



DEFENDERS

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GAZA:

After Genocide,
What Next?



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Editor's Note

“We know too well that our freedom is incomplete without the freedom of the Palestinians.”

Nelson Mandela

Welcome to Defenders Winter 2024 edition. As the world is witnessing unprecedented international crimes, humanitarian crisis, unimaginable pain and despair in Gaza as well as a genocide unfolding in the region, this edition considers the violations of IHL and IHRL in the occupied Palestinian territories. The current edition, comprises 5 papers by human rights lawyers and researchers in addition to an interview with Prof. Richard Falk, the former UN Special Rapporteur on the situation of human rights in the occupied Palestinian territory.

The first paper written by Mr. Pouria Askary, the distinguished Associate Professor of International Law at Allameh Tabataba'i University draws upon the important points of the Provisional Measures indicated by the International Court of Justice on 26 Jan 2024 (South Africa v. Israel). The second paper is an interview with Prof. Richard Falk which focuses on the current humanitarian crisis in Gaza including the starvation of people and serious limitation of access to essential items including medical care, food, clean water, fuel, communications as well as the massive killings. The third paper raises alarms over the current situations of Gaza that threatens the human right to life as well as the horrifying experiences of children and their staggering death toll. The fourth paper discusses the right to health in armed conflicts and the situation of the people in Gaza in terms of their enjoyment of the right to health. The fifth paper considers the infringements of IHL and IHRL in the enclave. The sixth and the final paper raises concern over the use of white phosphorus in 2023 Gaza war and jurisdiction of the International Criminal Court to investigate the issue.

We are all looking forward to seeing the «unspeakable» Gaza situation END as soon as possible so that the one million and a half forcibly - displaced people can live their own lives and their children can get rid of the current nightmare.

The Angel of Justice Aspiration to fly to Gaza Rescue: Few Points on the ICJ Provisional Masseurs on Application of the Genocide Convention on the Gaza Strip

Pouria Askary¹

The relentless violence of the Israeli army in the Gaza Strip, led and continued to a wide range of gross and systematic violations of the international legal frameworks and commission of numerous crimes. The situation makes every concerned person face the following questions:

“In the era when the world is fully proud of human civilization and fascinated with scientific and cultural achievements, how such crimes can take place before the world’s eyes?”;

“Is the so-called international legal system, enjoying the multiplicity of the available institutions and mechanisms, capable of stopping this exhibition of brutality and massacre”?

“Isn’t there any one to come to the rescue of children, women and civilians in the besieged and occupied Palestine”?

So many questions arise, and considering the horrible statistics and heartbreaking images reported from Gaza, it is hard to say that an encouraging answer is available to these questions. The figures released by the United Nations Palestinian Agency (UNRWA) indicate that between 7 October 2023 and 29 January 2024, about 27,000 Palestinians have been killed, 70% of which are women and children. In the meantime, it has been reported that the financial support of UNRWA has been drastically reduced and the United States and several

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other countries, which were the main suppliers of this organization, are currently considering suspending financial support from a pillar that shines little light to more than two million residents of Gaza, in the darkness of war. There are many shocking decisions the discussion of which is far beyond the scope of this article, however, these should be mentioned to encourage the world to think, especially some politicians, who are experiencing a deep sleep at the time of this human tragedy!

From this point of view, it is understandable why the world's public opinion is suddenly focused

on the provisional measures of the International Court of Justice, numerous TV and internet channels cover the moment of the reading of this decision live, and an hour later, the Court's announcement becomes the first headline of the world news and the trend of social networks, so that many who are fed up with the global inaction, think that the angel of justice has drawn the sword from its sheath and will eventually overcome the darkness. Although, the assumption is so far from the reality, it indicates that there is still global hope for justice for Gaza; a social capital that the Court judges and all the international law staff should appreciate and properly protect. Following the introduction, some points regarding the provisional measures will be discussed.

1. The Content of the Provisional Measures

In view of the deteriorating humanitarian situation in Gaza, South Africa filed a comprehensive application and requested the Court to issue provisional measures in order to reduce the number of violations under the Convention and support Palestinian victims¹. South Africa's requested provisional measures were summarized in nine clauses, at the top of which was the immediate suspension of Israel military operations in Gaza. However, the issued provisional measures, did not fulfil the Applicant's request. Perhaps because the other side of the conflict, the Hamas group, is not a party to the case, and South Africa cannot be considered a representative of this armed group; Perhaps because the court did not intend to deal with Israel's false claim of self-defense in justifying military operations at this stage; Perhaps because the Court knew that Israel would not comply with this order; and perhaps because the judges of the Court avoided the issuance of such an order, offering the excuse that the nature of this case is politically



The figures released by the United Nations Palestinian Agency (UNRWA) indicate that between 7 October 2023 and 29 January 2024, about 27,000 Palestinians have been killed, 70% of which are women and children

¹ The South Africa's application, is available at: <https://www.icj-cij.org/node/203394>

and legally different from that of *Ukraine vs. Russia*, where they asked for the immediate suspension of Russian military operations on the territory of Ukraine. Surprisingly, paragraph 9 of South Africa's application, which asked the court to stipulate in its provisional measures that Israel should not take actions to further deteriorate the dispute, has not been approved by the Court either.

In decision (Paragraph 1), the Court asks the respondent state to take all measures within its power to implement its obligations under Article 2 of the 1948 United Nations Convention on the Prohibition and Punishment of the Crime of Genocide (Genocide Convention), in particular:

- (a) the killing of Palestinians as a "group protected by the Convention"*
- (b) causing serious bodily or mental harm to members of the group;*
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and*
- (d) imposing measures intended to prevent births within the group;*

Paragraph 2 of the Provisional Measures explicitly asks the respondent state to guarantee that its military forces will not commit the aforementioned acts. But can it be said that the implementation of the measure has actually prohibited Israel from continuing military operations in Gaza? In other words, can it be assumed that the continuation of the military operation, inevitably, will lead to commission of acts that the court has explicitly prohibited in paragraphs 1 and 2 of the provisional measures? In my opinion, although from a legal point of view, for the reason I will explain below, this argument does not seem convincing, but from a political point of view, it can provide the basis for putting pressure of global public opinion on Israel, and from this point of view, it should not be simply overlooked. On the same basis, the Special Rapporteurs of the UN Human Rights Council, in a joint statement issued on 31 January 2024, announced that the most effective way to act on the Court's provisional measure is an immediate ceasefire.

However, from a legal point of view, the above argument has certain limitations, Paragraphs 1 and 2 of the Court order of 26 January 2024 are actually a repetition of the obligations that member states have accepted under Genocide Convention, therefore if the implementation of the obligations arising from Convention prohibits member states from resorting to military operations in general, practically any member state that resorts to military operations, whether offensive or defensive, has violated the convention. However, as stated by the International Court of Justice in its advisory opinion on the legitimacy of the use of nuclear weapons, in war *lex specialis* of armed conflicts are applicable (Paragraph 25). In other words, special rights have priority over *lex generalis* and during armed conflicts, humanitarian rights as *lex specialis* have priority over other obligations of states and killings or harms against the permissible humanitarian targets are not prohibited.

Following the above discussion, let's consider the possible future of the case. What emerges from the Court's procedure and the position of the Court regarding *prima facie* jurisdiction, is that probably South Africa will not face a serious

obstacle in proving the jurisdiction of the Court. Therefore, from now on, South Africa and other states, institutions and people who are trying to support the proceedings instituted before the Court, should prepare themselves to respond to Israel's defenses. It is obvious that in the meantime and specifically regarding committing the crime of genocide, Israel will focus on absence of genocidal intent or the same mens rea (mental element). (See paragraphs 186 to 189 as well as 379 to 376 of the judgment of the Court in the case of Bosnia and Herzegovina vs. Serbia and Montenegro) The German judge in the declaration attached to the order of the Court, in the Gaza Strip case refers to the above judgment and the judgment in the case of Croatia v. Serbia (paragraph 8 of the Judge Nolte's declaration) and compares Israel's operations in Gaza with crimes against the Rohingya people in Myanmar (paragraph 14 of Judge Nolte's declaration), considering all the cases, the Court predicts that in proving the genocidal intent (provided in Article 2 of the Convention), South Africa does not have an easy path ahead, (Paragraph 15 of Judge Nolte's declaration).

But leaving the mental element aside, according to what was mentioned above regarding the *lex specialis* governing the armed conflicts, it can be predicted that Israel will use arguments of humanitarian rights regarding clauses (a) and (b) of Article 2 of the Genocide Convention. Israel will try to prove that the killings and destructions which have taken place by bombardments are justified according to *lex specialis* of armed conflicts. Therefore, this case, despite being apparently limited to the Genocide Convention, potentially has the capacity to turn the dispute, at least in part, on the interpretation of the provisions and principles of humanitarian law and, in particular, military necessity and proportionality of military advantages of attacks compared to civilian casualties and civilian property destruction. Perhaps this is the reason why in paragraph 85 of the Measures, the Court has unexpectedly mentioned the obligations of the parties to the conflict according to international humanitarian law.

