

HEGEMONY OVER HUMANITY: HOW VESTED INTERESTS UNDERMINE JUSTICE FOR PALESTINE

by

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Background

The conflict in Gaza has been ongoing since 8th October 2023. Even after a ceasefire agreement came through Israel has continued airstrikes on Gaza thereby violating ceasefire agreements. Israel has used methods of starvation, bombing hospitals, restricting humanitarian relief, intentionally directing attacks against civilian populations, and committing multiple other crimes well-recognized as war crimes under International Laws and Statutes. The death toll in Gaza has crossed a threshold of 50,000.

Following this, the office of the Prosecutor in the ICC received a referral regarding the situation in the State of Palestine from South Africa, Bangladesh, Bolivia, Comoros, Djibouti, the Republic of Chile, and the United Mexican States on 17th November, 2023. Subsequently, the Pre-Trial Chamber, after due analysis of the situation, issued arrest warrants for Benjamin Netanyahu and Yoav Gallant for crimes against humanity and war crimes committed from at least 8th October, 2023 until at least 20th May, 2024. The court also issued an arrest warrant for Mohammad Diab Ibrahim Al-Masri, commonly known as Deif. However, Deif was killed in an airstrike, and his death was confirmed by Hamas on 30th January, 2025.

After the issuance of the arrest warrants, Israel challenged the jurisdiction of the court over the State of Palestine and Israeli nationals based on Article 19(2) and Article 18(1) of the Rome Statute. The Chamber rejected the appeals of invalid jurisdiction on the following grounds:

1. The Court can exercise jurisdiction based on the territorial jurisdiction of the State of Palestine.
2. States are not entitled to challenge jurisdiction under Article 19(2) prior to the issuance of arrest warrants, which leaves room for future appeals to challenge the jurisdiction of the court and is merely premature.

This recent development raises the question of whether the ICC has jurisdiction over Israeli nationals, specifically Netanyahu and Gallant.

Relevance of Oslo Accords

The Oslo Accords were an agreement signed in 1993 between Israel and the Palestine Liberation Organisation (PLO), which was recognized as the representative of the Palestinian people at that time. The Oslo Accords aimed to establish a two-state solution through limited self-governance for Palestinians in the Gaza Strip and West Bank by establishing a Palestinian Authority (PA). The agreement was signed by Israeli Prime Minister Yitzhak Rabin and PLO Negotiator Mahmoud Abbas. The accords provided the Palestinian people in the West Bank and Gaza Strip the right to govern themselves based on democratic principles, with direct, free, and general political elections conducted for the Council under agreed supervision and international observation, thereby forming a right to self-determination for Palestinians. However, the Oslo Accords prohibited criminal proceedings against Israeli nationals. Consequently, the Palestinian Authority was never able to delegate criminal jurisdiction over Israeli nationals to the ICC¹, as it never possessed such jurisdiction initially. This aligns with the principle of **"nemo plus iuris transferre potest quam ipse habet"**, which means "no one can transfer to another more rights than they possess themselves."² It is safe to assume that the Oslo Accords have proven to be a failure in providing a peaceful situation in Palestine or a state of normalcy, and even if another agreement with provisions similar to the Oslo Accords were to be enforced, the same would not stand considering the extreme ideologies held by both the current Israeli government and Hamas.

It can be concluded that there are primarily two reasons under which the provisions of jurisdiction under the Oslo Accords would be deemed invalid:

1. The Oslo Agreements were signed between the Palestinian Authority (PA) and the Israeli government, and the areas of the West Bank and Gaza were given under PA control. However, since the Gaza Strip has been under the control of Hamas since 2007 after it defeated Fatah, which was a part of the Palestinian Authority (PA), the Agreements would not be applicable since Hamas is a militant organization and a rival

¹ Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, Sept. 13, 1993, available at <http://www.israel-mfa.gov.il/peace/dop.html>.

