

Can Israel Prevent The Icc From Conducting An Investigation In The Situation In Palestine?

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ABSTRACT

The territorial conflict between Israel and Palestine has been the longest dispute in history. Although various efforts have been made to reconcile the dispute, no successful outcome could be achieved. The tension between the two states have been ever-increasing and upon the completion of preliminary examination, the ICC has now declared to conduct an investigation into the Palestinian situation. However, there has been speculations regarding the ICC's ability to conduct an investigation on the basis of various clauses in the Rome Statute. Moreover, upon the declaration of an investigation by the OTP, the Israeli government has condemned the decision on various grounds. The primary objective of this paper is to iterate that Palestine is a recognized state and the crimes being committed in its territories fall under the purview of the Rome Statute, entailing accountability of the perpetrators. Hence, the author has attempted to refute Israel's grounds and basis for non-cooperation and analyses the alleged "escape-clauses" in the Rome Statute. Finally, the author has reinforced that the ICC plays a non-partisan role in conducting investigations and holding war criminals accountable. Furthermore, the so-called "escape-clauses" in the Rome Statute are not loopholes rather a means by which the ICC aims to encourage national courts to undertake genuine proceedings to prosecute war criminals, in order to ensure global peace and order. Therefore, international law cannot be used as a tool to escape liability. The author has applied qualitative method, relying on primary and secondary sources of international law.

Keywords: 2021 Palestinian conflict; ICC jurisdiction; international criminal court; complementarity principle; the Rome Statute

INTRODUCTION

While numerous scholars have commented on the legitimacy of the ICC in conducting an effective investigation on the basis of jurisdiction, admissibility and principle of complementarity; others have criticized the inadequacy of the Rome Statute in holding non-member states accountable for war crimes committed in member states. Nevertheless, scant attention has been given to the fact that the ICC was created to complement national criminal jurisdiction; precisely as a "tribunal of last resort".¹ This paper aims to contribute to the debate by critically analyzing the preventive-provision of the Rome Statute that is responsible for enabling perpetrators to remain off the hook or to enable non-cooperation with the ICC in conducting an investigation. The main assertion of this paper is that the alleged "escape-clauses"² are not loopholes rather a means by which the ICC aims to encourage national courts to undertake genuine proceedings to prosecute war criminals; and nonetheless, that it remains in the power of the Office of the Prosecutor to initiate proceedings if it remains of the opinion that the domestic investigative processes have not been genuine or may be somewhat tainted by "unwillingness or inability".³

The Israel-Palestine conflict has been one of the world's long-lasting hostilities. Although various attempts have been made to resolve this conflict, as a part of the Israel-Palestine peace process, the conflict has never been fully resolved till date, and the more concerning aspect has been the ever-increasing clashes between the two States, particularly the perpetual attacks by Israeli government on the Palestinian territories, from time to time.

In January, 2020, former US president Donald Trump had presented a peace plan titled "*Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People*" which proposed for recognition of an independent Palestinian state and Israel's sovereignty over West Bank settlements. Nevertheless, the plan was dismissed by Palestinian President Mahmoud Abbas, claiming it to be a 'conspiracy. Israel has systematically, over the past 50 years, evicted thousands of Palestinians from their residences that have been adversely possessed by Jews. The freedom and livelihood of Palestinians have been violated bleakly, although Israeli government claims its actions to be purely in 'self-defense' and to protect itself from attack by the Palestinians.⁴