2. The Outcome of the Provisional Measures

In order to issue the Provisional Measures, the International Court of Justice must, among other things, prove the plausibility of the Applicant state's claims. In the case of the Gaza Strip, in paragraphs 46 to 54 of its Order, the Court reviews the shocking reports of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and other UN bodies, as well as the public comments of Israeli officials, and concludes that the notion of plausibility is verified, at least in terms of some of the rights whose protection is sought by South Africa (Paragraph 54). On this basis, in addition to what was mentioned above, the Court provisional measures stipulate that, Israel must:

- *take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention;*
- *ensure, with immediate effect, that its military forces do not commit any of the aforementioned acts;*
- *prevent and punish the direct and public incitement to commit genocide;*

- *take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in Gaza;*
- *take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and III of the Genocide Convention;*
- *submit a report to the Court on all measures taken to give effective to this order within one month from 26 January 2024.*

But the most important thing is to verify the plausibility of South Africa's claim that Israel has committed genocide and other violations of the Genocide Convention in the Gaza Strip. It is true that, in paragraphs 30 and 62 of the Measures, the Court emphasized that it will not get to the 'merits' (or substantive) stage of the proceedings at this stage and it will take years for the Court to decide on the case, but the plausibility of South Africa's claims - especially with the Court's reference to the statements of high-ranking Israeli officials and the actions taken by the Israeli army (paragraph 52) - indicates that the accusation of committing genocide and violating the 1948 Convention is serious and considering that prohibition of genocide, as stated by the International Law Commission, is among the peremptory norms (*jus cogens*) of general international law, the states that support Israel, and above all, the United States should consider the fact that they may face allegation of being complicit in genocide. In addition, regarding the violation of the peremptory norms of international law, the International Law Commission determined that, on the one hand, states are committed to non-cooperation and participation in committing the violations, and on the other hand, they are committed to aid ending that situation (Paragraphs 1 and 2 of Conclusion No. 19). That is, providing arms and financial support to Israel and preventing the adoption of ceasefire resolutions in the Security Council, which is the basis for assisting the possible commission of genocide, can be contrary to the international obligations of states under the Genocide Convention as well as general international law. This issue will be especially highlighted considering Israel's reaction to the paragraph 6 of the ICJ provisional measures regarding Israel's requirement to report to the Court; because according to the comments made by Israel authorities as well as the performance of its military forces following the indication of the Court Measures, it does not seem that Israel intends to follow the Order.

From another point of view, it can be said that the states' decision to suspend UNRWA funding is contrary to their obligation under Article 1 of the Genocide Convention to commit to the prevention of genocide, the article that formed the basis for the issuance of the clause (iv) of the ICJ provisional measures. In other words, if the clause (iv), which stipulates that Israel must "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in Gaza" is based in Israel's obligation under Article 1 of the Genocide Convention, and the Court assumes that lack of access to basic needs

and humanitarian aid for the people of Gaza could be contrary to the obligation to prevention of genocide, then, cutting financial support to UNRWA in the critical situation of Gaza will also be considered contrary to the aforementioned commitment, because this action, as the Secretary General of the United Nations has also emphasized, will undoubtedly cause double sufferings to the people of Gaza, who are currently struggling to survive the terrible destructions of the war.



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Conclusion

The landmark order of 26 January 2024 should be considered as an important legal achievement for South Africa, emphasized in paragraph 3 of the state application to the ICJ: “ South Africa is acutely aware of the particular weight of responsibility in initiating proceedings against Israel for violations of the Genocide Convention.” Entering into a dispute of a very complex political nature is not without cost, therefore, it is necessary for the international community to support South Africa in every possible way.

However, the judges of the International Court of Justice experience a more complicated situation when confronted with a case that, on the one hand, is highly politicized in nature, and on the other hand, it seems to be a test of the effectiveness of international legal norms and structures in the eyes of the world. As we have seen, the dissenting opinion of the Ugandan judge of the Court provoked public anger against him, especially in the African continent.

At this stage, the International Court of Justice, realistically used all available capacities, on the one hand, to give this message to Israel, that while in the international political structures and specifically in the United Nations Security Council create obstacles to addressing Israel crimes, the ICJ insists on the implementation of justice; and on the other hand, to convey the message to the world that the angel of justice still has the aspiration to fly to rescue the victims. However, this is the beginning of the pathway to justice, and we need to see when the issue of the Gaza war is not so trending, how the Court will be able to rely on international law to defend justice in the full-of-hypocrisy realm of politics. Finally, it should also be noted that instituting the proceedings in the International Court of Justice and indication of the Provisional Measures has not affected the very alarming situation of nearly two million Palestinians, still trapped in the Gaza Strip and the world should focus on the immediate stop of this catastrophic war and ending decades of occupation and apartheid against the Palestinian people.

GAZA: After Genocide, What Next?

ODVV Interview with Richard Falk; United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (2008-2014)

More than 16,000 Palestinians have lost their lives as a result of continuous and deadly Israeli attacks. The main victims of this war are women and children; more than 6 thousand of the killed persons in Gaza are children; also, about 1,500,000 residents of Gaza have been internally displaced.

Gaza has an area of 364 square kilometers. This city has a population of 2,300,000 people. Gaza is the most densely populated place in the world (with more than 6,100 people per square kilometer). About 70% of Palestinians living in the Gaza Strip have been displaced to this area from other parts of Palestine. The people of this place have been suffering and under pressure for years and live in an area, heavily controlled by Israel. From time to time, several Palestinians have been killed by settlers or Israeli soldiers. These actions finally led to the attack of Hamas on Israel under the title of al-Aqsa Storm. An action that according to the United Nations Secretary-General, Antonio Guterres, did not happen in a vacuum. After that, more than 16,000 Palestinians have lost their lives as a result of continuous and deadly Israeli attacks. The main victims of this war are women and children; more than 6 thousand of the killed persons in Gaza are children; also, about 1,500,000 residents of Gaza have been internally displaced.

The situation became so dire that the protests of many human rights activists and United Nations officials could also be heard clearly. Antonio Guterres warned of a deepening ‘catastrophe’ in Gaza as he called on the Security Council to act. The United Nations Secretary-General Antonio Guterres has invoked Article 99 of the UN Charter, urging the UN Security Council to act on the war in Gaza. Due to the importance of the Gaza crisis and the need to observe humanitarian laws in this region, the Organization for the Defense of Victims of Violence (ODVV) conducted an interview with Dr. Richard Anderson Falk, an American professor emeritus of international law at Princeton University, and Euro-Mediterranean Human Rights Monitor’s Chairman of the Board of Trustees. In 2004, he was

listed as the author or coauthor of 20 books and the editor or co-editor of another 20 volumes. Dr. Falk has published extensively with multiple books written about international law and the United Nations. In 2008, the United Nations Human Rights Council (UNHRC) appointed Falk to a six-year term as a United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.



Policies of war combatants that deliberately focus on starvation or denial of access to food as a tactic or tool of war are guilty of war crimes

**Below is Dr. Falk's view GAZA:
After Genocide, What Next?**

At the moment many prayers call fervently for a permanent ceasefire, but the future is suspended in doubt, and the pre-pause Israeli genocidal onslaught casts a dark shadow over all of humanity. Many innocent lives in Gaza still remain in jeopardy if the pause or truce is not converted into a ceasefire and emergency relief on a large scale. My responses waver between fears of a resumed Israeli military operation and hopes of confronting day-after issues of post-genocidal economic reconstruction and scenarios of political transformation.]

Horrible media outlets focus on the access to food and other essential items for the Gaza civilians. What do you think of the starvation of civilians and children as a tool for war?

Policies of war combatants that deliberately focus on starvation or denial of access to food as a tactic or tool of war are guilty of war crimes. It is usual for such tactics to be disavowed by their perpetrators as collateral damage with no intention to target civilians of any category. If the targeting appears deliberate, continues in similar patterns disregarding predominant civilian targeting, and inflicts heavy civilian casualties, as has been the case with respect to the Israeli attacks in Gaza since the October 7 Hamas attack, it is viewed as criminal activity. The fact that October 7 itself included severe war crimes does not in any way justify Israeli conduct in a retaliatory mode that is disproportional or criminal. Starvation intentionally directed at civilians is unconditionally prohibited by the Geneva Conventions and an inherent war crime, which if repeated or continuous can be prosecuted as a Crime against Humanity or even Genocide if the instrument of starvation seems to be used for the purpose of destroying a racial, ethnic, or religious group in whole or in part.

How do you see the limitation of access to electricity, water, medicine, and hygiene items to be affecting people's and children's lives?

In the context of Israel's 'war' on Gaza such restrictions, applied to an impoverished



the limitation of access to electricity, water, medicine, and hygiene items are genocidal examples of aggravated war crimes

population without qualification, are genocidal examples of aggravated war crimes explicitly prohibited by provisions of the 4th Geneva Convention on Belligerent Occupation. Israel as the Occupying Power does not right enjoy any right of self-defense against an Occupied People and is under a pervasive duty to protect the civilian population under all circumstances. Israel's implementation of its government order totally cutting off Gaza's access to food, fuel, and electricity has contributed to the destruction

of the medical system, imperiling the entire population of Gaza, killing many children and women, as well as men, and the cause of widespread suffering of all Gazans, including children at women. Specific provisions are found in the Geneva Convention that confirm this assessment. Article 6 indicates the full reach of the protective legal duties of the Occupying Power to the civilian population under their control. The text of this provision underlies the commitment of International Humanitarian Law to the protection of civilians:

ART. 6. - "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

In addition, because so responsive to inquiry as to the status of starvation under international humanitarian law, the partial texts of Article 55 & 56 is reproduced below:

ART. 55. - "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

ART. 56. - "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health

and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.”³ Over the decades, the world has witnessed a multitude of various rounds of attacks on Gaza, with no achievements, in your opinion, what is the reason for the inability of the international community to address the gross violations of human rights by Israel?

We have witnessed the dreadful attack on Gaza Hospital, what do you think of the air raids that seem to be indiscriminately targeting the places that are supposed to serve as civilians’ sanctuary in wartime?

The wording of the question suggests the confusion surrounding this important dimension of the most serious allegations of ‘indiscriminate targeting’ when contrary to the literalness of the allegations, the targets are obviously being selected and targeted by Israel’s precision weaponry against just such legally protected sites and civilians, including hospitals, refugee camps, sick and wounded patients, forced civilian evacuees compelled by Israel mandatory order to leave their homes in the north of Gaza for the southern portion of the strip. The entire military operation against Gaza is seemingly intended to create an ethnic cleansing phenomenon comparable to the forced dispossession of more than 700,000 Palestinians. This happened in the final phases of the 1948 War known to Palestinians as the Nakba (or catastrophe).