² *Written Observations by the League of Arab States Pursuant to Rule 103*, ICC-01/18-282 (Int'l Crim. Ct. 2024).

to Fatah, and therefore not a part of the Palestinian Authority established under the Accords.³

2. Article 58 of the Rome Statute outlines the conditions under which the Court may issue an arrest warrant upon the Prosecutor's application. This involves determining whether there are reasonable grounds to believe that the individual has committed a crime within the Court's jurisdiction. Since Palestine has acceded to the Rome Statute, the Court is required to exercise its jurisdiction in the Situation in Palestine in accordance with the Statute. The wording of the Statute clearly indicates that the Court has jurisdiction over crimes committed by Israeli nationals in the territory of Palestine. Therefore, in this scenario, the bigger picture of International Law comes into play, where the ICC can interfere.



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³ *Written Observations by ICJ Norway and Defend International Law Pursuant to Rule 103*, ICC-01/18-276 (Int'l Crim. Ct. 2024).

ICC or an Ad-Hoc Tribunal? Who can take robust measures?

The answer is likely none. Since the ICC has released warrants against Gallant and Netanyahu, all 124 countries that are signatories of the court are obliged to arrest them and further hand them over for prosecution to the court. The UK, Canada, Australia, France, Belgium, Italy, the Netherlands, and Norway all happen to be Israel's staunchest Western allies.⁴ Therefore, arresting Netanyahu or Gallant will be a diplomatic and political challenge for members of the ICC. This can be supported by the recent circumstance where Russia's Vladimir Putin and Sudan's Omar Al-Bashir couldn't be arrested. Hence, this puts signatories and members of the ICC in a conundrum.

Nonetheless, there is concern in Israel that various political entities may be encouraged by the ICC to pursue actions against individual soldiers under the premise of universal jurisdiction. This principle permits any state to prosecute individuals suspected of committing war crimes, regardless of a connection between the suspect and that state. Previous efforts to initiate such actions in the UK, Belgium, and Spain by pro-Palestinian groups have been impeded by local authorities, often on the basis that Israel maintains an independent judiciary capable of conducting its own investigations.

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⁴ Ali, R. (2024, November 21). ICC arrest warrants: What are the legal consequences for Netanyahu and Gallant? Anadolu Agency. Retrieved from <https://www.aa.com.tr/en/middle-east/icc-arrest-warrants-what-are-the-legal-consequences-for-netanyahu-and-gallant/24003064>

International Criminal Tribunals

In the post-Cold War era, a wave of recurring mass killings and violence that was happening throughout the world called for an international law control to be established, especially after the genocide in Rwanda and the former Yugoslavia. The International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for Yugoslavia ("ICTY") were formed for the specific purpose of prosecuting crimes committed in these specific regions. The concept of these tribunals was rooted in the Nuremberg trials and the Tokyo Trials, which were aimed at addressing mass genocides committed during WWII. The UN Security Council addressed war crimes from the Balkan conflicts of the 1990s through Resolution 827. Established in May 1993, it operated from 1993 to 2017 and made precedent-setting decisions on genocide, war crimes, and crimes against humanity. On 24th May 1999, the Tribunal indicted Slobodan Milosevic, the then-former President of the Federal Republic of Yugoslavia, for crimes in Kosovo, marking him as the first sitting head of state to be charged with war crimes by an international tribunal. The conflict in Kosovo was ongoing at the time of the Prosecutor's announcement, positioning the Tribunal as the first international law enforcement agency to address significant crimes in real-time.

The International Criminal Tribunal for Rwanda (ICTR) is the first international court established to prosecute senior individuals for significant human rights violations in Africa. Its purpose is to hold accountable those allegedly responsible for the 1994 Rwandan Genocide. The ICTR was established via Resolution 955. The ICTR established two significant precedents in the trial of Jean Kambanda (The Prosecutor v. Jean Kambanda). Kambanda served as Prime Minister of the Interim Government of Rwanda during the entire 100 days of genocide. He was brought before the ICTR in October 1997, where he pleaded guilty to six counts, including genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity. Kambanda's guilty plea and subsequent conviction represented the first instance in international law where a Head of Government was convicted of genocide and where an accused individual accepted responsibility for genocide before an international criminal tribunal.