The International Criminal Court (ICC) is the predominant international court that has the jurisdiction for prosecuting crimes of genocide, crimes against humanity, war crimes and the crimes of aggression.⁵ The underlying reason behind the establishment of the Court was the need for an international tribunal in order to adjudicate cases against international political leaders. Furthermore, the aim of the Court is to complement existing national judicial systems, and hence, the Court may only exercise its jurisdiction, when national courts have not conducted a genuine procedure or are 'unwilling' or 'incapable' of prosecuting criminals; Prior to an individual being prosecuted by the Court, the Rome Statute requires the fulfillment of several criteria, which involve jurisdictional and admissibility requirements.⁶ The three jurisdictional requirements include subject-matter jurisdiction, territorial jurisdiction and temporal jurisdiction. Furthermore, the Court's jurisdiction may only arise by any one of three possible sources: State party, the Security Council or a Prosecutor. Jurisdiction is delegated on the international criminal courts and tribunals by the States themselves.⁷ States may directly delegate jurisdiction when they ratify the Rome Statute or by making a declaration under Article 12(3) of the Statute; or the delegation may be indirect, when it is grounded in the United Nations Security Council (UNSC)'s powers under Chapter VII of the United Nations (UN) Charter or the referral of a situation to the ICC Prosecutor under Article 13(b) ICC Statute. According to Riccardi, in both cases, jurisdiction is based upon consent of the States to confer the Court the authority to adjudicate crimes under international law.⁸

Levy and Rozenweig found that the ICC usually begins proceedings with a preliminary examination, whereby the OTP examines aptness of conducting an independent investigation. At this stage, the issues of jurisdiction, principles of admissibility and interests of justice are examined.⁹ Admissibility is tested on the basis of the "principle of complementarity" which means that the Court will only prosecute an individual if states are 'unwilling' or 'unable' to do so.¹⁰ Hence, if authentic national proceedings into crimes are ongoing or have taken place already, the Court will not initiate proceedings, irrespective of the outcome of national proceedings.

The complementarity principle has often been alleged to be a "protection" for perpetrators, here Israel, in denying an intervention by the ICC, by

claiming to have prosecuted individuals for war crimes, in domestic courts. However, it is well-settled that the complementarity rule is applied on the discretion of the ICC. Even though states may attempt to bar the court from intervening by claiming to have internally prosecuted criminals, the ICC must first be satisfied that such internal procedures have been genuine, independent and carried out without any bias.¹¹ Hansel and Obel opined that the complementarity doctrine has been hailed as the Rome Statute's keystone; and has been applauded in protecting state supremacy, emaciating crimes that could be investigated by the Court; and the rule upholds accountability as States are under obligation to carry out their own investigation and legal proceedings.¹²

In early March of 2021, Fatou Bensouda (Office of the Prosecutor), declared to initiate an investigation in the Palestinian situation, under the Rome Statute's Article 18(1), which will encapsulate all crimes committed by Israel in the Palestinian territories since 2014, conditioned on the fact that such crimes are fall in the category of crimes recognized in Article 5 of the Rome Statute.¹³ Despite previous referral by the Palestinian authorities, the Court failed to proceed with any sort of investigation as it lacked jurisdiction; back in 2014, Palestine was not recognized as a State which barred it from being a party to the Rome Statute.¹⁴ On the contrary, in December, Israel did sign the Rome Statute, however, did not ratify it.¹⁵ Finally, in 2020, the issue of lack of jurisdiction due to Palestine's non-state position was settled and the OTP declared to have jurisdiction in the territories. According to the OTP's 2019 report, the criteria for an investigation had been satisfied, but the issue of jurisdiction could not be resolved; furthermore, given that the Israel judicial system contains legal provisions for penalizing war criminals the ICC is unlikely to have jurisdiction over such crimes given that such national proceedings are genuine and non-biased, as per the OTP.¹⁶ Clancy and Falk argued that any attempt of investigation by the ICC to address Israel's wrongdoings would include both political and logistical challenges. As the court is an independent institution it relies on international funding and the cooperation of its state parties for commencing investigations and carrying out arrest warrants.¹⁷ Furthermore, since Israel is a non-party to the Rome Statute, it has no obligation to cooperate with the ICC.¹⁸

RESEARCH QUESTION AND METHODOLOGY

Taking into consideration, the OTP's recent decision to conduct an investigation, this paper analyses on the subsisting escape-clauses that allegedly preclude the Court's capacity and capability to adjudicate this long-lasting historical conflict. This paper has highlighted that the alleged clauses are rather tools for the ICC, in compelling nations to ensure accountability of perpetrators and it shall remain for the OTP to ultimately decide the genuineness of national proceedings. Furthermore, a successful and effective investigation that results in punishment of the perpetrators would serve justice to both innocent Palestinian and Israeli civilians; and restore global peace and order.

