

# No Time to Lose: Israel's Military Attacks against Palestinians in Gaza as Violation of International Humanitarian Law

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Mariam Bin Ghaith\*

*Following the attack on Israel by Hamas militants on October 7, 2023, Israel declared war on the Gaza Strip. In the relentless and nonstop bombardment of the Gaza Strip, about 40,000 Palestinian civilians have lost their lives, the majority of whom were children and women. Additionally, more than 92,000 Palestinians have been injured and many more are still missing or under the rubble. The dire situation in the Gaza Strip requires a firm stand from the international community, as what is happening to the Palestinian people is nothing short of genocide. This paper discusses Israel's attacks on the Gaza Strip and illustrates how these actions meet the criteria for war crimes, crimes against humanity, and genocide. It also discusses the case filed by South Africa against Israel in the International Court of Justice, alleging that Israel has violated the Convention on the Prevention and Punishment of the Crime of Genocide.*

## Keywords

Geneva Contentions, IHL, Genocide, Israel, Palestine, Gaza, Hamas, ICJ, South Africa

\* Assistant Professor of International Law at Kuwait University College of Law. LL.B. (Kuwait U.), LL.M./SJD (American U.). ORCID: <https://orcid.org/0000-0001-6904-8748>. The author may be contacted at: [m.binghaith@gmail.com](mailto:m.binghaith@gmail.com) / Address: Kuwait University Law School, Shuwaikh, Jamal Abdunnasser Road, Kuwait City, Kuwait. All the websites cited in this article were last visited on November 11, 2024.

## I. Introduction

Following the attacks on Israel by Hamas militants on October 7, 2023, Israel launched a full-scale offensive against Palestinian civilians in the Gaza Strip, killing more than 40,000 and injuring over 92,000 innocent Palestinians by August 22, 2024<sup>1</sup> - an unprecedented number in the Israel-Palestine conflict. Israel has bombed houses, buildings, schools, and hospitals. Moreover, it has targeted 267 places of worship, including mosques and churches, as well as the Al-Mamdani and Al-Shifa hospitals. These attacks are in clear violation of international humanitarian law (IHL) and the Fourth Geneva Convention governing the treatment of victims of war.

In light of Israel's actions - which amount to war crimes, crimes against humanity, and genocide against the Palestinians - and after witnessing the failure of the international community to take a firm stand, South Africa filed a case with the International Court of Justice (ICJ) under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention).<sup>2</sup> South Africa requested the ICJ to rule on the issue of provisional measures, which the Court granted. The ruling was hailed as a victory by many, including the Palestinians. The Court, however, has yet to rule on the merits of the case: "whether Israel is perpetrating a genocide against the Palestinian people."<sup>3</sup> The case is still in its early stages as of August 2024. Does hope remain that justice will be served by the highest court and that Israel will be held accountable for its horrendous crimes against Palestinian civilians?

Israel's attacks on the Gaza Strip encompass war crimes, crimes against humanity, and (gravest of all) genocide. Each of these three types of crimes have specific definitions, with several subjective and objective elements. Considering the dire situation in the Gaza strip which requires the attention of the international community, this study aims to convey a humanitarian situation that is unbearable, catastrophic, and continues to deteriorate daily from a viewpoint of IHL. The author will look into violations that the Israeli military is committing against the Palestinians in the Gaza Strip. She will carefully examine and prove those crimes committed by Israel in the Gaza Strip. This paper is composed of six parts, including a short Introduction and

<sup>1</sup> AjLabs, *Israel-Gaza War in Maps and Charts: Live Tracker*, AL JAZEERA (May 19, 2024), <https://www.aljazeera.com/news/longform/2023/10/9/israel-hamas-war-in-maps-and-charts-live-tracker>.

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>3</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J. 192, 14 (Jan. 26) [hereinafter *South Africa v. Israel*].

Conclusion. Part Two will discuss war crimes committed by Israel in the Gaza Strip. Part three will look into crimes against humanity. Part four will look into genocide and how it is being committed in the Gaza Strip. Part five will look into the ICJ case filed by South Africa. Part two, three, four and five will present the definitions of the crimes and apply them to Israel's actions and the ongoing atrocities in the Gaza Strip to demonstrate that they are indeed been committed.

## II. Israel's War Crimes under the Rome Statute and the Fourth Geneva Convention

### A. The Rome Statute and Israel's War Crimes

Article 8 of the Rome Statute of the International Criminal Court (ICC) defines "war crimes" as "grave breaches of the Geneva Conventions of 12 August of 1949." War crimes "are the serious violation of customary or treaty rules belonging to international humanitarian law"<sup>4</sup> as defined in the *Tadic* case of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>5</sup> Considering the above definition, serious war crimes have been committed by Israeli troops in the Gaza Strip since October 7, 2023. First, regarding "willful killing,"<sup>6</sup> Israel's killing of Palestinians and indiscriminate attacks on and bombardment of the Gaza Strip have left more than 40,000 dead and many more injured.<sup>7</sup> Second, Israel has "willfully caused great suffering and seriously bodily harm" to the Palestinians<sup>8</sup> by the continuous bombardment of homes and hospitals in the Gaza Strip. In addition, the Israeli military has caused "extensive destruction to property,"<sup>9</sup> as nearly all of the structures in the Gaza strip have been reduced to rubble; most homes have been destroyed by Israeli strikes, not to mentioned Israeli attacks on hospitals.<sup>10</sup> Furthermore, Israel has committed

<sup>4</sup> Rome Statute art. 8; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 65 (2013).

<sup>5</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

<sup>6</sup> Rome Statute art. 8 ¶2 (a) (i).

<sup>7</sup> AjLabs, *supra* note 1.

<sup>8</sup> Rome Statute art. 8 ¶2 (a) (iii).

