

POLICY PAPER

مؤسسة الدراسات الفلسطينية
Institute for Palestine Studies

ISSUE: 015 | 18 Dec. 2023

Legal Measures Available to Bring Israel to Trial Following the Gaza War of 2023

* Paul Morcos



I. Executive Summary

This policy paper attempts to investigate the legal measures available to bring Israel to trial, charged with violations of international law during its war on Gaza in 2023. It aims to analyze the basic principles of international law, including the four Geneva Conventions and other international protocols, resolutions, and agreements, and to assess potential legal measures to be followed. The paper further highlights the importance of existing, fair and honest legal procedures dealing with such violations, in order to enhance justice and contribute to the establishment of permanent world peace.

II. Introduction

The 2023 war on Gaza has raised very serious concerns due to the unrestrained violations by Israel of international humanitarian law and human rights. By citing diverse legal procedures, this policy paper seeks to throw light on the question of accountability for any violations of these laws and principles, and to survey, in general terms, the legal procedures available to bring Israel to trial for its actions during the Gaza War.

“ The 2023 war on Gaza has raised very serious concerns due to the unrestrained violations by Israel of international humanitarian law and human rights ”

1. International agreements, protocols, and resolutions (International Humanitarian Law)

The Four Geneva Conventions constitute a series of international agreements governing the principles of human wars, and the protection of civilians and non-combatants during armed conflicts. Israel signed but did not ratify the Geneva Conventions, nor did it include them in their domestic legislation. The violations committed, such as targeting civilians and civilian infrastructures, the excessive use of force, and forcible expulsions should result in investigation and trial in accordance with articles 3, 27 and 49 of the Fourth Geneva Convention of 1949 (1), regarding the necessity of protecting civilians, as well as article 18, which prohibits the targeting of health and medical establishments.

Furthermore, the first Protocol of 1977 (2), particularly article 79 entitled “Measures of protection for journalists”, specifies the obligation to protect journalists, a matter not respected by Israel. On the contrary, Israel deliberately targeted them, nor did it abide by UN Security Council resolutions to this effect, for instance Resolution number 1738, of

December 23, 2006, entitled “Protection of civilians in armed conflict.” (3)

Even though Israel is not party to the protocols attached to these conventions in 1977, this nevertheless does not allow it to shirk its responsibility to abide by international humanitarian principles.

In this context, one must activate the legal and juridical measures that permit holding Israeli officials to account.

“ The Four Geneva Conventions constitute a series of international agreements governing the principles of human wars, and the protection of civilians and non-combatants during armed conflicts ”

2. The Rome Statute of the International Criminal Court of 1998

The Rome Statute established the International Criminal Court (hereafter ICC) as a permanent international court to try individuals accused of the most serious crimes of international import such as war crimes, crimes against humanity, and crimes of genocide and the crime of aggression. The Statute does not exempt national leaders and heads of state from prosecution, trial and accountability, which means that they do not enjoy any immunity before this court. (4) Although Israel is not party to the Rome Statute, the International Criminal Court does possess competence to exercise legal power in certain circumstances. Thus, Article 13 of the Rome Statute states:

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor

by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor

by the Security Council acting under Chapter VII of the Charter of the United Nations;
or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.” (5)

On February 5, 2021, the ICC Pre-Trial Chamber I held by majority that (6): *“(i) Palestine has correctly acceded to the Rome Statute and has thus become a State party to it; and (ii) the ICC’s*

territorial jurisdiction extends to ‘the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.’”

This highly important decision was taken as a result of a request submitted by the office of the Prosecutor-General of the ICC to emphasize the regional competence of the court after the Prosecutor-General had concluded earlier on that there is reasonable basis for the view that: *“war crimes had been, or are being committed in the West Bank, including East Jerusalem, and in the Gaza Strip.”* (7)

Said Benarbia, the ICC’s MENA Programme Director stated (8): *“The ruling is a first step towards breaking the cycle of impunity for crimes under international law committed by all parties to the conflict in Palestine. The Prosecutor should immediately open an investigation with a view to establishing the facts about such crimes, and identifying and prosecuting those most responsible.”*

3. UN Security Council

The UN Security Council is empowered with confronting all threats to international peace and security, as per Article 39 of the UN Charter, and can create special Ad Hoc tribunals or else refer cases to the ICC for investigation and trial. However, to exercise this power, the Council needs to vote, or in other words is subject to the political will of its members, which in many cases leads to the use of the veto by the permanent members of the Council who are the Russian Federation, the United States, China, France and the United Kingdom, thereby preventing the adoption of a firm and clear resolution.