In analyzing this topic, a qualitative method has been used, relying on primary sources such as the Rome Statute and secondary sources, for instance, articles, books and thesis on jurisdictional aspects of the International Criminal Court (ICC). Firstly, a brief discussed has been made on the evidences of war crimes that Israel has committed and the miserable situation in Palestine since 2014; rebuttal to Israel's grounds for non-cooperation with the ICC; the doctrine of complementarity and to what length it can debar the Court from conducting an all-embracing investigation. Lastly, I have reiterated on the fact that, the ICC is an independent and non-biased institution, the aim of which is to restore global peace and order by holding international criminals accountable; and the ICC plays a non-partisan role in convicting war criminals, irrespective of how powerful the state against whom it is investigating or conducting trial.

DOES THE ROME STATUTE COMPRISE ESCAPE-CLAUSES FOR PERPETRATORS?

Soon after the declaration of investigation by the OTP, although the Palestinian authorities lauded the decision and informed the ICC of "full cooperation"; Israel, however, criticized the decision and claimed not to have committed any of the alleged war crimes. Furthermore, the Israeli Prime Minister questioned the legal basis of the ICC in the Situation and deemed it to be unacceptable on the grounds that the ICC lacks jurisdiction over the alleged territories, Israel is not a member of the ICC and that Palestinians do not qualify as a sovereign state and hence, does not qualify to be a member.¹⁹ Furthermore, countries such as the United States,

Germany and Hungary also denounced the ruling based on the latter ground.²⁰ Although it is true that, one of the significant detriments that have been existing against the ICC to conduct the investigation has been the question of "jurisdiction", the issue has been subsequently resolved and Palestine is rightfully now a member state.²¹

PALESTINE ATTAINS MEMBERSHIP TO THE TREATY OF ROME

In the past, Palestine was not conferred the status of a nation and therefore, it was unable to be a member of the Rome Statute; on the contrary, although Israel had signed the treaty in early 2000s, it did not formalize the Statute.²² Subsequently, on 1st of April, 2015 Palestine had successfully received membership of the Rome Statute. The main incentive behind ratification of the Statute, for Palestine, is international recognition. Being an ICC member state includes receiving recognition at the diplomatic level, in the international faction and reinforces international supremacy by appending another treaty or organization.²³ Furthermore, Tuncay opined that ratification of the Rome Statute would in turn boost the global support for the Palestinian movement.²⁴ At this point, it seems apt to underline the process of Palestine's journey of attaining membership to the Rome Statute. In 2009, the authorities of Palestinian informed the ICC that it accepted the Court's jurisdiction in its territory; nonetheless, the ICC could not approve of such a declaration as the question of Palestine's statehood was under speculations. Furthermore, the ICC may seek guidelines from the the United Nations General Assembly, in such situations. In due course, on the basis of the fact that, Palestine received 'realization as a State', by majority of 130 nations and also international organizational bodies; Palestine was bestowed the position of "observer" by the UN General Assembly. There is a significant and substantial contribution by international institutions in realization of nations and their nationhood, which only becomes probably through a membership in such organizations.²⁵ Borovci iterated that when a state becomes member of an international organization, it confers on the state the *factual recognition* of statehood and accelerates the process to the international relations as a *legitimate actor*.²⁶ Furthermore, Elgindy stated that Palestine being bestowed the status of 'non-member observer' state through a resolution passed by the UN General Assembly, in 2012, was a new strategy of statehood

by the Palestinian authority.²⁷ Moreover, according to Quigley, the UN General Assembly's decision to grant Palestine non-member observer State status "represents a step in a process that has been in motion for some decades".²⁸ Nevertheless, it was pointed out by Vidmar that the upgradation of Palestinian's status and recognition as a non-member observer state, does not alter its legal status. The *procedural tricks via international treaties and organizations* do not create statehood but can be evidence of it.²⁹