<sup>9</sup> *Id.* art. 8 ¶2 (a) (iv).

<sup>10</sup> *Destroying Houses and Burning Them Another War crime in the Gaza Strip* [الالتحاق لآل في فاضرا ببحر قديرج. اوقرحو لآانملا فالآت-], AL JAZEERA (Feb. 2, 2024), <https://www.aljazeera.net/politics/2024/2/2/%D8%A5%D8%AA%D9%84%D8%A7%D9%81-%D8%A7%D9%84%D9%85%D9%86%D8%A7%D8%B2%D9%84-%D9%88%D8%AD%D8%B1%D9%82%D9%87%D8%A7-%D8%AC%D8%B1%D9%8A%D9%85%D8%A9-%D8%AD%D8%B1%D8%A8-%D8%A5%D8%B6%D8%A7%D9%81%D9%8A%D8%A9>.

unlawful deportation or transfer”<sup>11</sup> as it continues to order Palestinians to evacuate, and then targets them in places where they should be protected, as can be seen in the attacks against the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) schools in the Gaza Strip.<sup>12</sup>

## B. Violations of the Fourth Geneva Convention

Israel has violated a number of provisions of the Fourth Geneva Convention and its Additional Protocol as follows.

### 1. Article 16

Article 16 of the Fourth Geneva Convention states: “The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. ...”<sup>13</sup> Nearly 70% of the victims of Israeli military attacks in Gaza are women and children.<sup>14</sup> The destruction of hospitals means that expectant mothers cannot access the medical care and supplies they need.

### 2. Articles 18 and 19

Article 18 of the Fourth Geneva Convention states: “Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.”<sup>15</sup> The Israeli military clearly violated this provision when it bombed Al-Ma’amadani Hospital, killing 500 people, including doctors, nurses, and civilian patients.<sup>16</sup> Furthermore, Israel violated Article 19 by bombing the areas surrounding Al-Shifa Hospital, killing many civilians who sought refuge near the hospital, believing it to be a protected place.<sup>17</sup> It is estimated that more than 200

<sup>11</sup> Rome Statute art. 8 ¶2 (a) (vii).

<sup>12</sup> *Israel Targets more than 70% of UNRWA Schools in the Gaza Strip* [أقزغ يف اوفنوالا سرامدم نم 70% تفدهتسا لئى اوس], AL JAZEERA, (July 16, 2024), <https://www.aljazeera.net/news/2024/7/16/70-%D9%85%D9%86-%D9%85%D8%AF%D8%A7%D8%B1%D8%B3-%D8%A7%D9%84%D8%A3%D9%88%D9%86%D8%B1%D9%88%D8%A7-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9-%D8%AF%D9%85%D8%B1%D8%AA%D9%87%D8%A7>.

<sup>13</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Geneva Convention], art. 16.

<sup>14</sup> *The War on Gaza Women and Children are the most victims of the Israeli Strikes* [قزغ برح: اقزغ يلع ولى لئى اوس اى ا فصقلا], BBC NEWS (Oct. 15, 2023), <https://www.bbc.com/arabic/articles/c84kmy3jmyo>.

<sup>15</sup> Fourth Geneva Convention art. 18.

<sup>16</sup> *The Israeli Palestinian conflict: After hundreds are dead the rection towards the targeting of Al Mamdani hospital* [دعب اقزغ يف ين امد عمل ا يله ا اى فصقلا تفسم فصق هاجت لع فل ا دودر زربا .], CNN (Oct. 17, 2023), <https://arabic.cnn.com/middle-east/article/2023/10/17/al-ahli-baptist-hospital-in-gaza-struck>.

<sup>17</sup> *Israel Targets AL-Shifa Hospital in Gaza* [اقزغ يلع ولى لئى اوس اى ا فصقلا], AL JAZEERA (Mar.

medical personnel have lost their lives since the attacks began and 22 hospitals have been rendered inoperable, including 138 medical institutions.<sup>18</sup>

Hospitals remain protected places under international humanitarian law; accordingly, the continued bombing of the surroundings of hospitals violates Articles 18 and 19 of the Fourth Geneva Convention.<sup>19</sup> Israel claims that Hamas uses the underground areas of hospitals as havens, which is an unfounded allegation.<sup>20</sup> However, the victims of the hospital attacks were Palestinian civilians, not Hamas combatants.

### 3. Article 49

Article 49 of the Fourth Geneva Convention states: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>21</sup> The elderly, women and children should have been fully protected. Although Israel keeps asking them to relocate and even forcibly transfers them to other parts of the Gaza Strip, nowhere is safe in the Gaza Strip. Now we witness the targeting of civilian Palestinians.

### 4. Article 53

Israel has repeatedly stated it intends to displace the Palestinians from the Gaza Strip. It has proposed building an artificial island to which the Palestinians will be transferred,<sup>22</sup> in clear violation of Article 53 of the Fourth Geneva Convention, which stipulates: “Any destruction by the Occupying Power of real or personal property ... is prohibited, except where such destruction is rendered absolutely necessary by military operations.”<sup>23</sup> The Israeli military’s bombings have targeted civilian homes

18, 2024), <https://www.aljazeera.net/news/2024/3/18/%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84-%D9%8A%D9%87%D8%A7%D8%AC%D9%85-%D9%85%D8%B3%D8%AA%D8%B4%D9%81%D9%89-%D8%A7%D9%84%D8%B4%D9%81%D8%A7%D8%A1-%D9%88%D9%8A%D9%82%D8%B5%D9%81>.

18 *Why Does Israel Keep Targeting Hospitals in the Gaza Strip?* [لماذا تستهدف إسرائيل المستشفيات في قطاع غزة عاطق يف تاي فوش تسرم لمل اعدا دتسا ليئ ارسا لصاوت اذامل], BBC NEWS (Dec. 20, 2023), <https://www.bbc.com/arabic/6774942>.