The message that the Palestinians were receiving from pressure against them by Israel including building settlements and killing civilians in Gaza is that Israel is against the two-state solution question. So, it’s a big question mark on the two-state solution. Do you think that a two-state solution is still a valid solution and can be a way to get out of this deadlock and war? or do you believe that these current incident events have also brought this solution to a dead end?

This is a puzzling time for those thinking about a benevolent future for both Palestinians and Israelis. At the moment external voices that are seeking a permanent ceasefire, including the UN Secretary-General, as well as many longtime Jewish supporters of Israel, continue to act as if a two-state is the best and only feasible solution despite seemingly formidable obstacles that are being overlooked. The first set of obstacles is the extensive and militant settler phenomenon, which has been consistently viewed at the UN and most international venues as being in direct violation of Article 49(6) of Geneva IV. There are currently about 250 settlements spread around the West Bank and as many as 500,000 settlers who would resist by force any arrangement calling for their relocation in pre-1967 Israel (as did the 2005 ‘Disengagement’ from Gaza). The second obstacle is the known opposition of Likud leadership, including Netanyahu, to meaningful forms of Palestinian statehood, most dogmatically and openly by Netanyahu’s coalition partner, the Religious Right Party, as most prominently represented in the current

so-called 'unity government' by Ben Gvir and Smotrich. A possible third obstacle relates to the likelihood of a Palestinian refusal to accept an inferior form of statehood involving permanent demilitarization, Israel's retention of West Bank settler enclaves, and some West Bank land transfers to Israel.

A sustainable peace depends on political arrangements based on equality between the two peoples as well as upholding the dignity of other minorities (Druze, Bedoin). If this skepticism about a two-state solution seems to imply a single state it would highlight the principal obstacle that would doubtless come from Zionists who remain deeply committed to a Jewish supremacist state and to a lesser extent from Palestinians demanding the full right of return of the five million or more Palestinian refugees and involuntary exiles living in camps or spread around the world. Given the depth of resentment that is associated with events since October 7 even a confederal union of the two peoples is hardly even thinkable under present conditions. At the same time, restoring the former status quo seems impossible given the devastation of Gaza, underscored by the lingering prospect of mass homelessness affecting the entire population of northern Gaza. Innovative solutions involving federation or confederation with either Lebanon or Egypt seems also non-viable at this point, although given the absence of a feasible peace arrangement the advocacy of innovative solutions is the least bad of plausible day-after options.

Considering the scope and intensity of the destruction of the civilian infrastructure and the blockade which is imposed on Gaza, in your opinion, what strategy should be implemented to firstly end the siege of Gaza (permanently and not return to the pre-conflict situation that practically turned Gaza a prison) and secondly, what should be done to heal this 75-year-old wound which was created since the establishment of Israel?

These are difficult questions for which there may be no satisfactory answers to long as Israel is governed by such an extreme government and continues to enjoy the support of the US and the strongest members of the EU. I think that even these governments supporting Israel throughout the horrifying genocidal spectacle feel increasing pressure from their own citizenry to find a more humane future for the people of Gaza and all of occupied Palestine, and in this sense, the devastation wrought by Israel has backfired as a strategy that coupled security concerns with expansionist ambitions, although it is too soon to be confident of such an assessment.

I think the first priority after a permanent ceasefire is established would be to secure the withdrawal of Israel's armed forces from Gaza, followed by an emergency international relief effort that gave priority to rebuilding destroyed residential neighborhoods and family residences, as well as the dispatch of some form of an international peacekeeping force, whether under UN auspices or otherwise. The forced evacuations together with the intensity of bombardment have destroyed over 76% of the residences in northern Gaza. Of course, the rebuilding of hospitals and the repair of damage to UN structures, mosques and churches, and refugee facilities

should also be included by international donors in their effort to meet this gigantic challenge of devastation at a time of cold weather and overcrowding.

More difficult by far is to end the iron grip on Gaza that has been maintained in different cruel forms ever since 1967. A first step would be a demand by the UNSC, and possibly such other intergovernmental groupings as the BRICs, to lift the blockade imposed in 2007 and agree with a Palestinian unity governance council on mutually administered border controls and an international protection force to

monitor arms inputs ideally to both Gaza and Israel. It is virtually certain that these steps could not be taken until certain political preconditions were met. Of vital political, perhaps indispensable, importance in day-after contexts would be the replacement of the Netanyahu government by a new coalition with a commitment to sustainable peace. Hopefully, a new Israeli leadership committed to finding a neutral framework for negotiating a genuine political compromise that must finally give recognition to the basic rights of the Palestinian people.

These ideas may seem utopian at present, but they represent the only practical alternative to the sort of extremist politics that Israel has so far relied upon in responding to the October 7 attack, which was immediately seized upon as an opportunity by the Israeli government to carry out the expansionist final phases of the Zionist Project, which included sovereign control and Palestinian dispossession in the West Bank and overall international erasure of the Palestinian people and extinguishing any remaining statehood expectations. Destroying Hamas was never the entire, and perhaps not the main, rationale for the disproportionate Israeli response, and may have also been motivated by the perceived need of the Tel Aviv leaders to divert the attention of Israelis and the world from the inexcusable security failures of the Israeli government that allowed Hamas to plan and carry out its October 7 attack. For Israel to achieve the political space required to fulfill the maximalist Zionist vision required several developments: the demonization of Hamas, the exaggeration of future security threats facing Israel, and the genocidal onslaught that inflicted undeserved and horrifying punishment upon 99% innocent and previously victimized Gaza civilians while distracting the attention of the world to the wider policy agenda of the Tel Aviv leadership. In thinking about the future, it is helpful to separate the humanitarian urgency of funding livable conditions for the people of Gaza from a politics that aimed at the transformation of the underlying conflict. Yet to leave the political track to the parties would invite future tragedies arising from the contradictory goals inherent in settler colonialism and those of a national movement of resistance in a post-colonial setting.



More difficult by far is to end the iron grip on Gaza that has been maintained in different cruel forms ever since 1967

The Situations that Threaten the Right to Life in Gaza

Maryam Erzi¹

Abstract

The Occupied Palestinian Territories (OPT) have been witnessed to decades of unrest and widespread human rights violations by the occupying power. However, in Oct. 2023 the decades-long conflict showed a horrifying escalation and unprecedented crimes began unfolding in the region, especially in the Gaza strip. The present article, reviews the Gaza incidents from a human rights perspective and considers the various forms of Gaza people's rights being violated in the time period between 7 October 2023 to 30 January 2024. This article focuses on the rights to water, to food, to access medical care and medicine, to safe shelter and housing as well as the impacts of shortage of fuel, electricity, and communication limitation on human lives and human rights in Gaza. Considering the staggering statistics of the affected children in the conflict, this article has allocated a separate section to the situation of children in the enclave, within the mentioned time period.

Key words: *Gaza, human rights, 2023 war, right to food, right to water, right to safe shelter, children's rights*

¹ Human Rights activist

Introduction

In order to understand the situation in the Occupied Palestinian Territories (OPT), including the Gaza Strip, we need to consider the context of 75-year apartheid, the 65-year occupation and the 15-year blockade which has deprived the Palestinians from adequate access to almost ALL economic, social and cultural rights, social and political rights as well as all aspects of the right to development and attainment of all sustainable development goals.

The long history of violation of all human rights in the OPT lead to serious escalation of conflict on 7 October 2023.

Israel responded with a heavy bombardment campaign unprecedented in modern history, leading to thousands of civilian deaths and injuries. Since the 7 October, the civilian population of Gaza were subject to heavy unabated bombardments, as well as **collective punishment, war crimes, crimes against humanity and genocide.**

According to the Ministry of Health, between 7 October and 12:00 on 7 January, at least 23,084 Palestinians were killed in Gaza and 58,926 Palestinians were reportedly injured¹ with children comprising 40 percent of the colossal death toll.

The extent and intensity of the long-run serious violations of IHL and IHRL having taken place in the OPT, as a result of Israel policies, is far beyond the scope of the present study, however, considering the heinous crimes unfolding in Gaza – from 7 October 2023 up to the time of preparation of the present report – the current study tries to shed light on grave violations of some fundamental human rights as means of war, including serious violation of the right to access: clean water; sufficient food; adequate and timely medical care and safe shelter, a combination of which threaten the right to life in Gaza.

The Right to Clean Water and Sanitation

The right to Water

The right for everyone to access clean and safe drinking water is guaranteed in the UN documents. On 28 July 2010, the United Nations General Assembly Resolution 64/292, explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. In addition, the annual 2021 report of the UN High



In order to understand the situation in the Occupied Palestinian Territories (OPT), including the Gaza Strip, we need to consider the context of 75-year apartheid, the 65-year occupation and the 15-year blockade

¹ <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-87>

Commissioner for Human Rights on the Human rights situation in Palestine and other occupied Arab territories discusses the right to water in the OPT. It must be noted that Israel's discriminatory policies² that limit Palestinians access to water are as old as the occupation itself and has been frequently criticized in the UN reports³ and resolutions⁴.

The Israel discriminatory policies and repressive measures that reduced Palestinians' use of water started from early days of occupation⁵ and increasingly imposed more restriction on Palestinians over the next decades and the whole situation got devastatingly worst with 2023 war.