A second declaration was made by the government of Palestine in 2014, pursuant to Article 12(3) of the Rome Statute, voluntarily accepting the jurisdiction of the ICC. Subsequently, the second declaration was accepted. In 2015, Palestine once again initiated another step and ratified the Rome Statute, as the ICC no longer questioned its statehood. Consequently, Palestine is equal among all other signatories of the Rome Statute. Additionally, even though Israel has not ratified the Rome Statute, under the territoriality principle of the ICC, any crime committed in the territories of a member state can be investigated and prosecuted by the Court (Article 12, Rome Statute).³⁰ Kontovorich argued that the contentious aspect of the ICC's jurisdiction is the application of it to nationals of non-member states for conduct on the territory of member states; nevertheless, it is congruous with national sovereignty since the member state has jurisdiction under conventional territorial principles over the non-member nationals and the member state may delegate this jurisdiction to an international tribunal. Hence, subsequent to Article 12 of the Treaty, it is apparent that the ICC has jurisdiction to adjudicate in matters of Israel, particularly on crimes that occurred of 'on the territory' of the state of Palestine.³¹

THE 'COMPLEMENTARITY' RULE

Although the issue of jurisdiction appears to have been somewhat resolved, the most impactful hurdle that lies before the ICC could be the "*principle of complementarity*".³²

Essentially, Palestine cannot initiate legal action against Israel, merely due to the fact that the ICC now has jurisdiction in its territories nor because Palestine's statehood has been established. There are various reasons, namely, the nature of the ICC is a criminal court and it cannot uptake lawsuits; whether to initiate a criminal case remains at the discretion of the ICC and not with its member states. What Palestine can do is simply refer its 'situations'

to the OTP and demand an investigation. 'Situation' may be defined as a pattern of events within which certain crimes have been committed; and this restricts member states from hiding crimes that may be their own.³³

As mentioned in Article 17 of the Rome Statute, the complementarity rule is operational and the ICC may only initiate legal proceedings if the state in question demonstrates 'unwillingness' or 'inability' to conduct its own domestic proceedings.³⁴ In addition to this, a case is categorized as 'admissible' if the domestic proceedings are proven to evade delivery of justice.³⁵ Luis Moreno Ocampo, the ICC's first Chief Prosecutor acknowledged that forming an "extra-national criminal court" was likely to create "*fear and misunderstandings*", however, he assured that if a genuine State action has been initiated, the Court shall never intervene. He reiterated that the primary responsibility laid with the States for investigating and prosecuting war crimes. Therefore, under the complementarity rule, if it is established that Israel has already adjudicated and punished for certain alleged war crimes, it would be less probable for the ICC to exercise jurisdiction in such cases; the only criteria is that such national investigation has been carried out in *good faith*. Therefore, in order to allow the ICC to investigate and prosecute such war crimes, it would have to be demonstrated that the national courts had acted in 'bad faith' in prosecuting the war criminals. However, the burden of proof lies with the ICC to prove 'bad faith'.³⁶

Furthermore, according to Shereshevsky, certain defects may exist in domestic proceedings, for instance, reluctance to commence proceedings against high level officials and the constriction of these proceedings to low-level perpetrators.³⁷

WAR CRIMES COMMITTED BY ISRAEL

The following areas would be mainly focused during the ICC's investigation: the Israel-Gaza war of 2014; violence along the Israel-Gaza border in 2018; and Israeli settlements in the occupied territories.

In 2014, a seven-week war had emerged between Israel and Hamas that caused the deaths of approximately two thousand Palestinians and hundred Israelis. The 2014 Gaza War had given rise to the question of proportionality and necessity. The UN Human Rights Council had appointed the United Nations Independent Commission of Inquiry which reported evidences of disproportionate and unnecessary use of force during the conflict and

absence of any national proceedings. At the time of conflict, more than thousand Palestinians were killed, there was an outpouring in use of firepower, firing of airstrikes, tank and artillery shells. Furthermore, Israel authorities have been non-cooperative with the Commission and refused to give any access to the territories and as such the Commission acquired such details through video calls and telephone interviews.³⁸

Israel has also been accused of enforcing discriminatory diminution on the exercise of human rights of Palestinians, constructing illegal settlements, transferring Israeli residents to West Bank. An assessment published by the U.N. Human Rights Council reported various instances of laws-of-war violations. In 2018, the Human Rights Watch had concluded that the continuous use of lethal force by Israel would be categorized as war crimes.³⁹