The Council has two options:

--It can either refer the matter to the Prosecutor-General of the ICC in accordance with Chapter VII of the UN Charter or,

--It can create a special criminal tribunal in accordance with Chapter VII to try those responsible for the crimes.

Accordingly, any attempt to refer the Gaza War to the ICC will come up against political challenges in the Security Council, where conflicts of interest among member states, especially permanent members, could impede the course of justice. Nevertheless, the Security Council remains a viable, indeed essential alternative to demand accountability provided there is consensus of political will.

4. The International Court of Justice (Convention for the Prevention and Punishment of the Crime of Genocide)

The International Court of Justice (hereafter ICJ) jurisdiction allows for deciding cases involving states but not individuals, and it gives advisory opinions on legal questions at the request of the organs of the United Nations and its specialized agencies. Article 34, paragraph 1, of the Statute of the ICJ (originally appended to the UN Charter) states: *“Only states may be parties in cases before the Court.”*(9) The ICJ examined cases relating to non-observance of the Convention for the Prevention of Genocide as in Bosnia-Herzegovina /Yugoslavia (Serbia

and Montenegro) and issued certain temporary measures prior to passing judgment.

In this regard, one must note that Israel signed that Convention on December 11, 1948 and ratified it on March 9, 1950. It agreed to all its provisions, including the text relating to the compulsory jurisdiction of the Court without expressing any reservations. In any case, this Convention obliges all states to abide by it, whether or not they signed it.

Article IX of the Convention for the Prevention and Punishment of the Crime of Genocide states: *“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”* (10)

“ The International Court of Justice jurisdiction allows for deciding cases involving states but not individuals ”

5. The UN General Assembly

When the Security Council is unable to adopt a resolution, it is possible to “circumvent” it by addressing another body where all states enjoy equal voting rights. What is intended here is the UN General Assembly which is considered the venue to expose and authenticate the occurrence of violations by means of what is known as Resolution 377 A, the "Uniting for Peace" resolution, passed by the General Assembly in 1950, and upon the initiative of the United States. (11)

Recourse to this mechanism occurred already in 2003 with regard to the Separation Wall in Palestine, when the ICJ requested an advisory opinion then issued its judgment, based on the above-mentioned Resolution 377 A. (12)

This demonstrates that the General Assembly constitutes an additional venue for condemning violations, in line with the "Uniting for Peace" resolution and without the need to resort to the Security Council. This in turn may be considered a legal and pragmatic means available to the international community to deal with serious policies or crimes, provided there is a real political will and effective readiness to put the accused on trial.

6. Investigative committees and fact-finding commissions

In cases involving violations of international humanitarian law and of human rights, recourse is mostly had to investigative committees and fact-finding commissions. These above-mentioned committees and commissions are formed by the Security Council and/or the General Assembly and /or the Human Rights Council and/or the UN Secretary-General

and/or the High Commissioner for Human Rights. In the past twenty years, many such committees and commissions were formed to authenticate violations of human rights and of international humanitarian law throughout the world, including in occupied Palestine. Of note is the fact that the Human Rights Council was recently delegated to establish “*an ongoing, independent, international commission of inquiry to investigate, in the Occupied Palestinian Territory, including East Jerusalem, and in Israel, all alleged violations of international humanitarian law and abuses of international human rights law leading up and since May 27, 2021*”. This, in addition to a “*UN Commission of Inquiry to investigate violations committed during the protest movements in the occupied Palestinian territories*” (18 May, 2018-March, 2019) (13)

Furthermore, the International Committee of the Red Cross (Red Cross) plays a vital role in observing and reinforcing adherence to the Geneva Conventions, since the Red Cross can investigate alleged violations and submit its reports to the international community as per Article 90 of the First Additional Protocol for 1977 (14) [Protocol I] after the Committee had issued a series of international principles in this regard.