Access to Water in Gaza in 2023

Now, as the brutal war continues to take lives in Gaza, the serious lack of access to clean water in the enclave is a violation of international law and Israel's intentional denial of Gaza people's access to drinking water, as a method of war, has been widely condemned. According to the UN Special Rapporteur on the human rights to safe drinking water and sanitation, Pedro Arrojo-Agudo, on 17 November 2023, "Israel must allow clean water and fuel into Gaza to activate the water supply network and desalination plants in the besieged enclave before it is too late" and "Every hour that passes with Israel preventing the provision of safe drinking water in the Gaza strip, in brazen breach of international law, puts Gazans at risk of dying of thirst and diseases related to the lack of safe drinking water." The UN expert warn that "Israel must stop using water as a weapon of war", adding that "every hour that passes with Israel preventing the provision of safe drinking water in the Gaza strip, in brazen breach of international law, puts Gazans at risk of dying of thirst and diseases related to the lack of safe drinking water"; "around 70% of the population in Gaza is drinking salinized and contaminated water" leading to spread of waterborne diseases. ⁶

The UN Special Rapporteur on the Right to water has also emphasized that, "under Article 7 of the Rome Statute, intentionally depriving the civilian population of conditions of life, calculated to bring about their destruction, is an act of extermination and classified as a "**crime against humanity**." The impact of water deprivation on public health and hygiene will be "unimaginable and could result in more civilian

² Over the 65 years of occupation, Israel has been systematically denying or restricting Palestinians access to water while developing its own water infrastructures and networks, for further information please see the relevant reports, e.g., The Occupation of Water, available at:<https://www.amnesty.org/en/latest/campaigns/2017/11/the-occupation-of-water/>

³ e.g., A/HRC/40/73; A/HRC/46/22; A/HRC/46/65; A/HRC/46/63; A/75/199; A/HRC/48/43.

⁴ e.g., General Assembly Res. 58/292 (2004), Security Council Res. 2334 (2016), Human Rights Council Res. 43/32 (2020)

⁵ The Commission established under Security Council resolution 446 (1979) reported that in the early days of the occupation Israeli authorities, under the claim of security, blew up 140 water pumps installed on the west bank of the River Jordan; as a result of that action, the Palestinian farmers were prevented from pumping water from the river for irrigation, whereas the Israeli settlers in the area were allowed to continue to do so. More info, at: <https://www.un.org/unispal/document/auto-insert-197919/>

⁶ <https://www.ohchr.org/en/press-releases/2023/11/israel-must-stop-using-water-weapon-war-un-expert>

deaths than the already colossal death toll from the bombardment of Gaza.” The UN expert warned that as usual, “children are the first to be affected by the water and sanitation crisis – particularly those under five years old – and women” and considered the Gaza current conditions as a “perfect situation” for the outbreak of yet another pandemic which would punish the “innocents”⁷.

According to the official Twitter account of the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, on 5 Jan 2024, “a public health crisis is unfolding in Gaza”. The spillover of

sewer in overcrowded shelters in Gaza has resulted in spread of infectious diseases, while the deadly bombardments continue.

Denial of access to water violates international humanitarian law and the Article 56 of the fourth Geneva conventions, constituting a “**war crime**”⁸ according to experts. The inhuman policy of preventing access to drinking water also contradicts the General Comment No. 15 of the Economic, Social and Cultural Committee, paragraphs 21 and 31.

Lack of access to clean water in Gaza is a violation of international law and constitute **war crimes** and **crime against humanity**⁹. Israel must allow clean water and fuel into Gaza to activate the water supply network and desalination plants in the besieged enclave before it is too late, before more deaths were recorded as a result of Israel crimes in Gaza. These frequently invisible casualties of war are preventable, and Israel must prevent them.

The Right to Sufficient Food

The Right to Food

The right to food is a fundamental human right that ensures that everyone has regular, permanent, and unrestricted access to adequate and sufficient food. In this regard, the obligation of states is to respect, protect, and fulfill the right to food. This means that states must not take any measures that prevent access to adequate food even in the armed conflicts. UN documents warn warring parties

7 ibid

8 Prof Lyla Mehta, Institute of Development Studies, University of Sussex and Dr. Alan Nicol Researcher in international water policy in <https://www.theguardian.com/world/2023/oct/19/cutting-off-water-to-gaza-is-a-war#:~:text=Water%20is%20a%20basic%20human,access%20to%20water%20and%20food>.

9 In Oct, 2023, UN Expert Pedro Arrojo warned that hundreds of thousands of Gaza people were drinking unclean or salty water to survive and considered Israel’s actions a “crime against humanity.”



Lack of access to clean water in Gaza is a violation of international law and constitute war crimes and crime against humanity



“everyone in Gaza is hungry! Skipping meals is the norm, and each day is a desperate search for sustenance.

People often go the entire day and night without eating”. Adults go hungry so children can eat”

against any resort to starvation of people as a method of war.

The use of starvation as a method of war is strictly prohibited by International Humanitarian Law (IHL). Article 8(2) (b) of the Rome Statute provides that intentionally starving civilians by “depriving them of objects indispensable to their survival, including willfully impeding relief supplies” is a **war crime**¹⁰.

The Security Council Resolution, 2573 (2021), “Urges all parties to armed conflict to ... ensuring the proper functioning of food systems and markets

in situations of armed conflict,” and expresses deep concerns over the increasing number of civilians facing food insecurity and famine during armed conflicts. Customary Rules of International Humanitarian Law (Rule 53) prohibits starvation of civilians as a method of warfare and “denying access of humanitarian aid intended for civilians in need, including deliberately impeding humanitarian aid (see Rule 55).

Access to Food in Gaza 2023

Despite all condemnations of people starvation as a method of war, the Palestinian people were facing the highest levels of food insecurity ever recorded in Gaza in early January 2024, to a level that United Nations Office for the Coordination of Humanitarian Affairs (OCHA) announced that “famine is around the corner.” On 2 January 2024, the UN World Food Programme (WFP) announced that “everyone in Gaza is hungry! Skipping meals is the norm, and each day is a desperate search for sustenance. People often go the entire day and night without eating”. Adults go hungry so children can eat”. The situation was particularly dire for undernourished children, who were at risk of communicable disease outbreaks¹¹.

Serious starvation of people, including thousands of children, pregnant women and women nursing the newborns, by Israel, is another form of war crime being continually committed in Gaza, during the 2023 Israel-Hamas conflict.

Lack of access to food has led to establishment of Famine Review Committee (FRC), in Gaza due to evidence proving acute food insecurity Phase 5 (Catastrophic threshold). The committee warned that the risk of famine is

¹⁰ <https://ihl-databases.icrc.org/zh/ihl-treaties/icc-statute-amendment-art8-starvation-2019?activeTab=default>

¹¹ <https://palestine.un.org/en/257058-everyone-hungry-gaza-warn-un-humanitarians#:~:text=%E2%80%9CEveryone%20in%20Gaza%20is%20hungry,hungry%20so%20children%20can%20eat.%E2%80%9D>

increasing daily amid intense conflict and restricted humanitarian access. The Committee has called for the cessation of hostilities and the restoration of humanitarian space for delivering multi-sectoral assistance as vital first steps to eliminate any risk of famine.

Medicine and Medical care

The Right to Health and Access Medical care

The right to health is a fundamental human right recognized in the **Universal Declaration of Human Rights, the International Covenant on Economic (ICESCR), Social and Cultural Rights, and the Convention on the Rights of the Child (CRC)**. These documents guarantee the right to access medical care and other health services, as well as the right to enjoy the highest attainable standard of physical and mental health.

The ICESCR recognizes the right to the highest attainable standard of physical and mental health, which includes the right to access medical care and other health services.

The Convention on the Rights of the Child (CRC) recognizes the right of every child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. The convention also requires states to take appropriate measures to combat disease and malnutrition, and to ensure that all segments of society, in particular parents and children, are informed, have access to education, and are supported in the use of basic knowledge of child health and nutrition.

Access to Medical Care in Gaza 2023

According to WHO, on 3 January 2024, 13 out of 36 hospitals in Gaza were partially functioning, nine in the south and four in the north¹². The hospitals in the north were offering maternity, trauma, and emergency care services while confronting complications such as medical staff shortages of specialized surgeons, neurosurgeons, and intensive care staff in addition to lack of medicines such as anesthesia, antibiotics, pain relief medicines, and external fixators. The north Gaza hospitals were also reported to be in urgent need of fuel, food, and drinking water. The minimum level of supplies reaching the hospitals and their fluctuating capacities were reported to be among the other challenges impacting their functionality.

In the south, nine hospitals were partially functional, operating at three times their capacity, while facing critical shortages of basic supplies and fuel. According to the Ministry of Health in Gaza, the occupancy rates in inpatient departments and intensive care units reached the alarming figures of 206% and 250% respectively², due to the continuation of hostilities in Gaza and the significant increase in the number of casualties.

¹² <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-86-enar>

Access to Fuel, Electricity, and Communication in Gaza 2023

Israeli's decision to cut power, water and fuel supply to Gaza amounts to collective punishment of its entire population of 2.3 million people and violates international laws.

Fuel

The lack of access to fuel, in the enclave, is having a devastating impact on the people, delivery of humanitarian services, and people's human rights. The UN Relief and Works Agency (UNRWA) has announced that the complete depletion of fuel in Gaza is having catastrophic consequences, including the collapse in water supply, sewage and sanitation services, telecommunications and healthcare. Lack of fuel also leads to failure of humanitarian operations and response in Gaza, including desalination, electricity production, delivery of food and the operation of trucks that bring humanitarian aid to the enclave through the Rafah crossing. The United Nations has warned that the lack of fuel is jeopardizing "the entire architecture of the humanitarian response" in Gaza¹³.

Electricity

As of 13 December, about 1.4 million internally displaced persons (IDPs) were sheltering in 155 facilities belonging to the United Nations Relief and Works Agency (UNRWA). However, the agency reported that the lack of electricity created a water crisis in UNRWA emergency shelters and across the Gaza Strip due to damaged infrastructure, because lack of electricity prevented the operation of water pumps and desalination plants, and limited supply of water in the enclave¹⁴. The situation has forced many Palestinians including children to drink salinized and polluted water, leading to outbreak of waterborne diseases, taking lives in the absence of adequate and sufficient medical care and nutrition.

Communication Blackout

From 7 October 2023, to end of January 2024, Israel was deliberately shutting down or destroying telecommunications systems that caused disproportionate harm to civilians. Phone and internet disruption can prevent those who are injured or are in emergency situations from access to urgent rescue services or required medical attention, undermining humanitarian efforts and threatening lives.