Lately, in 2021, in the holy Ramadan month, the Israel Armed Forces (IAF) ambushed innocent Palestinians who were worshipping at Masjid Al-Aqsa, an ancient holy site revered by Muslims worldwide; as a result, hundreds of Palestinians were injured in the clashes. The clash apparently continued for two weeks that led to casualties of two hundred Palestinians, such heinous acts were condemned by nations worldwide, and finally, the two states agreed upon a ceasefire; which was, nevertheless infringed by the Israeli force within a day.⁴⁰

Therefore, it is quite evident that Israel can no longer question the legal basis of the ICC, neither on the grounds of jurisdiction, non-membership of Israel to the ICC nor that the crimes committed do not fall in the category of “war crimes”. The only escape-route to evade intervention by the ICC is to demonstrate that Israel has internally conducted judicial proceedings to hold war criminals accountable and, on that basis, by relying on the complementarity rule, convince the OTP to not advance with further investigations.

CURRENT SITUATION SINCE 2020

Since 2021, the governments of the two states have multiplied on executing policies that suppress Palestinians and benefit the Jews. Such policies that uphold grant dominion to Jewish Israelis over fall in the category of crimes against humanity of apartheid and persecution.⁴¹

In a report submitted by the UN Office for the Coordination of Humanitarian Affairs (OCHA), it surfaced that, in the initial eight months of 2021,

around seven hundred homes in the West Bank and other structures were destroyed by Israeli authorities. In the latter half of 2021, Israeli authorities had labelled significant Palestinian organizations as belonging to terrorist groups.⁴²

Nevertheless, armed groups in Palestine also fired rockets that led to the death of 13 Israelis. The authorities also detained two Israelis who were mentally challenged, beyond six years, and no details were provided on their whereabouts. In 2020, more than fifty complaints were received regarding arrests and torture by Hamas authorities, reported by the Independent Commission for Human Rights (ICHR). The Gaza-based Palestinian Centre for Human Rights reported that Hamas authorities executed 28 people since 2007; and imposed death sentence to 19 people in 2022.⁴³

Furthermore, the Covid-19 pandemic has significantly affected the communities in Israel and the Occupied Palestinian Territories. Although the Israeli government ensured vaccination for its citizens; more than 4 million Palestinians were deprived of the vaccination living under Israeli control. Under the Fourth Geneva Convention, occupying authorities have the responsibility to ensure medical supplies and to contain breakout of pandemics. It has been reported, by WHO, that around one million Palestinians were vaccinated through external sources.⁴⁴

Furthermore, it is difficult to acquire building permits in East Jerusalem and more than fifty percent of the West Bank is under the control of Israel; which has in turn risked the unauthorized building structures of Palestinians to destruction or confiscation. There are restrictions under international law on an occupying authority from demolishing property unless it is totally necessary for military operations. In different areas of East Jerusalem, Israeli settlers have taken adverse possession of Palestinian homes. Palestinians are subsequently debarred from redeeming their property on the parts that became Israel, under discriminatory Israeli law.⁴⁵

More than 80% of the detachment barrier by Israel, which was claimed to have been for security purposes, fell within West Bank that disconnected Palestinians from their agricultural lands; also restricting the access to property of 11,000 Palestinians.⁴⁶

INTERNATIONAL DOUBLE-STANDARDS

During the May, 2021 clashes, although President Biden condemned attacked by Palestinian, no such

criticisms were made for the Israeli actions. The Biden administration further sold \$735 million in arms to Israel.⁴⁷

Consequently, the UN Human Rights Council formed a Commission of Inquiry (COI) to address the abuses that took place during the hostilities, for instance, discrimination and suppression on the basis of identity; and the main causes behind them. Surprisingly, majority of western states refrained or voted against the formation of such commission. Additionally, although the European Union denounced Israel's actions, difference of opinion among its member states debarred the EU from adopting any enforceable measures. Furthermore, social media platforms such as Facebook concealed posts and videos that updated the situation in Palestine by Palestinian supporters.⁴⁸

DOMESTIC PROCEEDINGS IN ISRAEL: ARE THEY SUBSTANTIAL?