“ International Committee of the Red Cross plays a vital role in observing and reinforcing adherence to the Geneva Conventions ”

7. Criminal Investigations

Developments on the ground play an essential role in data gathering related to alleged violations. Thus, satellite photos and digital investigations, together with other technological devices and in addition to TV stations that carry live events and social media outlets, these provide valuable documentation of events in wartime. Such means and technologies enhance the ability of international bodies, NGOs and national governments to assemble documentary evidence for presentation at trials.

The international community must invest in advanced technology and encourage its use to guarantee the gathering of credible evidence that can be authenticated. This does not merely enhance the close observation of legal cases but contributes also to the larger aim of establishing an accurate historical record, strengthening accountability, and deterring future violations.

8. Enhancing international legal frameworks

The efficacy of legal measures depends upon the strength of the international legal frameworks. The international community ought to strive to constantly enhance and clarify the current legal frameworks, with particular emphasis upon closing the gaps, especially political gaps, and clarifying the ambiguities that often impede putting individuals on trial on

charges to do with war crimes, crimes against humanity and genocide. States must also be encouraged and urged to ratify and implement international agreements which fortify the legal frameworks pertaining to accountability, thus contributing to achieving a truly international character for these agreements, and in building a structure more in tune with international justice.

“ The international community ought to strive to constantly enhance and clarify the current legal frameworks, with particular emphasis upon closing the gaps, especially political gaps ”

9. National and Comprehensive Jurisdiction

This principle, known as comprehensive humanitarian jurisdiction, permits putting individuals on trial for serious crimes, irrespective of the place where the crimes were committed or the nationality of the accused. Therefore, Palestinians holding foreign passports can apply to foreign national courts, in accordance with the provisions of the Geneva Conventions, in certain states in South America or in certain European states, like Belgium.

UN Security Council Resolution 1265, issued on September 17, 1999, (15) stated that the Council: *“emphasizes the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law.”*

Although putting on trial senior officials of a foreign state presents certain political difficulties, states which possess laws allowing comprehensive jurisdiction can commence legal procedures against individuals accused of war crimes, crimes against humanity or genocide. To be noted, however, is the fact that this matter frequently comes up against difficulties and impediments as regards implementation, especially conflicts over the competence of states. But there is nothing to prevent Palestine from resorting to this measure with the help of friendly states.

10. Building up the efficacy of national legal structures

The international community ought to enable their national legal structures to deal with international crimes within their own competence in empowering their legal measures in general. This can be done by offering technical aid, training sessions, resources and political support to enhance the capabilities of national legal institutions and thus enhancing their

ability to conduct investigations and hold just and honest trials.

In this context, and emphasizing the points made above, national courts with international criminal competence can initiate legal prosecutions, in view of the fact that several Israeli individuals had previously faced challenges when visiting certain European countries after some activists had submitted accusations against them in some countries. However, the intervention of some governments prevented implementation. (16)

11. General awareness

General awareness plays an important role in ensuring that the alleged violations committed during the war on Gaza are not forgotten and in maintaining the pressure for securing accountability. NGO's, human rights activists, and the media play vital roles in increasing awareness of the necessity for justice, in documenting violations of human rights and in emphasizing legal accountability and the protection of journalists.

The international community ought to support and enhance the voices of those who call for justice and accountability, be it inside or outside the zone of conflict. Pressure from public opinion can influence political decisions and contribute to implementing legal measures, since reacting to the feelings and views of the masses would help in forming international responses to the alleged violations.

12. Lessons learnt and prevention

International entities, governments and non-governmental organizations must conduct precise investigations and assessments to determine the basic causes of the conflict, the efficacy of legal measures and the areas where these can be improved. The lessons learnt from the war on Gaza may contribute to developing more effective measures of prevention in future conflicts. This includes diplomatic initiatives, early warning systems, and strategies to deal with the diverse economic and social levels that contribute to solving conflicts.