In addition, damage to core communications infrastructure provide cover for atrocities and breed impunity and put human lives at risk of repeated and continuous crimes, including the ongoing genocide, war crimes and crimes against humanity, endangering the lives of Gaza's population. While on the other hand, normal access to means of telecommunication can contribute to the process of documenting atrocity crimes, making the perpetrators accountable

¹³ <https://news.un.org/en/story/2023/11/1143672>

¹⁴ UNRWA report of 18 December 2023 on days 72-73 of Hostilities

and providing the victims with adequate remedy and redress.

Safe Shelter and Housing in Gaza 2023

Following the 7 October Hamas attacks, Israel started heavy bombardment of the Northern Gaza and gave the over one million populations only 24 hours to evacuate. Despite the expert's announcement (including the UN) that the huge displacement would not be possible in such a short time, thousands of tons of bombs continued to attack the overpopulated Gaza killing thousands of children and civilians.

The horrible conditions forced the population of Northern Gaza to move to the South, and seek refuge under the UN flag in UNRWA schools while even the UN facilities have come under repeated Israeli attacks taking the lives of an unprecedented number of the UN personnel as well as Palestinian civilians and children.

Between 7 October 2023 to 8 January 2024, 220 incidents were reported to have affected UNRWA premises and people inside them, including 63 direct hits on UNRWA installations. The incidents killed at least 319 Palestinians and injured another 1,135. According to UNRWA, by the end of 2023, 1.9 million people of Gaza, or nearly 85 per cent of the total population, were estimated to have been internally displaced¹⁵.

Many families have been forced to displace multiple times in search of safety, while there have been multiple announcements by the UN officials and the press that "Nowhere is safe in Gaza"¹⁶.

By the end of 2023 the unabated Israeli bombardment turned over 70% of Gaza homes into rubble, to a point that the besieged strip became unrecognizable in satellite imagery. The bombing that destroyed 300,000 out of 439,000 homes as well as 200 heritage and archaeological sites is considered "the most destructive in modern history"¹⁷.

In December 2023 it was estimated that over 2000 children and thousands of adults who went missing, have lost lives under rubble.



By the end of 2023 the unabated Israeli bombardment turned over 70% of Gaza homes into rubble, to a point that the besieged strip became unrecognizable in satellite imagery. The bombing that destroyed 300,000 out of 439,000 homes

¹⁵ <https://reliefweb.int/report/occupied-palestinian-territory/hoistilities-gaza-strip-and-israel-flash-up-date-87>

¹⁶ <https://reliefweb.int/report/occupied-palestinian-territory/no-safe-place-gaza-not-even-south>

¹⁷ <https://www.aljazeera.com/news/2023/12/31/israeli-bombardment-destroyed-over-70-of-gaza-homes-media-office>

Armed conflicts and the right to health; An overview the health status of Gaza residents

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Abstract

The right to health is a core fundamental component of human rights. Recognized by both international humanitarian law and international human rights, it is imperative that this right be respected, supported, and protected by all international actors no matter the time and the place, during both wartime and peacetime. The Fourth Geneva Convention has emphasized the need to protect the health of civilians, particularly that of children, women, and the disabled during wartime in several of its articles. The current research aims to investigate the citizens and residents of Gaza's right to health, particularly since the onset of hostilities between Israel and Hamas on October 7th, 2023. The findings indicate during the recent war, Israel has widely violated the rules and principles of war by targeting of hospitals, and laying siege to Gaza which has resulted in the subsequent lack of access to water, food, medicine, and basic goods. We shall conclude that, based on these actions, it is evident that Israel has perpetrated war crimes as well as crimes against humanity.

Key Words: *Right to health, Gaza, armed conflicts, human rights, humanitarian rights*

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Introduction

Since the onset of the conflict between Israel and Hamas on October 7th, 2023, thousands of people have been killed or injured as a result of Israeli attacks. Israel has not shied away from targeting civilian and residential areas, hospitals, and medical personnel inside the Gaza Strip. Its attacks target the infrastructure, electricity, fuel, and water supply facilities in Gaza. The United Nations and various other international and domestic medical institutions have issued warnings regarding the possible spread of disease and the lack of access to healthy water and food supplies. It is believed that the contaminated drinking water in the area could become the source of the spread of diseases. Furthermore, approximately 1,600 of the casualties of Israeli attacks in Gaza still remain below the rubble, and the necessary capability to find and retrieve them does not exist, which raises more concerns regarding the spread of the diseases. At present, certain observations have been reported regarding diseases such as chicken pox, scabies, and diarrhea caused by unsuitable health conditions created because of the aforementioned reasons.¹ In addition to the aforementioned cases, the conflict has cast a shadow on the Gaza Strip, endangering and harming the mental well-being of its residents, particularly children.² Presently, as stated by the United Nations Office for the Coordination of Humanitarian Affairs, approximately 13 out of 35 hospitals inside the Gaza Strip are non-functional.³ All these actions showcase a clear and gross violation of the fundamental principles of human rights and the rules governing international humanitarian law. In the current paper, to introduce the concept of the right to health, initial explanations are provided regarding the key aspects, subsequently, the process resulting in the entering of the right to health within the international humanitarian law is discussed, and then, the status of the right to health for the residents of Gaza particularly since the onset of hostilities between Israel and Hamas on October 7th, 2023, is examined.

Key aspects of the Right to Health

• **The right to health is an inclusive right.** We frequently associate the right to health with access to health care and the building of hospitals. This is correct, but the right to health extends further. It includes a wide range of factors that can help us lead a healthy life. The Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these the “underlying determinants

1 Public Health Situation Analysis (PHSA) on Hostilities in the occupied Palestinian territory (oPt) - 05 November 2023 - occupied Palestinian territory | ReliefWeb.

2 The crisis in Israel and the Occupied Palestinian Territory is a global crisis - Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, following his two-day visit to Israel and the oPt | OCHA (unocha.org).

3 Emergency Relief Coordinator visits Israel and the Occupied Palestinian Territory, 30 October 2023 | OCHA (unocha.org).

of health”. They include:

- Safe drinking water and adequate sanitation;
- Safe food;
- Adequate nutrition and housing;
- Healthy working and environmental conditions;
- Health-related education and information;
- Gender equality.

• **The right to health contains freedoms.** These freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment.

• **The right to health contains entitlements.** These entitlements include:

- The right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health;
- The right to prevention, treatment and control of diseases;
- Access to essential medicines;

Many of these and other important characteristics of the right to health are clarified in general comment N° 14 (2000) on the right to health, adopted by the Committee on Economic, Social and Cultural Rights. The Covenant was adopted by the United Nations General Assembly in its resolution 2200A (XXI) of 16 December 1966. It entered into force in 1976 and by 1 December 2007 had been ratified by 157 States.

- Maternal, child and reproductive health;
- Equal and timely access to basic health services;
- The provision of health-related education and information;
- Participation of the population in health-related decision -making at the national and community levels.

• **Health services, goods and facilities must be provided to all without any discrimination.** Non-discrimination is a key principle in human rights and is crucial to the enjoyment of the right to the highest attainable standard of health (see section on non-discrimination below).

• **All services, goods and facilities must be available, accessible, acceptable and of good quality.**

- Functioning public health and health-care facilities, goods and services must be available in sufficient quantity within a State.
- They must be accessible physically (in safe reach for all sections of the population, including children, adolescents, older persons, persons with disabilities and other vulnerable groups) as well as financially and on the basis of non-discrimination.
- Accessibility also implies the right to seek, receive and impart health-

related information in an accessible format (for all, including persons with disabilities), but does not impair the right to have personal health data treated confidentially.

- The facilities, goods and services should also respect medical ethics, and be gender sensitive and culturally appropriate. In other words, they should be medically and culturally acceptable.

- Finally, they must be scientifically and medically appropriate and of good quality. This requires, in particular, trained health professionals, scientifically approved and unexpired drugs and hospital equipment, adequate sanitation and safe drinking water.⁴

The process of entering the right to health in the International Humanitarian Law system

The Universal Declaration of Human Rights makes no reference to war except to assert that respect for human rights is a means of preventing it. The lack of attention is not surprising given that in the post-World War II period the conduct of war was the subject of the 1945 Nuremberg Declaration about war crimes and crimes against humanity, and intense debate in the lead-up to the re-drafting of the Geneva Conventions of 1949. Indeed, part of the push for addressing human rights in the UN Charter was the belief that respect for human dignity in peacetime was being neglected.⁵ The consequence of that peacetime focus, though, led to almost 60 years of neglect of the right to health in armed conflict. Over time, human rights ideas made their way into the law of armed conflict. Traditionally, the responsibilities of belligerents not to harm people not engaged in combat were grounded in the principle of humanity, to avoid unnecessary suffering. It is a far more limited concept than ideas of human dignity that ground the UDHR and the conventions that followed. In the two decades leading up to the 1949 conference on new Geneva Conventions, some international humanitarian law experts sought to introduce human rights concepts, especially human dignity, into the Conventions. For political and institutional reasons, though, the drafters of the 1949 Conventions rejected that approach.⁶ The new conventions only recognized a handful of rights, such as freedoms of religion and not to be tortured or be subjected to human experimentation.

The omission had serious consequences. First, major gaps in Geneva Conventions regarding health in armed conflict are properly filled by the right to health. The Conventions require parties to the conflict to refrain from attacking the wounded and sick and the health workers that offer them care, to collect and care for the wounded and sick in war, and to provide care impartially. But they are silent

4 Office of the United Nations High Commissioner for Human Rights, The Right to Health, fact sheet, No 31

5 I. Glendon M.A. *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House; 2001. pp. 9–10.

6 Van Dijk B. "Human rights in war: On the entangled Foundations of the 1949 Geneva Conventions," *Journal of the American Society of International Law*. 2018; 112:553–582.

on ongoing obligations by states engaged in war to offer available, accessible, acceptable and quality health services to the civilian population. Even during military occupation, the Conventions only obligate occupying military forces to preserve existing services and lack human rights criteria for their content and administration, much less any requirements for participation of the local population or accountability to it. The right to health fills this major gap in critical ways by requiring continuity of health services and mitigating the effects of war on the civilian populations such as through prevention and treatment of infectious diseases that so often accompany armed conflict.⁷ Especially in this time of protracted and chronic armed conflict, governments cannot be left off the hook by ignoring the right to health.