It may be pertinent to analyze any internal proceedings that Israel may have conducted or initiated since the 2014 Gaza war. Following the commencement of the war, the Israeli Defense Forces (IDF) established a "Fact Finding Assessment (FFA) Mechanism" responsible for investigating occurrence of potential war crimes and Israel's ability to prosecute such crimes. The FFA Mechanism provides the Military Advocate General (MAG) Corps with factual information to assist with decisions whether or not to initiate a criminal investigation and the issuance of operational recommendations in order to mitigate the risk of occurrence of further incidents.⁴⁹

Furthermore, the MAG Corps has independently opened various investigations and charged Israeli soldiers. Although numerous allegations have not led to prosecution, investigations remain ongoing, for various incidents. Nevertheless, there are speculations regarding the adequacy of Israel's internal accountability steps.⁵⁰ The UNHRC report has stated that enough people are not being held accountable under the efforts of investigation by IDF. Although it was acknowledged that significant steps are being taken by Israel to establish investigation system that complies with international standards, the Commission also expressed the probability of "impunity" existing for violations.⁵¹ Furthermore, the UNHRC expressed its disappointment with Israel's process of inspection by labelling Israel's record "*in holding wrong-doers accountable*" as "*lamentable*".⁵²

Additionally, during the ongoing fights, the then Military Advocate for Operational Affairs requested B'Tselem (a non-profit organization) to provide information on law violations throughout the Operation Protective Edge. However, the latter denied to provide any such information on the grounds that any complaints would yield an effective result; as in the experience of B'Tselem's examinations and investigations conducted were not focused on revealing the existing facts nor did they result in serving justice.⁵³ According to B'Tselem, Israeli official's intention was to create an illusion regarding "a functioning law enforcement system"; when in reality the crimes of accused individuals were neither investigated nor were, they punished. Moreover, the organisation produced a paper that aimed at major issues regarding how Israel dealt with the investigation of the Gaza conflict: firstly, none of the government officials and senior military commanders were held to account with regards to the manner in which Israel conducted investigation and the devastation effects that entailed from their decisions.⁵⁴

Secondly, the Military Advocate General (MAG) plays multiple roles by providing legal counsel to the military during combat and in deciding whether or not to initiate criminal investigations against soldiers – which is alleged to raise conflict of interests; and thirdly, only incidents of "exceptional" nature were covered in the investigations by the Military Police Investigations Unit (MPIU) and hence, only low-ranking soldiers were held to account. Furthermore, Israel's obligation to investigate Operation Protective Edge incidents were independent of whether B'Tselem provided any information to MAG Corps or not.⁵⁵

In 2016, a report was produced by the organisation entitled *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, where it demonstrates how the work of the MAG Corps and the MPIU reflects enforcement of law where in reality it has been whitewashing violations, including the investigation during the conflict in the Gaza Strip. During the conflict, hundreds of people were killed and thousands were left homeless due to air strikes launched by Israel. The report emphasised the need for "effective and genuine" investigation both for ensuring justice and to restrain such future actions and losses.⁵⁶

Consequently, the ICC Chief Prosecutor' has made it clear in its Policy Paper on *Preliminary*

Examinations, published in 2013, that mere “domestic inactivity” is adequate to render a case as admissible; independent of whether the state in question has a functioning judicial system. In the paper, the Chief Prosecutor iterated the revised test for deciding the authenticity and genuineness of State’s proceedings. Firstly, a primary enquiry will independently examine various issues, for instance, identification of witnesses, all sorts of evidences and the gravity of such evidences in initiating investigation by the ICC. Moreover, the Court added that any non-cooperation with the ICC would signal of a state’s intent to shield someone.⁵⁷

At the investigation stage, the OTP collates maximum information to discover the facts about alleged crimes and identify the major perpetrators. The investigation includes inspection of places in which the alleged offence has taken place, gathering material evidences (mobile phone data, video, forensic materials etc), interrogating witnesses and victims; discussion with experts etc. The OTP has the legally responsibility to initiate all the necessary steps to collect evidences that are linked to the alleged offence.⁵⁸ Therefore, reluctance by Israel to cooperate with the OTP, may further indicate of its attempt to either conceal material facts of war crimes.

