁴ Ibid.

²⁵ Shadi Sakran, "The Creation of the Non-Member Observer State of Palestine: A Legal Analysis of Un General Assembly Resolution 67/19", *Vrije Universiteit Amsterdam Faculty of Law* 9, no.2 (2017): 131-135.

²⁶ "Israel and the Palestinians: History of the conflict explained", British Broad Casting (BBC), 8 August 2025, <https://www.bbc.com/news/articles/ckgr71z0jp4o>.

²⁷ Waqar Ahmed, Anila Sheikh, Sheikh Waleed Rasool, "Navigating the Israel-Palestine Conflict: Historical Roots, Current Dynamics, and Pathways to Peace", *Journal of Xi'an Shiyou University, Natural Science Edition* 20, no.6 (2024): 1-09.

²⁸ Ninda Soraya, Ali Muhammad, Suyatno Ladiqi, "ICC Jurisdiction: Against Israeli War and Humanitarian Crimes Targeting Palestinian Civilians 2023", *Jurnal Media Hukum* 31, no.1 (2024), 59- 77.

²⁹ ICC Pre-Trial Chamber I issues its decision on the Prosecutor's request related to territorial jurisdiction over Palestine, Press Release: 5 February 2021, at: <https://icc-cpi.int/Pages/item.aspx?name=pr1566>. See also, Andrew Tucker, "The ICC's controversial ruling on "Palestine" – pushing the boundaries of law", *thinc*, February 12, 2021, <https://thinc-israel.org/articles/the-iccs-controversial-ruling-on-palestine-pushing-the-boundaries-of-law/>

³⁰ Yaser Khalaileh, "Aggression in Palestine Jurisdictional Limitations of the International Criminal Court", *Journal of Legal, Ethical and Regulatory Issues* 25, no. 2(2022), 1-9.

³¹ William A. Schabas, "Investigation and Pre-Trial Procedure." Chapter. In *An Introduction to the International Criminal Court* (Cambridge University Press, 2017), 232-282.

³² Ibid.

³³ Beti Hohler, "Office of the Prosecutor: International Criminal Court (ICC)", *Max Planck Encyclopedia of International Procedural Law*, <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3359.013.3359/law-mpeipro-e3359?prd=OPIL#law-mpeipro-e3359-div1-7>.

³⁴ For details see, Alexander Lawson, Unable and unwilling: the ICC arrest warrants related to the case Situation in the State of Palestine," <https://rsilpak.org/2024/unable-and-unwilling-the-icc-arrest-warrants-related-to-the-case-situation-in-the-state-of-palestine/>.

³⁵ The Prosecutor is permitted to review and appeal decisions under Articles 15(4-5), while the Pre-Trial Chamber is permitted to investigate a State Party and obtain witnesses and evidence under Article 57. If there are reasonable grounds to suspect that an individual has committed a crime within the Court's jurisdiction and

such action is required for the investigation or trial, the Pre-Trial Chamber may issue a warrant of arrest or summons to appear under Article 58. For details see, See, Rome Statute of the International Criminal Court, 17 July 1998, available at, <https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-1998/>.

³⁶ For details see, William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn OUP 2016).

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⁴³ Alessia Preti, "The ICC Arrest Warrants in the Situation in the State of Palestine: Some Reflections on the Chamber's Decisions", 27.2025, <http://www.sidiblog.org/2025/01/27/the-icc-arrest-warrants-in-the-situation-in-the-state-of-palestine-some-reflections-on-the-chambers-decisions/>.

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⁴⁵ Ibid.

⁴⁶ Luca Poltronieri Rossetti, "The International Criminal Court and recent events in Israel and the Palestinian Territory: what are the prospects for establishing international criminal responsibility?", SIDIBlog, November 9, 2023, <http://www.sidiblog.org/2023/11/09/la-corte-penale-internazionale-e-i-recenti-avvenimenti-in-israele-e-nel-territorio-palestinese-quali-prospettive-per-l'accertamento-di-responsabilita-penali-internazionali/#comments>

⁴⁷ Victor Tsilonis, *the Jurisdiction of the International Criminal Court* (Springer, Hague, 2019), 127.

⁴⁸ Yara Asi and David Mills et. al, "Nowhere and no one is safe": spatial analysis of damage to critical civilian infrastructure in the Gaza Strip during the first phase of the Israeli military campaign, 7 October to 22 November 2023", *Conflict and Health* 18, 24 (2024), <https://doi.org/10.1186/s13031-024-00580-x>

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⁵⁰ Tristan Ferraro, "The applicability and application of International Humanitarian Law to Multinational Forces", *International Review of the Red Cross* 95, no. 891/892 (2013): 561–612.

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Individual criminal responsibility, <https://www.legal-tools.org/doc/e8ad48/pdf/>.

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⁵⁶ Ibid.

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⁶³ Raphaël van Steenberghe, “The Armed Conflict in Gaza, and Its Complexity under International Law: Jus Ad Bellum, Jus in Bello, and International Justice.” *Leiden Journal of International Law* 37, no. 4 (2024): 983–1017, <https://doi.org/10.1017/S0922156524000220>.

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⁸² The Al-Bashir case decision by the ICC Appeals Chamber establishes a significant precedent. The Chamber concluded that customary international law does not acknowledge the immunity of Heads of State as a barrier to international criminal jurisdiction in international courts. This suggests that even current Heads of State and high-ranking officials may be subject to ICC proceedings. It is important to note that Al-Bashir was the President of Sudan when the International Criminal Court (ICC) issued arrest warrants for him in 2009 and 2010. Sudan, like Israel, was not a State Party to the Rome Statute. The principle that personal immunity does not apply in international criminal courts and tribunals has been firmly established by the legal developments in cases such as Slobodan Milošević at the International Criminal Tribunal for the former Yugoslavia, where he was the President of Serbia when indicted in 1999 and remained in office until 2000, Charles Taylor at the Special Court for Sierra Leone, Hashim Thaçi at the Kosovo Specialist Chambers, and Omar Al-Bashir and Vladimir Putin at the ICC. Additionally, Uhuru Kenyatta and William Ruto were both summoned to appear before the International Criminal Court (ICC) while serving as the President and Deputy President of Kenya, respectively. Despite the fact that no arrest warrants were ultimately issued against them, their cases serve to underscore the irrelevance of official capacity in the ICC's jurisdiction over sitting state officials. This principle, which is explicitly enshrined in Article 27 of the Rome Statute, has now been recognised as customary international law, thereby confirming that no official status can shield individuals from accountability before international criminal tribunals.

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