The status of the Right to Health for the residents of Gaza

The Israeli airstrikes targeting hospitals inside Gaza amount to “Attacks Against a Civilian Population.” The civilian population refers to individuals who are not considered military personnel or, if they are part of the military, do not take part in armed conflicts.⁸ The targeted areas are hospitals which are among the protected locations in armed conflicts as stated in the international documents. Article 18 of the Fourth Geneva Convention underscores that the civilian hospitals established to care for pregnant women, wounded, sick, and disabled, must not be targeted under any circumstances, and must be supported and respected at all times by hostile governments.

Regarding medical centers and matters related to the right to health of individuals in wartime, Articles 1 and 2 of the Geneva Convention ratified in 1864 states that ambulances, military hospitals, medical personnel, and equipment must not be disabled or targeted by military actions. It should be noted that the convention was later revised in 1929 and 1906.

Regarding the protection of civilians and following international humanitarian law, access to food, agricultural products, livestock products, and drinking water infrastructure, should not be targeted. Article 75 of the First Protocol states that all individuals must be entitled to certain guarantees including the right to life, the right to health, and mental and physical integrity. Furthermore, efforts should be made to prevent exposing individuals to torture and infectious diseases.

Considering said cases, the concerns expressed by the Security Council in a resolution(2720) 2023 regarding the violation of human rights and humanitarian laws, the concerns raised by various governments regarding the siege on Gaza Strip and the subsequent endangering of the health of the residents within the war-torn Gaza Strip resulting from the lack of access to food, water, etc., and the spread of infectious diseases, the slow pace of humanitarian aid delivery, and

7 Muller A. The Relationship between economic, social and cultural rights and international Humanitarian law: An analysis of health-related issues in non-international armed conflicts. Leiden, Boston: Martinus Nijhoff; 2013. Footer K., Rubenstein L. “A human rights approach to health care in conflict. International Review of the Red Cross. 2013; 95:889. 1–21.

8 Customary IHL - Rule 5. Definition of Civilians (icrc.org)

Israel's obstruction through various means, such as targeting hospitals, medical personnel, relief centers, camps, schools, and other crimes, It is evident that a clear and gross violation of fundamental human rights particularly that of the right to health has been committed against the people residing within the war-torn Gaza. According to the mentioned cases, also the reports of experts of the United Nations and the Human Rights Council on the violation of international obligations, especially the four Geneva conventions, by the troops of the Israeli regime are obvious. According to the statute of the Rome, the severity of these violations is so gross that it is easy to say that the Israeli has committed war crimes and crimes against humanity. Also, the Provisional Measure of the International Court of Justice that was brought by South Africa regarding the commission of genocide by Israel, the court of this the regime wanted to comply with the provisions of the Genocide Convention

Below, a number of activisms, particularly regarding the collection of documentation that could be cited in international courts are mentioned: In 2014, Palestine became a party to the Rome Statute, therefore, the International Criminal Court (ICC) has the jurisdiction to investigate and prosecute the four Major crimes (war crimes, crimes against humanity, genocide, and military aggression) within the territory of Palestine. Consequently, governments and international law actors are able to gather the evidence and documentation of the perpetrated crimes and submit them to the prosecutor's office. Additionally, they may cooperate in issuing a deterring statement through the court. Another solution involves NGOs (non-governmental organizations), their potential role should not be underestimated. Another mechanism in the ICC, known as Court-Friendly Institutions (Amicus Curia), they can play a significant role in addressing the Israeli-Palestinian conflict. These organizations may also participate in issuing and submitting collective statements and preparing evidence of the atrocities committed within the Gaza Strip to the prosecutor's office.

Conclusion

The right to health is considered one of the most fundamental components of human rights, which must be respected by international actors not only in times of peace but also in times of armed conflicts. The right to health is mentioned in the Universal Declaration of Human Rights, but there is no mention of the right to health during armed conflicts. This does not mean that the right to health has no place in wartime, but in wartime it is one of the most crucial elements that states involved in war should pay attention to it because its violation causes the perpetrator state to be punished according to international standards. In the recent war in Gaza, the international crimes of Israeli can be clearly seen. Hospitals, schools, health centers and ambulances were targeted and the city was besieged and unfortunately the access to food, water, medicine and other essentials was severely limited or cut off and subsequently the health of civilians were also endangered. And we are still witnessing an increase in the death toll of civilians in Gaza.

The situation in the Gaza Strip

Sajjad Ghadamyari¹

The Gaza Strip and East Jerusalem have been under Israel's belligerent occupation since 1967. Although Israel removed its forces from Gaza in 2005, it kept its control over airspace, territorial waters, land crossings, water, electricity and civilian infrastructure as well as over key government functions there, remaining as an occupying power in Gaza given its continuing effective control. After 7 October 2023, Israel by claiming its right to defend itself and to free Israeli hostages taken by Hamas, launched an all-out attack on Gaza Strip described as one of the heaviest conventional bombing campaigns in the history of modern warfare. Since then, Israel has continued its military operation in Gaza and denied General Assembly Resolution ES-10/21 calling for a humanitarian ceasefire in Gaza. Israel as an occupying power and Apartheid has manifestly breached its human rights obligations towards the Palestinian people for the past 57 years. However, violations of human rights law and international humanitarian law are now more severe than at any time in the Gaza Strip, even Plausible to constitute the crime of Genocide in the eyes of International Court of Justice (ICJ).

Infringement of Human Rights in Gaza

A considerable number of Palestinians' human rights are currently being violated by Israel. For example, the Right to highest attainable standard of health. This right is a fundamental human right indispensable for the exercise of other human rights, recognized in numerous international instruments including the Universal Declaration of Human Rights (Article 25), International Covenant on Economic, Social and Cultural Rights (Article 12), and the Convention on the Rights of Persons with Disabilities (Article 25). According to General

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Comment No. 14 of Committee on Economic, Social and Cultural Rights (CESCR), it requires health facilities, goods and services to be accessible to everyone without discrimination, within the jurisdiction of the State party. However, Israel has deliberately denied the Palestinians in Gaza adequate shelter, clothes and sanitation. For months, there have been acute shortages of clothes, bedding, blankets and critical non-food items. Clean water is all but gone, leaving far below the amount required to safely drink and cook. There have been 171 attacks on health care. Massive displacement to shelters with inadequate resources will result in disease outbreaks. The WHO has stated that Gaza is “experiencing soaring rates of infectious disease outbreaks”. Cases of diarrhea in children under five years of age have increased by 2,000 percent since hostilities began. Even on 7 December, the United Nations Special Rapporteur on the right to health noted that “the healthcare infrastructure in the Gaza strip has been completely obliterated” and “We are in the darkest time for the right to health in our lifetimes.” Those wounded by Israel in Gaza are being deprived of life-saving medical care. Gaza’s healthcare is unable to cope with the scale of the injuries. Civilian facilities such as hospitals are off-limits from attacks. Israel has claimed the Palestinian resistance group Hamas is using hospitals as bases but has not produced any convincing evidence of that claim.

In addition, Israel’s campaign has pushed Gazans to the brink of famine. Under-Secretary-General of the UN for Humanitarian Affairs and Emergency Relief Coordinator stated the great majority of 400,000 Gazans characterized by UN agencies as at risk of starving, “are actually in famine, not just at risk of famine.” An “unprecedented 93% of the population in Gaza is facing crisis levels of hunger”. The situation is such that the experts are now predicting that more Palestinians in Gaza may die from starvation and disease than airstrikes and yet Israel continues to impede the effective delivery of humanitarian assistance to Palestinians not only refusing to allow sufficient aid in but removing the ability to distribute it through constant bombardment and obstruction. On 8 January, a planned mission by the UN agencies to deliver urgent medical supplies and vital fuel to a hospital and medical supply center was denied by Israeli authorities. This marked the fifth denial of a mission to the center since 26 December, leaving five hospitals in northern Gaza without access to life-saving medical supplies and equipment.

Infringement of Humanitarian Law in Gaza

Several actions taken by the Israeli army, including its blockade on electricity, food, fuel and water, were characterized as collective punishment, a war crime prohibited and unjustifiable by both international and non-international armed conflicts under Common Article 3 of the Geneva Conventions and Additional Protocol II. Israel’s president Isaac Herzog accused the residents of Gaza of collective responsibility for the war. Doctors Without Borders international president Christos Christou said millions of civilians in Gaza faced “collective

punishment” due to Israel’s blockade on fuel and medicine. As the UN Secretary-General stated, the level of Israel’s killing is so extensive that “nowhere is safe in Gaza”. UN High Commissioner on Human Rights pointed out Israel’s collective punishment and forcible evacuation of Gazans were both war crimes. Moreover, Israel is alleged to have broken medical neutrality, a war crime under the Geneva Conventions as hospitals are given special protection under international humanitarian law. According to Gaza officials, the Israel Defense Forces (IDF) deliberately targeted ambulances and health facilities with airstrikes. In a statement, the Palestine Red Crescent demanded “accountability for this war crime.” The International Federation of Red Cross and Red Crescent Societies and The United Nations Relief and Works Agency for Palestine Refugees (UNRWA) reported the deaths of their medical personnel. On 14 October, the WHO noted the killing of healthcare workers and the destruction of health facilities “denies civilians the basic human right of life-saving health” and is prohibited by International Humanitarian Law. On 17 October, WHO stated 51 health facilities had been attacked by Israel and on 4 November, the Gaza Health Ministry stated 105 medical facilities had been deliberately targeted.