There are examples of various cases, where upon a successful investigation the OTP convicted the accused criminals. For instance, in the situation of Central African Republic (*The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*), in 2019, the Pre-Trial Chamber II declared the decision regarding the partly confirmation of war crime and crimes against humanity charges - against Alfred Yekatom and Patrice-Edouard Ngaïssona. The Pre-Trial Chamber II emphasised the existence of significant grounds that establish that an international armed conflict was ongoing between 2013 and 2014, in the territory of the Central African Republic. In 2014, the CAR authorities direct the alleged committed crimes in their territories, since 2012, to the Prosecutor. Consequently, another investigation was initiated by the Prosecutor in 2014.⁵⁹

With regard to M. Yekatom, he was accused of committing various war crimes, for instance, deportation, murder, torture, cruel treatment etc. On the other hand, M. Ngaïssona, was also held responsible for the war crimes, such as – murder, rape, torture, cruel treatment, destruction of religious sites etc. All these crimes were proved to have been committed in different locations in the CAR.⁶⁰ On the

other hand, there have also been instances, where the OTP had refused to proceed with an investigation, for example, in the case of Mavi Marmara, the OTP refused to investigate the allegations regarding the conduct of the Israeli Defence Forces, as it was believed that no reasonable grounds existed that would induce that application of the Rome Statute. The Union of the Comoros had acceded to the Rome Statute in 2006; hence, there was no issue regarding the Court’s jurisdiction for the Rome Statute’s crimes executed on the Comoros territories. In 2013, Union of Comoros government applied to the Prosecutor requesting to initiate an investigation. Following an in-depth examination on the basis of the submissions made and information present before the Court, the Prosecutor was of the opinion that no reasonable grounds existed that would allow the Court to initiate any sort of investigation.⁶¹

Hence, examples of above two situations indicate the non-partisan role played by the ICC in taking up cases of investigation before it. Since the declaration of investigation, Israel and many other influential states have questioned the fairness and impartiality of the ICC, accused the institution of illegal intervention and disproportionate decisions. It is transparent that, the ICC works on the basis of evidences and facts, and not on personal intimacy with any individual or states. The only working tool for the ICC is the Rome Statute; if the statute allows the ICC to prosecute individuals, then it may do so and if the statute does not grant the ICC any jurisdiction in a situation, the ICC shall abide by such provision.

CONCLUSION

From the arguments discussed in this paper, it is explicit that Israel has been in violation of many international laws and have clearly committed war crimes recognized in the Rome Statute. Consequently, the ICC has intervened in the conflict, however, misinterpretation of various clauses in the Rome Statute and non-cooperation by Israel have slowed down a steady investigation in the past; if this remains ongoing, the cardinal purpose of the international court would be defeated and consequently, result in inconceivable and irreparable damages for the Palestinians and also innocent Israeli citizens. Hence, it is vital that the recent declaration of investigation by the OTP proceeds with little to no blockade.

Against the argument by Israel that it is a non-party to the Treaty of Rome, it could be counter

argued that, in respect to Article 12 of the Statute, it remains irrelevant whether a state is signatory to the ICC statute or not, irrespective of that, the ICC shall still be entitled to prosecute crimes that may be committed by nationals of country that is not a member state, as long as the territory in which it is committed falls within that of a member state. Much emphasis has been put on the universal nature of the ICC's jurisdiction, alongside the territorial and subject-matter basis. Universal jurisdiction signifies that all states will have jurisdiction over a category of offences that are recognized to be of 'universal concern'; irrespective of the territory of offence, nationality of the perpetrator and that of the victim. Furthermore, it was deduced by Scharf that during the Rome Diplomatic Conference that under customary international law, the core crimes recognized in Article 5 of the Treaty fell under the category of 'universal jurisdiction'; and therefore, the draftspersons of the ICC statute were unlikely to take into account that "consent of the national or territorial state" was the determining factor for 'jurisdiction', rather the consent regime was a limit on the ICC's inherent jurisdiction; consequently, the Court might exercise such jurisdiction if referred by the UN Security Council, or the state's consent in whose territory the crimes were alleged to have been committed.⁶²

Now, dealing with the issue of "complementarity", the ICC may not probably have jurisdiction over various alleged crimes if Israel can be established that genuine procedures have been undertaken; nonetheless, the cases of building settlements has not yet been summoned by the Israeli courts, and consequently, the ICC shall have jurisdiction to adjudicate such case; furthermore, the alleged Palestinian crimes in the 2014 Gaza conflict have not been prosecuted; hence, such a case could be brought before the ICC, as well.