From these instances of International ad hoc tribunals and historical perspectives from the Nuremberg trials as well as Tokyo Trials, it can be proved that the concept of justice for victims of genocide in International Law is not a utopian ideal but a very real possibility if nations unite without having vested interests. Thus, in the case of Palestine, the vested interests of the West

come into play. Unlike the independence of the ICC, which faces limitations after a certain threshold, these ad hoc tribunals can only be constituted by resolutions of the UNSC.⁵

The power to establish these ad-hoc mechanisms was finally established by the United Nations Security Council via Resolution 955 & Resolution 827 for ICTR & ICTY. Therefore, the question of whether an ad-hoc criminal tribunal can be established for genocide committed in Palestine rests on the opinion and willingness of the Security Council and its Permanent Members.



Role of the Security Council

⁵ S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010), available at [https://undocs.org/S/RES/1966\(2010\)](https://undocs.org/S/RES/1966(2010)).

The Security Council, being the most important organ of the United Nations, has the responsibility of maintaining international peace. The Security Council deploys international sanctions and authorizes military action.

Article 27 of the UN Charter states that decisions on all substantive matters require the affirmative votes of nine members, and even if any one permanent member vetoes or gives a negative vote, the adoption of the proposal can be prevented.

From 1972 to 2011, the US has constantly vetoed multiple resolutions to protect Israel from criticism from the Security Council.⁶ Here are some instances:

- In 1973, the US vetoed the rights of the Palestinian people to self-determination, statehood, and equal protections under International Law.
- Again in 1980, a resolution endorsing self-determination rights of people. The resolution gained 9 votes; the US was the only one that voted against the resolution.
- In 1988, the US vetoed a resolution demanding that Israel abide by the Fourth Geneva Convention and condemning Israeli human rights violations.
- In 1989, the US vetoed a resolution condemning Israeli human rights violations and for the establishment of a UN monitoring team in the occupied territories, including Jerusalem.
- In 2024, the US vetoed a resolution of the Security Council granting Palestine full UN Membership.

The United States' constant vetoing of resolutions in favour of Palestine, even those pertaining to basic human rights, signifies obstructing the will of the international community and the importance of vested interests of a nation over human rights.

Therefore, it can be concluded that the Security Council, which has failed to fulfil its main agenda of peacekeeping and efficiency, is unlikely to pass a resolution forming a criminal ad-hoc tribunal. But in such an instance where the US and other permanent members decide to support human rights, a Special Tribunal is the most just and feasible remedy to the victims of genocide in Gaza.

Conclusion

⁶ Majid Bozorgmehri & Ali Mohammad Khani, *Palestinian Issue and the Security Council of the UN*, 7 *Geopolitics Q.* 78 (2011).

As of 15th January 2025, a ceasefire has been reached between Israel and Hamas, thereby ending fifteen months of conflict in Gaza. The death toll reached 46,707, with 18,000 among these numbers being children. This number is way beyond the threshold of people killed in the Bosnian War, so the debate over whether this qualifies as genocide is futile. Approximately 85,000 tonnes of explosives were dropped on a major chunk of civilians, a number that is more than the number dropped in Japan during WWII.

The only mode to administer justice would be relying on a member state of the ICC to arrest Yoav Gallant and Benjamin Netanyahu. But the idea is a bit far-fetched because doing so is a huge step and will be an aggressive move towards the United States or other nations that support Israel.

The only hope for relief for both sides in the conflict would be reaching an agreement similar to the Oslo Accords but with more rights for the Palestinian people and complete right to self-determination, along with constant monitoring of the situation in the region by the United Nations.



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