Furthermore, On 13 October, the Israeli army ordered the evacuation of 1.1 million people from north Gaza including children, the elderly, the wounded and infirm, saying that they needed to separate the civilian population from the militants embedded among them, and that the population would be allowed to return after the war. Entire hospitals were required to evacuate, even newborn babies in intensive care. Gazan officials initially asked residents to ignore the order, with the Interior Ministry claiming Israel sought to “displace us once again from our land.” The action was condemned by the UN, UNICEF and Doctors Without Borders. On 14 October, the WHO issued a statement condemning Israel’s order to evacuate 22 hospitals in northern Gaza, calling it a “death sentence.” Nevertheless, on 22 October, the IDF dropped leaflets in northern Gaza stating anyone who did not comply with the evacuation would be considered a “terrorist.” There is nowhere safe for them to flee to those who cannot leave or refuse to be displaced have either been killed or are at extreme risk of being killed in their homes. Many Palestinians have been displaced multiple times, as families are forced to move repeatedly in search of safety. For many Palestinians, the forced evacuation from their homes is inevitably permanent. Israel has now damaged or destroyed an estimated 355,000 Palestinian homes leaving at least half a million Palestinians with no home to return to. The Special Rapporteur on the human rights of internally displaced persons explains that houses and infrastructure “have been razed to the ground, frustrating any realistic prospects for displaced Gazans to return home, repeating a long history of mass forced displacement of Palestinians by Israel”.

And lastly, Israel’s measures are in great risk of falling within Article 2 of the Convention on Prevention and Punishment of Crime of Genocide. More than 25000 Palestinians have been killed by Israeli forces during the sustained attacks over the last three months, at least 70 percent of whom are believed

to be women and children. Some 7,000 Palestinians are still missing, presumed dead under the rubble. Palestinians in Gaza are subjected to relentless bombing wherever they go. They are killed in their homes, in places where they seek shelter, in hospitals, in schools, in churches, in mosques and as they try to find food and water for their families. Israel's attacks have left close to 60,000 Palestinians wounded and maimed again the majority of them women and children. The level of killing is so extensive that those whose bodies are found are buried in mass graves, often unidentified the first three

weeks alone following 7 October, Israel deployed 6,000 bombs per week. At least 200 times, it has deployed two-thousand-pound bombs in southern areas of Palestine designated as "safe". These bombs have also decimated the north, including refugee camps. Two-thousand-pound bombs are some of the biggest and most destructive bombs available. It was clearly calculated to bring about the destruction of the population. No one is spared, not even newborn babies. The scale of Palestinian child killings in Gaza is such that UN chiefs have described it as "a graveyard for children." Also, the United Nations Special Rapporteur on violence against women and girls has pointed to acts committed by Israel that would fall under the fourth category of genocidal acts, in Article II (d) of the Convention. On 22 November she expressly warned the following: "the reproductive violence inflicted by Israel on Palestinian women, newborn babies, infants, and children could be qualified as acts of genocide under Article 2 of the Genocide Convention. Israel is blocking the delivery of life-saving aid, including essential medical kits for delivering babies, in circumstances where an estimated 180 women are giving birth in Gaza each day. Of these 180 women, the WHO warns that 15 percent are likely to experience pregnancy or birth-related complications and need additional medical care which is not available. As to the special intent, the Defense Minister of Israel stated "there would be no electricity, no food, no water, no fuel". "Everything would be closed", because Israel is "fighting human animals" and similar statements by High-Rank Officials of Israel. On 29 December South Africa filed the case South Africa v. Israel based on the Genocide Convention alleging that Israel "is committing genocide in manifest violation of the Genocide Convention. South Africa asked the ICJ to issue provisional measures, including ordering Israel to halt its military campaign in Gaza. ICJ issued a provisional measure order finding the existence of genocide in Gaza plausible, an order which Israel has not complied with.



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Jurisdiction Ratione Materiae of the International Criminal Court over Israel's Illegal Use of White Phosphorus in the 2023 Gaza War

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Abstract

One of the topics discussed in the 2023 Gaza war was the use of white phosphorus in Israel's attacks on Gaza; This article examines this action from the point of view of the Statute of the International Criminal Court. The findings of the article show that white phosphorus is in the class of incendiary weapons and is a conventional weapon based on international humanitarian law, although its use has limitations. According to the Rome Statute, cases concerning illegal use of this munition in hostilities as an example of crimes against humanity and war crimes are under the jurisdiction of the International Criminal Court.

Keywords: *white phosphorus, International Criminal Court, conventional weapons, war crimes, crimes against humanity, Human rights, international humanitarian law*

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Introduction

After the two world wars, many efforts were made to maintain international peace and security, and yet mankind has not succeeded in preventing the occurrence of armed conflicts. Following humanity's efforts to prevent or at least codify legitimate and illegitimate activities during war, treaties were concluded and principles and procedures were identified; In the 2023 Gaza war, the world witnessed a severe violation of these rules. One of the topics discussed by the media in connection with the events of the war was the use of white phosphorus

(WP) in Israel's attacks on Gaza. Human Rights Watch announced for the first time in a report on October 12, 2023 that Israel has used weapons containing WP in its attacks on Gaza and Lebanon and has endangered civilians.¹ Amnesty International also announces in a report Israel's use of WP and the harm caused to civilians.² The Pre-Trial Branch I of the International Criminal Court (ICC) had previously announced its competence on February 5, 2021 to deal with the situation of the Palestinian Authority regarding the events in Gaza and the West Bank.³ This article examines the use of WP by Israel from the perspective of the ICC Statute.

The military use of WP and the international humanitarian law approach

WP and its application

WP is a yellow and white, transparent and wax-like substance that ignites when exposed to oxygen and a temperature of more than 800 degrees Celsius. When it ignites, it has a yellow flame and a smell similar to the scent of garlic, and creates white and bright smoke; while oxygen is present WP continues burning.⁴ This material is used in the military munitions, including bombs, rockets, artillery shells, mortars and grenades.⁵ The main use of WP is to create a fog in the operational areas and disrupt the enemy's plans.

It is very difficult to extinguish this substance after ignition, and it sticks to clothes and skin and causes painful and thermal burns on the skin after contact with the human body; These burns can spread to the underlying tissues of the body and lead to the death of the individual. On the other hand, exposure to this burning substance causes severe respiratory and kidney problems and can even lead to unconsciousness and coma.⁶



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Historical record of the use of WP

WP appears to have been first used by the Irish in the 19th century. After that, it was used during the First World War and the Second World War. The United States used WP munitions extensively during the Vietnam War against the Viet Cong forces. The same government used this munition in the Fallujah region during the Second Persian Gulf War.⁷

Apart from the US, during the 1982 war and the 33-day war in Lebanon in 2006, Israeli forces used white phosphorus in their attacks.⁸ Israeli forces used this weapon again in their attacks in the 22-day war in Gaza and caused severe injuries to civilians.⁹

According to the reports raised during the Russian attack on Ukraine in 2022, the Russian army used white phosphorus in several cases.¹⁰ Russia had previously used this substance in the conflicts in Chechnya.

Legal status of WP

International humanitarian law (IHL) prohibits methods and weapons that cause excessive harm and unnecessary suffering.¹¹ This prohibition is based on the principles of limitation, necessity and prohibition of unnecessary suffering. According to the principle of necessity, the warring parties should act as much as necessary to overcome the enemy and should not seek to destroy and kill as much as possible.¹²

As the Declaration of 1868 of St. Petersburg stipulated, only military goals are legitimate. The principle of limitation, which is rooted in the Hague Law, considers the right of the warring parties to use unlimited military weapons.¹³ The purpose of the principle of prohibition of unnecessary pain and suffering is also clear according to the other two principles. Meanwhile, the important and key principle of separation, along with other principles, creates a basis for dividing military weapons: conventional and non-conventional weapons.

The use of toxic, microbial, biological and chemical weapons is prohibited due to non-compliance with the principles of humanitarian rights and also according to international documents. The question is, in which category is WP located? Contrary to the opinion of many people who consider WP a chemical weapon because it is a chemical substance, it should be noted that according to the Convention on the Prohibition of Chemical Weapons, WP is not considered a chemical weapon; because it acts as an incendiary agent and weapon and not the agent of an effective chemical process.¹⁴

WP is a subcategory of incendiary weapons; Incendiary weapons are not among the prohibited weapons based on IHL and specifically the 1980¹⁵ Convention on Conventional Weapons (CCW). According to the third protocol of the treaty, which is specific to incendiary weapons, the use of this class of weapons against military targets is not prohibited, but it is prohibited against civilian targets and even a situation where it is not possible to distinguish between military and civilian targets.¹⁶

Therefore, for the use of this class of weapons, the principles of IHL have set limits. The point here is that Israel, despite not accepting the protocol III of the CCW, does not have an obligation to comply with this distinction. It should be said that the issue of separating civilian targets from legitimate targets in the use of incendiary weapons is not limited to the CCW, because humanitarian customary law and its basic principles stipulate that in order to use incendiary weapons, the necessary care and caution must be taken to prevent casualties and damage to civilian people and objects.¹⁷

Based on the above, WP as an example of incendiary weapons is a conventional weapon that should be used in order to destroy military targets according to the principles of necessity, limitation and prohibition of unnecessary pain and suffering, and its use against civilian targets according to international custom and the principle of separation is prohibited.

The Use of WP by Israel from the perspective of the Rome Statute¹⁸

In this part, we want to answer the question whether the crimes related to the use of WP fall under the jurisdiction of the ICC? If the answer is yes, this crime falls under which of the four crimes under the jurisdiction of the International Criminal Court? In Article 5 of the Rome Statute, the Court has jurisdiction over four international crimes: genocide, crimes against humanity, war crimes and aggression.

Illegal use of WP is a common violation of HR and IHL; Crime against humanity is in fact a gross and widespread violation of the fundamental principles of human rights, which can be dealt with under the jurisdiction *ratione materiae* of the ICC; War crimes are also related to violations of *ius in bello*. Here, the prohibited military use of WP is evaluated as an example of committing crimes against humanity and war crimes because “War crimes and crimes against humanity can and do frequently overlap. For example, a mass killing of civilians during an armed conflict could constitute both types of crimes”¹⁹. However, there are differences between these two crimes in customary international law. Apart from the time of commission, according to international custom and Article 7(1) of the Rome Statute, criminal acts of crimes against humanity are part of a widespread, systematic and deliberate



WP as an example of incendiary weapons should be used in order to destroy military targets and its use against civilian targets according to international custom and the principle of separation is prohibited

attack that is committed against the civilian population, whereas, according to international custom, a single act is sufficient to commit a war crime.²⁰ The Rome Statute has limited jurisdiction over war crimes (see 3.2).