III. Conclusion

As the international community moves towards drawing up the parameters of the period following the war on Gaza, it must also remain committed to enforcing the principles of international law, ensuring just and honest legal procedures, and treating the roots of conflicts. The conjuncture of legal measures with diplomatic initiatives are considered essential processes for building a fair and permanent peace in the region. Otherwise, instability will prevail forever.

The pursuit of accountability requires expending major efforts which consist in adopting a comprehensive procedure for accountability, given the fact that international criminal justice is a relative justice. Implementing it and accessing it usually has to pass through the UN Security Council but it remains achievable "even after a time", since it does not lapse with time.

“ The conjuncture of legal measures with diplomatic initiatives are considered essential processes for building a fair and permanent peace in the region ”

In this context, the Security Council still has the option of creating a special international criminal court (Ad Hoc) or referring the issue to the permanent ICC in accordance with Chapter VII of the UN Charter, a matter requiring unanimity of political will, currently lacking.

Otherwise, and in view of the fact that Israel is not party to the Rome Statute, the ICC can take up the case if a state, party to that statute, refers the file to the Prosecutor General or if the Prosecutor on his own initiative commences an investigation of the case, which in the current circumstances is to be expected.

Activating legal and juridical measures in every possible way is essential if Israel is to be held responsible. This is possible by calling upon parties to the Fourth Geneva Convention to force Israel to respect its provisions, or else resorting to the UN General Assembly in accordance with the “Uniting for Peace” Resolution, without needing to pass by the Security Council, provided there exists the necessary political will and a real readiness to put perpetrators on trial.

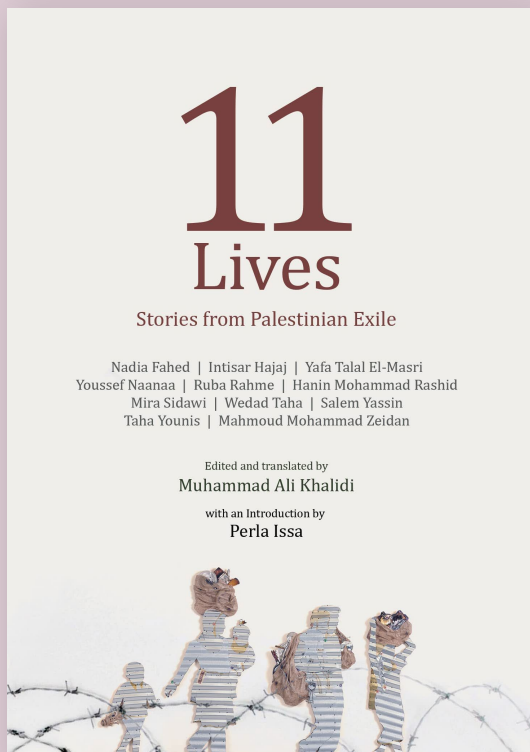
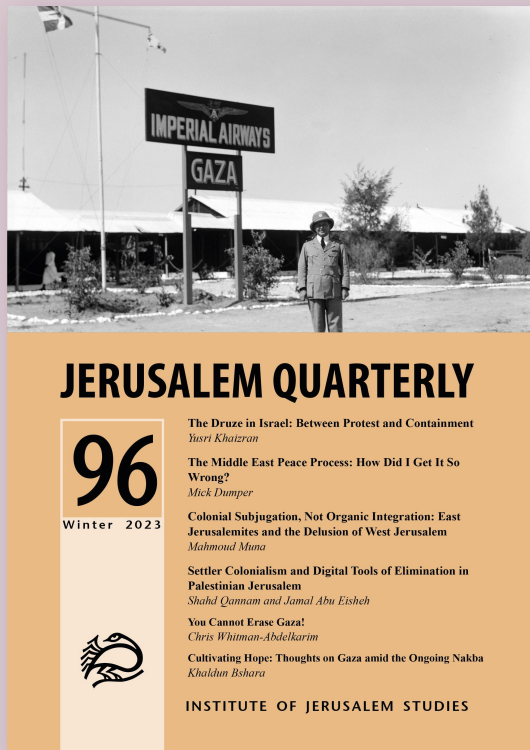
Hence, the international community and all its bodies must bear their responsibility to preserve and enhance international peace and security, especially through empowering the Security Council and implementing its resolutions and other necessary measures to settle conflicts justly, and to respect the rights and dignity of all states and individuals, free from political partisanship.