19 Fourth Geneva Convention art. 19. It states: “The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy...”

20 Human Rights Watch, *Gaza: Unlawful Israeli Hospital Strikes Worsen Health Crisis* (Nov. 14, 2023), <https://www.hrw.org/news/2023/11/14/gaza-unlawful-israeli-hospital-strikes-worsen-health-crisis>.

21 Fourth Geneva Convention art. 49.

22 Mared Jones & Shona Murray, *Artificial Island off Gaza Pitched by Israeli Minister in EU Meeting is “Irrelevant,” Borrell Says*, EURO NEWS (Jan. 22, 2024), <https://www.euronews.com/my-europe/2024/01/22/artificial-island-off-gaza-pitched-by-israeli-minister-in-eu-meeting-is-irrelevant-borrell>.

23 Fourth Geneva Convention art. 53.

and buildings, including safe havens, which are protected under IHL. Disregarding this provision, Israel has continued to bomb civilian targets, even after destroying 360,000 homes.<sup>24</sup>

### 5. Article 55

Israel has also violated Article 55 of the Fourth Geneva Convention which prescribes obligations to provide humanitarian aid to the civilians.<sup>25</sup> The Gaza Strip is under siege and the two border crossings are controlled by Israel. From the beginning of the war, the Israeli government blocked humanitarian aid from entering Gaza until a humanitarian truce was reached just shortly during the Ramadan period. However, the truce did not last long, and the number of trucks allowed during the truce did not meet the needs of the civilian population. After cancellation of the truce, the bombings resumed, making it exceedingly difficult to deliver aid, including food, medicine, clean water, and medical supplies, to Palestinian civilians. Israel has absolutely failed to provide the Gaza Strip with the humanitarian aid necessary for the survival of the Palestinian population. Moreover, as aid began to arrive at the crossing, a major road was bombed, making it difficult for aid trucks to enter.

### 6. Article 56

The Israeli military has violated Article 56 by displacing Palestinians and forcing them into life-threatening living conditions.<sup>26</sup> Israel requested that civilians move from the north to the south. Subsequently, more than 1.9 million people were displaced in the Gaza Strip and have sought refuge in schools run by the UNRWA schools, where many are living in unsanitary conditions, without proper food and clean water. Their basic hygiene needs are not met, and many live in makeshift tents without heat and little protection even at cold winter nights and rain. These unhealthy living conditions have led to respiratory and other medical issues. Following the statement of the World Health Organization, “[O]nly 15 hospitals are functioning even partially. The lack of clean water and sanitation, and overcrowded living conditions are creating the ideal environment for diseases to spread.”<sup>27</sup> Furthermore, the United Nations Children’s Fund has declared the Gaza Strip the most dangerous place in the world

<sup>24</sup> *Stories of Gazan People After Destroying Tens of Thousands of Houses* [تاريخ ربيعت دعب مهلازنام فصق نع قزغ نالسرل تاياور] [هلل لك لشرب فينلسلا تادرجول نم فالالا], BBC NEWS (Jan. 23, 2024), <https://www.bbc.com/arabic/articles/c4nd104j3yee>.

<sup>25</sup> Fourth Geneva Convention art. 55.

<sup>26</sup> *Id.* art. 56.

<sup>27</sup> WHO, WHO Director-General’s Opening Remarks at the Media Briefing (Jan. 10, 2024), <https://www.who.int/news-room/speeches/item/who-director-general-s-opening-remarks-at-the-media-briefing---10-january-2024>.

for children.<sup>28</sup>

### 7. Article 59

According to Article 59, Israel should provide the Gaza Strip with essential goods - food, water, medical supplies, and (most importantly) fuel.<sup>29</sup> However, as mentioned above, Israel has blocked humanitarian aid to the Gaza Strip, which remains under siege.

### 8. Article 34(1) of the First Additional Protocol

The Israeli military has exhumed the graves of Palestinians, disturbing and desecrating the bodies, damaging or destroying more than 2,000 graves throughout the Gaza Strip.<sup>30</sup> It is a clear violation of Article 34(1) of the First Additional Protocol of the Geneva Conventions.<sup>31</sup>

### 9. Article 48 of the First Additional Protocol

Israel has failed to distinguish between Hamas fighters and Palestinian civilians as laid down at Article 48 of the First Additional Protocol to the Geneva Convention.<sup>32</sup> Since the beginning of the war, the Israeli military has targeted civilian houses, killing more than 40,000 civilians, with many more missing under the rubble.

### 10. Article 51(5) (b) of the First Additional Protocol

Israel has further violated Article 51 (5) (b) of the First Additional Protocol of the Geneva Conventions by carrying out indiscriminate attacks against Palestinian civilians in the Gaza Strip, while the military advantage gained by targeting civilian homes and buildings is clearly non-existent.<sup>33</sup>

<sup>28</sup> Michelle Nichols, *Gaza 'most dangerous place in the world to be a child' – UNICEF*, REUTERS (Nov. 23, 2023), <https://www.reuters.com/world/middle-east/gaza-most-dangerous-place-world-be-child-unicef-2023-11-22>.

<sup>29</sup> Fourth Geneva Convention art. 59. It states: "... the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal..."

<sup>30</sup> *No Rest for Gaza's Dead with Rushed Burials, Bodies Desecrated*, AL JAZEERA (Jan. 30, 2024), <https://www.aljazeera.com/gallery/2024/1/30/no-rest-for-gazas-dead-with-rushed-burials-bodies-desecrated>.

<sup>31</sup> First Additional Protocol to the Geneva Conventions [hereinafter Protocol I], art. 34(1). It states: "the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in ..."