If the illegal use of white phosphorus is under the jurisdiction of the Rome Statute, regarding to its article 25(3), offenders, orders, aiders, abettors of committing these acts and according to 28 of the Rome Statute, commanders can be prosecuted. In international criminal law, the responsibility is towards natural persons and their position does not affect²¹.

Crime Against Humanity

The Statute of the Court provides a broad definition and framework for crimes against humanity that never existed before; The beginning of Article 7 envisages this crime only against civilians, and soldiers are excluded from the inclusion of this article. It is quite clear that international law allows a systematic attack against soldiers in a war.²² But it seems that individuals who are hors de combat can be included.

In cases of crimes against humanity according to the Rome Statute, crimes against civilians in war and the use of prohibited weapons or the prohibited use of conventional weapons are not specifically mentioned. Subparagraph a of the article widely considers the intentional killing of civilians as an example of a crime against humanity, WP has the potential to kill; In this regard, the civilians who were targeted and killed by the Article are victims of the crime of murder, a crime against humanity in subparagraph a; According to the document on the elements of crimes of the ICC, the number of murder victims can be even one person.²³

On the other hand, mens rea in committing murder as a crime against humanity is also milder, because not only intentionality in the act but also culpa gravis and dolus eventualis can provide the basis for its realization.²⁴ Even if the use of this weapon in some cases does not cause the death of people, subparagraph k of Article 7 also mentions inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health of people; Considering that WP causes severe physical suffering for people, it can be placed under this item.

according to the evidence and reports of the HRW, Israel's actions have been widespread and organized. As a result, by comparing the use of white phosphorus in Israel's widespread and organized air attacks with Article 7(a) (k), it can be concluded that this act is a clear example of a crime against humanity and falls under the jurisdiction of the ICC.

War Crimes

The war crimes are serious violations of IHL and rules such as The Hague and Geneva Conventions; In the meantime, attention should be paid to international documents related to military weapons, including the Chemical Weapons Convention, the 1925 Geneva Protocol, etc. Although these conventions

cannot prevent the occurrence of war, they have been able to reduce the pain and human injuries resulting from conflicts for the victims of war by applying some provisions.

Article 8 of the Rome Statute is dedicated to war crimes; This article is detailed and covers various aspects of gross violations of IHL. According to paragraph 1 of Article 8, the court's jurisdiction is limited to crimes that are part of a general policy and program or committed on a large scale. This provision gives the result that the court does not have jurisdiction over individual crimes and apart from the general program.²⁵ According to the reports and what has been said (3.1), there is no debate in this matter.

Article 8 differentiates between non-international armed conflict and international armed conflict, and in subparagraph b, it criminalizes a range of war crimes in international conflicts. Among the cases, the use of toxic weapons, asphyxiating gases, explosive bullets, biological weapons and laser weapons that cause blindness to the unarmed eye are criminalized. However, the illegal use of conventional weapons is not specifically mentioned. On the other hand, Article 8(2)(b)(xx) has conditions that have not been fulfilled.²⁶ According to the mentioned contents, other cases should be evaluated in Article 8 According to IHL, the first goal in any war is to protect civilian targets and distinguish between them and legitimate targets.²⁷ Until the Geneva Conventions, civilians were not protected by the treaties during the war as they should have been, so we have seen many crimes against civilians in the First and Second World Wars. Therefore, in 1949, with the approval of the Geneva Conventions, laws and regulations were codified to protect civilians. Violation of these rules results in international criminal responsibility. The use of WP against a civilian population in an armed conflict is an example of the violation of the following articles in the statute:

In conformity with paragraph a of Article 8, extreme violation of the Geneva Conventions against persons protected by the Conventions is a class of war crimes; Among these actions are intentional killing²⁸ and willfully causing great suffering, or serious injury to body or health²⁹. Murder can happen in any way, and if the Israeli forces have used WP with the intention of deliberately killing civilians, then the murder has been committed as a war crime against the protected group, and the number of people killed has no effect³⁰; The imposition of great suffering and pain caused by the use of WP will also be a



Murder can happen in any way, and if the Israeli forces have used WP with the intention of deliberately killing civilians, then the murder has been committed as a war crime against the protected group, and the number of people killed has no effect



The use of incendiary weapons such as WP directly against civilian targets, including persons and places, and where it is not possible to distinguish between Lawful and unlawful targets, is prohibited based on IHL

war crime. On the other hand, the use of WP, if the perpetrators are only aware of the consequences of using it against civilians, realizes mens rea of the crime.³¹

Among the cases in subparagraph b of Article 8, some verbs correspond to the prohibition of using WP against civilians: (i) Intentionally directing attacks against the civilian population..., (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives, (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage

to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives, (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives. The use of incendiary weapons such as WP directly against civilian targets, including persons and places, and where it is not possible to distinguish between Lawful and unlawful targets, is prohibited based on IHL (see 2.3.); Israel's use of WP in disregard of this prohibition is an example of the cases mentioned in subparagraph b and is considered a war crime.

Since WP is considered a conventional weapon, its use against the military objects is lawful; it seems to be despite the principles of IHL and Article 35(2) of the Geneva Additional Protocol I³². However, some believe no custom or rule prohibits WP.³³

It seems that there should be a revision in the rules of international law regarding some weapons such as WP, because great injuries that occur as a result, are incompatible with the goals of IHL, inter alia the prohibition of unnecessary suffering against combatants³⁴.

This non-prohibition causes an obstacle to the jurisdiction of the Court to enter these cases, and the jurisdiction to use WP against the military is not established.

Conclusion

Although WP is not an unconventional weapon in conformity with the Convention on Conventional Weapons 1980, the use of conventional weapons during conflict is prohibited in some situations, including against civilians; Also, according to Articles 7 and 8 of the Statute of the ICC, the use of weapons against this group, both conventional and unconventional, will be recognized as illegal and included as a crime against humanity and a war crime. By implementing these prohibitions on the use and effects of the use of WP, Israel's actions are an international crime and can be investigated by the court. The use of WP against the military forces is ultra vires of the court, according to the restrictions listed, and based on Article 8(2)(b)(xx), it is subject to a comprehensive ban and amendments according to the statute.

1 See to WHR, Israel: white phosphors Used in Gaza, Lebanon, Available at <<https://www.hrw.org/news/2023/10/12/israel-white-phosphorus-used-gaza-lebanon>>, Last visit on December 7, 2023

2 Amnesty International, Lebanon: Evidence of Israel's unlawful use of white phosphorus in southern Lebanon as cross-border hostilities escalate, Available at <<https://www.amnesty.org/en/latest/news/2023/10/lebanon-evidence-of-israels-unlawful-use-of-white-phosphorus-in-southern-lebanon-as-cross-border-hostilities-escalate>>, Last visit on December 7, 2023

3 Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC, (February 5 2021), Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF>

4 See to WHO, WP, Available at <<https://www.who.int/news-room/fact-sheets/detail/white-phosphorus>>, Last visit on December 2, 2023

5 Gary D. Solis, *The Law of Armed Conflict: international humanitarian law in war*, (Cambridge University Press, 2010), p.597

6 WHO, op.cit.

7 Gary D. Solis, op.cit. p.598

8 Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, 2009, p.12, Available at <http://www.hrw.org>

9 See to Ibid., pp.35-56

10 See to Daniel Arkin, Zelensky accused Russia of using phosphorus bombs. What does that mean?, NBC news, Available at <<https://www.nbcnews.com/news/world/what-is-phosphorus-bomb-russia-ukraine-rcna21371>>, Last visit on December 2, 2023

11 Rule 70 of Customary International Humanitarian Law, reprinted in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (Cambridge University Press, 2009), p.237

12 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, (Hart, 2008), p.47

13 Article 22 of Hague Convention (IV) 1907 and Article 35(1) of Additional Protocol I to the Geneva Convention

- 14 See to Art.II of Chemical Weapons Convention (CWC), Available at <https://www.opcw.org/sites/default/files/documents/CWC/CWC_en.pdf>
- 15 Convention on Prohibitions or Restrictions on the Use of Certain Conventional and Protocols 1980, Available at <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0811.pdf>
- 16 Ibid., Protocol III, Art.2
- 17 Rule 84 of Customary International Humanitarian Law, Henckaerts and Doswald-Beck, op.cit., p.287
- 18 Rome Statute of ICC, Available at <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>>
- 19 Robert Cryer and Others: An Introduction to International Criminal Law and Procedure, (Cambridge University Press, 2010), p.233
- 20 Ibid.
- 21 In Persian:
ابراهيم بيگ زاده، حقوق بين الملل جلد دوم،نشر ميزان، 1401، ص 1274
- 22 Ibid., p.241
- 23 Elements of Crimes, Art.7 (1) (a) Crime against humanity of murder, Available at <<https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/publications/ElementsOfCrimesEng.pdf>>
- 24 Prosecutor v. Akayesu, (Judgment), Case No. ICTR-96-4-T, (September 2 1998), par.589-590
- 26 "...provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123..."
- 27 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p.257, par.78
- 28 Rome Statute, Art.8(2)(a)(i)
- 29 Ibid., Art.8(2)(a)(iii)
- 30 Elements of Crimes, Art.8 (2) (a) (i), War crime of willful killing, par.1
- 31 See to Rome Statute, Art.30(2)(b)
- 32 Geneva Additional Protocol I 1977, Available at <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.34_AP-I-EN.pdf>
- 33 Example, See to Gary D. Solis, op.cit., p.599
- 34 Legality of the Threat or Use of Nuclear Weapons, op.cit.