“ Activating legal and juridical measures in every possible way is essential if Israel is to be held responsible ”

-
- (1) <https://www.icrc.org/ar/doc/resources/documents/misc/5nsla8.htm>
 - (2) <https://www.icrc.org/ar/resources/documents/treaty/protocol-i-additional-to-the-geneva-conventions>
 - (3) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/681/58/PDF/N0668158.pdf?OpenElement>
 - (4) https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf
 - (5) [https://legal.un.org/icc/statute/arabic/rome_statute\(a\).pdf](https://legal.un.org/icc/statute/arabic/rome_statute(a).pdf)
 - (6) <https://www.icj.org/palestine-israel-icc-decision-an-important-step-towards-accountability-for-crimes-under-international-law/>
 - (7) Ibid
 - (8) Ibid
 - (9) Statute of the International Court of Justice annexed to the Charter of the United Nations
 - (10) <https://tinyurl.com/58zkunsf>
 - (11) https://legal.un.org/avl/pdf/ha/ufp/ufp_ph_a.pdf
 - (12) <https://www.icj-cij.org/sites/default/files/advisory-opinions/advisory-opinions-2004-ar.pdf>
 - (13) https://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice_AR.pdf
 - (14) https://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice_AR.pdf
 - (15) <https://web.archive.org/web/20121026011443/http://www.un.org/News/Press/docs/1999/19990917.sc6730.doc.html>
 - (16) <https://www.aljazeera.net/news/humanrights/2023/11/27/>

Latest Issues from The Institute for Palestine Studies

www.palestine-studies.org/en/Books
www.palestine-studies.org/en/journals



* Author's Bio

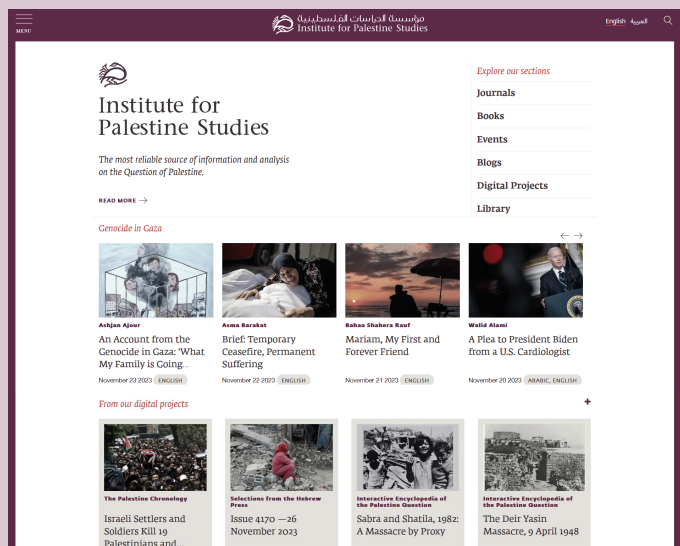
Paul Morcos, Lawyer, holds a PhD in Law, founder of the Justicia Law Firm, and Dean of the Faculty of International Relations at the International Business University of Strasbourg.

It should be noted that Fares Abi Khalil and Marilyn Shaheen, from Justicia, contributed to the research leading to the writing of this paper.

Institute for Palestine Studies

Founded in Beirut in 1963, is an independent nonprofit Arab research and publication center, which is not affiliated to any political organization or government.

The opinions expressed in its publications do not necessarily reflect those of the Institute.



www.palestine-studies.org

Institute for Palestine Studies, Anis Nsouli st. - Verdun, Beirut - Lebanon

+961 1-80-49-59

www.palestine-studies.org

@ ipsbeirut@palestine-studies.org

palstudies

palestinestudies

f palstudies