<sup>32</sup> *Id.* art. 48. It states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

<sup>33</sup> *Id.* art. 57.51(5)B. It states: "5. Among others, the following types of attacks are to be considered as indiscriminate: ... (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects,

### 11. Article 52 (1) of the First Additional Protocol

Article 52 (1) of the First Additional Protocol of the Geneva Conventions prohibits attacks on civilian targets such as people, houses, schools, and hospitals.<sup>34</sup> Israel has clearly violated this provision by targeting civilians, including children and women. Furthermore, for an act to be considered a war crime, it must not only violate the Fourth Geneva Convention, but also meet both the subjective and objective criteria for war crimes.

### 12. Article 57(2)(A)&(B)

Article 57 (2) A and B of the First Additional Protocol of the Geneva Convention clearly prohibits indiscriminate attacks, such as those conducted by the Israeli military.<sup>35</sup> The Israeli troops attack on civilian targets such as civilian houses, hospitals, and churches, as well as mosques.<sup>36</sup>

## C. Israel’s Violation of Three Principles of International Humanitarian Law

Israel has violated the three main principles of IHL: necessity, proportionality, and distinction. Necessity means attacks should be limited strictly to military objectives. This is derived from the provisions of multiple conventions, the most recent being Article 52(2) of the First Additional Protocol of the Geneva Convention.<sup>37</sup> As seen in the war in the Gaza Strip, Israel has relentlessly targeted Palestinian civilians. Proportionality means attacks should be proportionate, as under Article 51 (5) (b) of the First Additional Protocol. In other words, an attack should match the counterattack and not exceed the initial attack. Distinction means attacks should distinguish civilians from fighters; only fighters should be targeted, not civilians. The bombardment on the Gaza Strip has primarily affected civilians rather than Hamas fighters; this is a clear violation of ‘distinction’ principle.

or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

<sup>34</sup> *Id.* art. 52(1).

<sup>35</sup> *Id.* art. 57(2).

<sup>36</sup> *Gaza Israel Destroys 31 Mosques and 3 Churches* [قذغ...إذغ لال تالال 31 ردمي لال تالال], ALJAZEERA (Oct. 22, 2023), <https://www.aljazeera.net/news/2023/10/22/%D8%BA%D8%B2%D8%A9-%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84-%D9%8A%D8%AF%D9%85%D8%B1-31-%D9%85%D8%B3%D8%AC%D8%AF%D8%A7-%D9%88%D8%A3%D8%B6%D8%B1%D8%A7%D8%B1-%D8%A8%D8%A7%D9%84%D8%BA%D8%A9>.

<sup>37</sup> Protocol I art. 52.



### III. Crimes Against Humanity in Gaza

Crimes against humanity are committed as part of a large-scale attack directed against civilians, regardless of their nationality. These crimes include the most egregious violations of human dignity, such as murder, torture, rape, enslavement, persecution, and genocide.<sup>38</sup> The definition of crimes against humanity has evolved considerably since the concept first appeared in the St. Petersburg Declaration of 1968, while it was adopted in the Martin Clause at the first Hague Peace Conference in 1899.<sup>39</sup> Crimes against humanity constitute one of the four core categories of crimes in international criminal law and can occur in times of peace as well as during war. Moreover, crimes against humanity consist of objective and subjective elements.

#### A. Objective Elements of Crimes Against Humanity

Crimes against humanity include the following crimes “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>40</sup>

- A) Murder;
- B) Extermination;
- C) Enslavement;
- D) Deportation or forcible transfer of population;
- E) Imprisonment;
- F) Torture;
- G) Grave forms of sexual violence;
- H) Persecution;
- I) Enforced disappearance of persons;
- J) The crime of apartheid; and
- K) Other inhumane acts of similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.

Among the elements above mentioned, murder, extermination and deportation will be examined in this section.

<sup>38</sup> Rome Statute art. 7.

<sup>39</sup> STATUTE OF THE INTERNATIONAL CRIMINAL COURT ARTICLE BY ARTICLE COMMENTARY 142-3 (Kai Ambos ed., 2022) [hereinafter COMMENTARY].

<sup>40</sup> Rome Statute art. 7.

### 1. Murder of Palestinians

The categorization of murder as a crime against humanity is believed to have its origins in the Declaration of the Triple Entente in 1915 and the 1919 Paris Peace Conference.<sup>41</sup> Furthermore, there was a push to add murder as the first crime in the definition of crimes against humanity.<sup>42</sup> There was no disagreement to adding murder as a crime against humanity in the drafting of the Rome Statute of International Criminal Court (ICC).<sup>43</sup> In the Israel–Palestine conflict, Palestinian civilians have been routinely murdered. Furthermore, since the October 7 attack, more than 40,000 Palestinian civilians have been killed and more than 92,000 injured, with many more still trapped under the rubble.<sup>44</sup>

### 2. Extermination of Palestinians

The term “extermination” refers to murder on a large scale. Extermination is defined in Article 7(2) (B) as “the intentional infliction of conditions of life such as deprivation of access to food and medicine calculated to bring about the destruction of part of a population.”<sup>45</sup> Regarding whether a crime constitutes extermination, the ICTY states: “... in addition to the general requirements for a crime against humanity, there must be evidence that a particular group was targeted and that its members were killed or otherwise subject to conditions of life calculated to bring about the destruction of a numerically significant part of the population.”<sup>46</sup> More than 40,000 people, mostly women and children, have been indiscriminately killed in bombings. The fact that Palestinian civilians have been the clear target of Israeli bombardment can be inferred from the statements of Israeli ministers and members of the Israeli parliament where the head of the Israeli parliament stated: “Burn Gaza immediately and nothing less”<sup>47</sup>

The difference between extermination and genocide is that the *mens rea* of genocide is “to destroy, in whole or in part, a national, ethnical, racial or religious group,”<sup>48</sup> while that of extermination is to “the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction

<sup>41</sup> COMMENTARY, *supra* note 39, at 170-1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> AjLabs, *supra* note 1.