The condition for ascertaining complementarity, as affirmed by the Chambers of the Court, must be "two-fold" – if the state in question demonstrates that certain investigation is underway, assessment in regard to the presence of any element of *unwillingness* or *inability* must be undertaken; moreover, convincing evidences of such investigations must be produced, at the national level, any "future planned or scheduled" investigations may not qualify. "Unwillingness" signifies that the state in question has the necessary means and capacity to conduct efficient investigations and to bring legal proceedings against individuals, but there is some element of reluctance; on the other hand, "inability"

may be said to be the lack of resources or logistical support to investigate and prosecute individuals – in both cases, complementarity principle would not be applicable and the ICC would be able to intercede to conduct full-fledged investigations, by concluding that there is a situation.

Notwithstanding any such investigatory initiatives, it has been iterated by Hansen that the ICC Prosecutor may only proceed to conduct a full investigation if it can conclude that there are elements of 'inactivity' even in such investigations initiated by the state and also given that other statutory requirements for investigation are satisfied.⁶³

In 2016, the Human Rights Watch in its report, concluded that no significant developments could be found in ensuring justice for the violation of laws-of-war in the 2014 conflict. It was also reiterated that it was not the element of "inability" rather it was "unwillingness" that has been the prime barrier for initiating legal proceedings against crimes that Israel had committed. Nevertheless, at times, the intercession by the ICC assists in alerting the state concerned to be more active and vigilant.⁶⁴ Consequently, a deduction has been drawn that if the ICC prosecutor declares to initiate any form of investigation, it could be said to impose sufficient pressure on the alleged state to commence its own domestic proceedings, in order to evade the ICC's jurisdiction in the case.⁶⁵ Therefore, considering the magnitude of disproportionate loss and sufferings caused to the Palestinians over the years, it would be inequitable to bar the ICC from progressing due to some technicality of provisions in the Rome Statute. The ICC was established with the aim to prosecute political leaders accused of war crimes and to complement national judicial systems in order to guarantee justice by all means⁶⁶, thus, to interpret the statute in a manner that would be favorable for the perpetrators would be to undermine the object of the court and the Rome Statute, altogether. Finally, it has been contended by Oler that one of the parties in the action against Israel is Hamas which is an internationally recognized terrorist organization rooting for the destruction of Israel and legal proceedings, by the ICC, against Israel would advance Hamas' agenda and war aims. A distinction must be drawn between the PA and Hamas.⁶⁷ Against this contention, it can be strictly argued that, the Palestinian authorities had made a referral to the OTP, with the intention for investigating war crimes committed in its territory since 2014.⁶⁸ A plausible investigation as such does not imply that the Court has charged Israel already. An investigation by

the ICC, would entail thorough examination of evidences, witnesses, the authenticity of domestic legal proceedings initiated etc. and if during this stage, compelling evidences are found that indicate at any group or state to be responsible for war crimes, the OTP shall then proceed to the trial stage and announce the conviction of the perpetrators.⁶⁹ Thus, claiming that a mere investigation would serve a terrorist group is flawed⁷⁰ because firstly, if during investigation the OTP does not find a reasonable basis and/or clear evidences of war crimes the OTP may not proceed further at all, as was in the case of Mavi Marmara;⁷¹ and secondly, if during investigation new evidences emerge that point at other groups to be the actual culprits the OTP shall hold them accountable; and thirdly, if Israel can illustrate to have conducted genuine legal proceedings and to have taken necessary actions against those guilty, irrespective of their nationality, then Israeli officials would not be unjustly tried by the ICC.⁷²

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NOTES

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