<sup>45</sup> COMMENTARY, *supra* note 39, at 178-9.

<sup>46</sup> CASSESE, *supra* note 4, at 95.

<sup>47</sup> *Has Israel done enough to stop incitement to genocide?* [هل فعلت إسرائيل بما يكفي لوقف التحريض على الإبادة الجماعية؟], BBC NEWS (Aug. 27, 2024), <https://www.bbc.com/arabic/articles/ckg1dlxgrzjo>.

<sup>48</sup> Rome Statute art. 6.

of part of a population”<sup>49</sup>; requires knowledge that the act committed constitute extermination ...” This definition is fitting vis-à-vis the attacks against the Palestinian peoples, as will be discussed further in the section on genocide. Israel’s attacks are part of a series of widespread and systematic attacks against Palestinian civilians, consisting of a combination of direct bombing, displacement, and starvation. Thus, they meet the definition of crimes against humanity, as well as that of extermination.

### 3. Deportation or Forcible Transfer of Palestinians

Deportation or forcible transfer of population refers to the forced displacement of persons, via expulsion or other coercive acts, from the area in which they are lawfully present, without grounds permitted under international law. It is important to note that there is a difference between deportation and forcible transfer of people. Deportation means “the forcible removal of people from one country to another.”<sup>50</sup> Conversely, the forcible transfer of people means: “the compulsory movement of people from one area to another within the same state.”<sup>51</sup> This is what has been happening to the Palestinians, who have been forcibly transferred from the north to the south, as Israel’s bombardment campaign advances southward. Even in the south, many Palestinians are repeatedly displaced as they try to flee the bombardments, but it is in vain, as Israel continues to bomb different parts of the Gaza Strip, including the south and the UNRWA schools where Palestinians are seeking refuge.<sup>52</sup>

More than 1.9 million people have been displaced from the north to the south of the Gaza Strip, seeking refuge in Rafah, where, nevertheless, indiscriminate bombing continues. Israel has repeatedly ignored the calls of the international community to halt its operations in Rafah. The most recent call came from the ICJ, which ordered Israel to immediately halt its operations in Rafah due to the devastating and inhuman effects of such attacks.

In a judgment by the Military Tribunal of Nuremberg in the case of *U.S. v. Milch*, the Tribunal ruled: “the tribunal holds that the deportation, the transportation, the retention, the unlawful use and inhumane treatment of civilian population by an occupying power are crimes against humanity.”<sup>53</sup> This judgement clearly supports

<sup>49</sup> *Id.* art. 7 (2)(b).

<sup>50</sup> *Id.* art. 7 (2)(d).

<sup>51</sup> COMMENTARY, *supra* note 39, at 183.

<sup>52</sup> *70% of UNRWA Schools were Targeted in the Gaza Strip* [أكثر من 70% من مدارس وكالة إرسا في غزة], ALJAZEERA (July 16, 2024), <https://www.aljazeera.net/news/2024/7/16/70-%D9%85%D9%86-%D9%85%D8%AF%D8%A7%D8%B1%D8%B3-%D8%A7%D9%84%D8%A3%D9%88%D9%86%D8%B1%D9%88%D8%A7-%D9%81%D9%8A-%D8%BA%D8%B2%D8%A9-%D8%AF%D9%85%D8%B1%D8%AA%D9%87%D8%A7>.

<sup>53</sup> COMMENTARY, *supra* note 39, at 186.

the argument that what is happening to the Palestinians in the Gaza Strip constitutes crimes against humanity.

Consequently, crimes against humanity are being perpetrated against Palestinian civilians, as these attacks are widespread and systematic, as seen in the attacks in the Khan Yunis area, the Jabaliya Refugee Camp, Gaza City, and many other areas in the Gaza Strip.

## B. Subjective Elements of Crimes Against Humanity

The mental element (*mens rea*) involves understanding that the act is against the law. Furthermore, a special intent is required with variations depending on the particular crime listed under the definition of crimes against humanity. Not only is knowledge required, but also a special intent, similar to the requirements for genocide, which will be described in the next section. Special intent of the crimes committed against the Palestinians will be found in relation to murder, extermination and deportation or forcible transfer.

For murder to be established, the victim must be dead and their death should be a result of murder.<sup>54</sup> The difference between murder and extermination is scale; as stated in the Akayesu Trial Judgement: “Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder.”<sup>55</sup> Moreover, extermination requires preparation and organization. Furthermore, in the Ntakirutimana Appeal Judgement, the court set the objective and subjective element of the crime as follows:

[T]he Appeals Chamber finds that the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death [*actus reus*], and that the accused intended by his acts or omissions this result [*mens rea*].<sup>56</sup>

Moreover, the *mens rea* for the crimes of deportation and forcible transfer does not require the permanent removal of the victims: “The *mens rea* for these two crimes is present when the perpetrator of the forcible removal intended to remove the victims

<sup>54</sup> *Id.* at 177.

<sup>55</sup> The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, ¶ 591 (Int’l Crim. Trib. for Rwanda, Sept. 2, 1998), <https://www.refworld.org/jurisprudence/caselaw/ict/1998/en/19275>.

<sup>56</sup> The Prosecutor v. Elizaphan and Gérard Ntakirutimana (Appeal Judgement), ICTR-96-10-A & ICTR-96-17-A, ¶522 (Int’l Crim. Trib. for Rwanda, Dec. 13, 2004), <https://www.refworld.org/jurisprudence/caselaw/ict/2004/en/61947>.

by force. In the case of deportation, the perpetrator must, in addition, have had the intent to carry out the removal by crossing a de jure or de facto border.”<sup>57</sup> This is stated in the Radovan Karadžić and Jadranko Prlić cases, as well.<sup>58</sup> The *mens rea* of the crimes against humanity is present in the Israeli attacks against civilian Palestinians as it intended to kill civilian by targeting hospitals, schools, mosques, and houses of civilian Palestinians knowing that such attacks will result in civilian casualties. The use of heavy bombs has resulted in many casualties among civilians yet over and over again it is still used.

## IV. The Genocide in Gaza

As mentioned earlier, the Palestinians are struggling to survive without food, water, and supplies. The UN agencies continue to sound the alarm at the situation in the Gaza Strip in vain.<sup>59</sup> Israel has consistently blocked even the supply of humanitarian aid to the Gaza Strip, leaving those who have fled their homes without access to basic necessities. Palestinians are being forced into unsanitary and famine-like living conditions in which survival is difficult.

However, do these actions against Palestinians amount to the crime of genocide? The crime of genocide comprises objective and subjective elements. The objective criteria are described in Article 2 of the Genocide Convention as follows:

1. killing members of the group;
2. causing serious bodily or mental harm to the members of the group;
3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
4. imposing measures intended to prevent births within the group

It is believed that all of these criteria have been met in the Gaza Strip, where Palestinians have been killed and severely injured (both physically and mentally). The living conditions of the displaced Palestinians (who lack access to food, shelter, or proper medical care) constitute, in whole or in part, a state of destruction. Israel has displaced over 1.9 million people in the Gaza Strip, forcing them to move from north

<sup>57</sup> Prosecutor v. Radovan Karadžić, IT-95-5/18-T, Volume I of IV (TC), ¶ 493 (Mar. 24, 2016).

<sup>58</sup> Prosecutor v. Jadranko Prlić, IT-04-74-T, Judgement (TC), ¶¶ 57-58 (May 29, 2013).

<sup>59</sup> *The UN Warns of Catastrophic Consequences due to the Siege on Gaza* [الرصاص حلال، قيثور اللد بقاءوعلا نم رذخت فذحتهملا مهلا]، UN NEWS (Mar. 29, 2024), <https://news.un.org/ar/story/2024/03/1129671>.

to south, while bombing the southern areas anyway. Blocking humanitarian aid to Palestinian refugees has deprived them of various necessities, leading to the physical destruction of the group. The destruction of Palestinian homes and refugees' forced relocation have left them without proper shelter. Furthermore, violence against women and children including newborn infants can qualify as genocide. Blocking refugees' access to medical supplies and food is a clear violation of Article 2 of the Genocide Convention. The siege on the Gaza Strip, where the only two crossings are controlled by Israel, also violates Article 2. Given the current situation, the Palestinians are being subjected to genocide in the Gaza Strip.

As for the subjective element of the crime of genocide, it refers to the specific intent on the part of the perpetrator, which is Israel. Israel's intent is seen in its targeting of civilian homes in the Gaza Strip, and the killing of more than 40,000 civilian Palestinians. It is also evidenced by the statements of Israeli authorities, including Israeli Prime Minister Benjamin Netanyahu and the members of the Israeli government, parliament, and military. In particular, Israeli Defense Minister Yoav Gallant announced that he had ordered a full-scale siege on the Gaza Strip to cut off the supply of power, food, and fuel.<sup>60</sup> Prime Minister Benjamin Netanyahu stated: "We will not end the war before we complete all of its goals: the elimination of Hamas, the return of all our hostages, and ensuring that Gaza will no longer pose a threat to Israel."<sup>61</sup> Moreover, Israel's Culture Minister stated that Israel should use its nuclear weapons on the Gaza Strip.<sup>62</sup>

The *mens rea* of the crime of genocide is specific intent, namely, an attack against a protected group. Article 2 of the Genocide Convention states: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The attacks on civilian Palestinians amount to genocide, as they are directed against a national group (i.e., a group "of people who share a legal bond of common citizenship"<sup>63</sup>), an ethnic group (i.e., a group "who shares

<sup>60</sup> Emanuel Fabian, *Defense Minister Announces "Complete Siege" of Gaza: No Power, Food or Fuel*, THE TIMES OF ISR. (Oct. 9, 2023), [https://www.timesofisrael.com/liveblog\\_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel](https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel).

<sup>61</sup> Caroline Anders, *Netanyahu Wants to Continue the War in Gaza for Months to Eradicate Hamas*, YAHOO NEWS (Feb. 6, 2024), <https://news.yahoo.com/netanyahu-wants-continue-war-gaza-214924743.html>.

<sup>62</sup> *An Israeli Minister Calls to Use Nuclear Bomb against Gaza* [قبة ضاغ لعف دودرو في وون ةل بنقوب ةزغ فصرقل وعني ي لئيراسرا يذو] AL JAZEERA (Nov. 5, 2023), <https://www.aljazeera.net/news/2023/11/5/%D9%88%D8%B2%D9%8A%D8%B1-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84%D9%8A-%D9%8A%D8%AF%D8%B9%D9%88-%D9%84%D9%82%D8%B5%D9%81-%D8%BA%D8%B2%D8%A9-%D8%A8%D9%82%D9%86%D8%A8%D9%84%D8%A9>.

<sup>63</sup> CASSESE, *supra* note 4, at 120.

a common language or culture”<sup>64</sup>), and last but not the least, a religious group (i.e. “a group whose members share the same religion domination or mode of worship”<sup>65</sup>). The Palestinians are an ethnic, racial, and religious group protected by Article 2 of the Genocide Convention. As for the case law, the Trial Chamber observed that for genocide to be committed, an accused must act “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.”<sup>66</sup>

What continues to occur in the Gaza Strip constitutes not only a genocide, but also a crime against humanity and war crime, as discussed above. Therefore, the ICC and the ICJ should hold Israel accountable. Israel’s criminal actions in the Gaza Strip must not go unpunished. Justice should be given to all Palestinian civilians who have been killed and continue to be killed daily. The attacks against civilian Palestinians constitute three of the four crime categories in which the ICC specializes. Karim Khan, prosecutor of the ICC, has announced that he will look into the crimes committed by Israeli forces in the Gaza Strip.<sup>67</sup> The main difference between the ICJ and the ICC is that ICJ involves states, whereas the ICC holds individuals liable. In the case of the Gaza Strip, Israel’s Prime Minister and Minister of Defense are both liable for what is happening to the Palestinians.

## V. South Africa’s Genocide Case against Israel: An Analysis

On December 29, 2023, South Africa filed a proceeding in the ICJ against Israel in the case concerning genocide against the Palestinian people in the Gaza Strip.<sup>68</sup> The 84-page application was filed under the Genocide Convention. Both South Africa and Israel are the members of said convention - with Israel ratifying it on March 9, 1950,<sup>69</sup>

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> The Prosecutor v. Munyakazi (Judgment and Sentence), ICTR-97-36A-T, ¶¶ 493, 504 & 506 (Int’l Crim. Trib. for Rwanda, July 5, 2010), <https://www.refworld.org/jurisprudence/caselaw/ictr/2010/en/75666>

<sup>67</sup> ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (May 20, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

<sup>68</sup> South Africa v. Israel, at 13.

<sup>69</sup> UNTC, Ratification of the Genocide Convention, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&clang=\\_en&\\_gl=1\\*im1gxc\\*\\_ga\\*MTkxNjk1NTQ3My4xNj15OTIwNjM1\\*\\_ga\\_TK9BQL5X7Z\\*MTcyODIyNjg4NS4zOC4xLjE3MjgyMjcwMjUuMC4wLjA](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en&_gl=1*im1gxc*_ga*MTkxNjk1NTQ3My4xNj15OTIwNjM1*_ga_TK9BQL5X7Z*MTcyODIyNjg4NS4zOC4xLjE3MjgyMjcwMjUuMC4wLjA).

and South Africa on December 10, 1998.<sup>70</sup> Neither party has indicated objections to the Convention. The ICJ will first look into the provisional measures against Israel and then investigate the merits of the case of genocide.

Oral proceedings took place on January 11 and 12, 2024.<sup>71</sup> Israel claimed that the attacks were discriminate.<sup>72</sup> It is not true, however. As shown above, to date, many of its attacks targeted non-combatants such as children and women. Israel continues to bomb the Gaza Strip without distinction between civilians and Hamas fighters. Not only civilian homes, but also hospitals and UNRWA schools, mosques, and churches are the targets of Israel's attacks. They should be havens for civilians under IHL. Unfortunately, Palestinian civilians are not safe anywhere in the Gaza Strip. This sentiment was reiterated by the UN Secretary-General, who stated that: "Nowhere is safe in Gaza."<sup>73</sup> Israel clearly violated Article 18 of the Fourth Geneva Convention concerning civilians when it targeted Al-Ma'amadani Hospital, killing 500 people, including doctors, nurses, and patients.<sup>74</sup> Israel also targeted the surroundings of Al-Shifa Hospital.<sup>75</sup> The Israeli military's relentless targeting of civilian homes and buildings is a clear violation of Article 53 of the Fourth Geneva Convention.

The ICJ will determine whether genocide has occurred in the Gaza Strip. Before that, however, the ICJ ruled on the provisional measures that South Africa called for in its application to the Court.<sup>76</sup> According to Article 41 of the ICJ Statute, the Court shall have the right to rule with regard to the provisional measures.<sup>77</sup> At that stage, the Court is not required to decide on the merits of the case - i.e., whether genocide has occurred - but must only prove that the acts fall within the provisions of the Genocide Convention. Also, "orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed."<sup>78</sup> This means that Israel has a duty

<sup>70</sup> *Id.*

<sup>71</sup> South Africa v. Israel, at 5.

<sup>72</sup> *Id.* at 33.

<sup>73</sup> Nichols, *supra* note 28.

<sup>74</sup> *The Israeli Palestinian Conflict: After Hundreds are Dead the Reaction towards the Targeting of Al Mamdani Hospital* [أفزع يف ينالدهم عمل اليل هال يف شرتسم فحص هاجت لغفل دوبر زربأ .. يواول لتو لاملل تقم دعب], CNN (Oct. 17, 2023), <https://arabic.cnn.com/middle-east/article/2023/10/17/al-ahli-baptist-hospital-in-gaza-struck>.

<sup>75</sup> *Israel Targets AL-Shifa Hospital in Gaza and bombs the area of Alremal and Telalhawa* [زغب ءافشلل يف شرتسم مجاهي لال تلحال], AL JAZEERA (Mar. 18, 2024), <https://www.aljazeera.net/news/2024/3/18/%D8%A7%D9%84%D8%A7%D8%AD%D8%AA%D9%84%D8%A7%D9%84-%D9%8A%D9%87%D8%A7%D8%AC%D9%85-%D9%85%D8%B3%D8%AA%D8%B4%D9%81%D9%89-%D8%A7%D9%84%D8%B4%D9%81%D8%A7%D8%A1-%D9%88%D9%8A%D9%82%D8%B5%D9%81>.

<sup>76</sup> South Africa v. Israel, at 5.

<sup>77</sup> ICJ Statute art. 41.

<sup>78</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukr. v.



to abide by the requested provisional measures. Thus, Israel would have to provide the Court with a report within one month, stating what it has done to achieve the requested provisional measures. South Africa made requests for the following nine provisional measures to the ICJ:

- 1) Suspend military operations in and against Gaza (not addressed in the court's provisional measures);
- 2) Not escalate military operations any further (not addressed in the Court's provisional measures);
- 3) Allow access to adequate food, water, fuel, shelter, hygiene, and sanitation;
- 4) Prevent the destruction of Palestinian life in Gaza, including psychological damage;
- 5) Not destroy evidence that would support genocide allegations, nor deny international organizations and fact-finding missions access to Gaza to help preserve this evidence;
- 6) Abide by the rules of the Genocide Convention;
- 7) Take steps to punish those who have been involved in the genocide (not included in the Court's provisional measures);
- 8) Avoid actions that would complicate or prolong the case (not included in the court's provisional measures); and
- 9) Regularly report to the court on their progress towards implementing the measures. The Court requested Israel to report after a month with regards to provisional measures requested by the Court and its adherence to it.<sup>79</sup>

The ICJ did not grant South Africa's request that Israel suspend its military operations in the Gaza Strip, nor did it grant its request for a ceasefire, leading to a further escalation of the situation in the Gaza Strip. This was an unfortunate development, as the situation in the Gaza Strip required such a verdict to prevent further loss of civilian life. Nevertheless, the Court did address important points, such as the need to allow adequate humanitarian aid including food, water, fuel, and hygiene and sanitation items. Moreover, it instructed Israel to abide by the Genocide Convention.<sup>80</sup> Responding to South Africa's request, the Court issued a verdict on January 26, 2024. It granted South Africa's request in the following six points.

Russ.), Provisional Measures, 2022 I.C.J. Rep. I, ¶ 84 (Mar. 16).

<sup>79</sup> South Africa v. Israel, at 5.

<sup>80</sup> *Id.*

*First, Israel must implement all possible measures to prevent acts as outlined in Article 2 of the 1948 Genocide Convention. This entails not killing members of a particular group (in this case, Palestinians), not causing physical or psychological harm to members of that group, not inflicting living conditions which are calculated to bring about the end of the existence of a group, and not carrying out actions designed to prevent births within that group of people. (Majority opinion: 15 votes to 2, with Judge Sebutinde and Judge Barak dissenting).<sup>81</sup>*

Unfortunately, Israel has continued its indiscriminate bombardment of the Gaza Strip, killing hundreds of people every day, the majority of whom are children and women.<sup>82</sup> Furthermore, Israel is using starvation as a method of warfare, which is a clear violation of the Court order of not inflicting conditions calculated to bring about the end of the existence of a group which are the civilian Palestinians. (Majority opinion: 15 votes to 2 with Judge Sebutinde and Judge Barak dissenting).

*Second, Israel must ensure its military does not carry out any of the above actions. (Majority opinion: 15 votes to 2 with Judge Sebutinde and Judge Barak dissenting).<sup>83</sup>*

Israel has failed to abide by this judgement, as its bombardment campaign continues to kill Palestinian civilians daily. Furthermore, its use of starvation as a weapon of warfare meets the criteria of genocide. The death toll keeps raising daily and so is the deaths of children and women, who are protected during warfare under international humanitarian law.

*Third, Israel must prevent and punish the “direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.” (Majority opinion: 16 votes to 2 with Judge Sebutinde dissenting).*

High-ranking Israeli officials have repeatedly stated that the war will not end until Hamas is eradicated. Furthermore, they have stated that they will do whatever is necessary to eradicate Hamas. As Benjamin Netanyahu stated: “the war will not end until Hamas is eradicated,”<sup>84</sup> and other Israeli officials also stated: “all Gaza should be

<sup>81</sup> South Africa v. Israel, at 5.

<sup>82</sup> *200 Days Following the War on the Gaza Strip* [دعوى 200 يوم، 200 Days Following the War on the Gaza Strip]، AL JAZEERA (Apr. 23, 2024), <https://www.aljazeera.net/encyclopedial/2024/4/23/%D8%A8%D8%B9%D8%AF-200-%D9%8A%D9%88%D9%85-%D8%A3%D8%A8%D8%B1%D8%B2-%D9%85%D8%AD%D8%B7%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%AF%D9%88%D8%A7%D9%86>.

<sup>83</sup> *Id.*

<sup>84</sup> *Netanyahu's office responds to Biden's speech: The war will not end before Hamas is eliminated* [ندى اب باطخ ىلع اذروه ايهى نتن بت لدم]، AL-ARABIYA NEWS (June 1, 2024), <https://www.alarabiya.net/arab-and-world/2024/0>

burnt". That rhetoric should be considered incitement to commit genocide.<sup>85</sup>

*Fourth, Israel must ensure the delivery of basic services and essential humanitarian aid to civilians in Gaza.<sup>86</sup> (Majority opinion: 16 votes to 2 with Judge Sebutinde dissenting).*

Israel has clearly violated the above mention section of the provisional measures judgement by blocking humanitarian aid to the Strip. As a result, the humanitarian situation in the area has become catastrophic, as famine continues to spread, and children continue to die as a result. Also, Israel took control of the Rafah crossing and completely destroyed it, as it was the border crossing used by convoys to deliver humanitarian aid to the Palestinians.

*Fifth, Israel must prevent the destruction of evidence of war crimes in Gaza and allow fact-finding missions access. (Majority opinion: 15 votes to 2 with Judge Sebutinde and Judge Barak dissenting.)<sup>87</sup>*

Fact-finding missions have not been sent to the Gaza Strip due to the continuous bombardment and the dangerous situation in the Gaza strip. The UN is obliged to send such fact-finding mission to the Gaza Strip to report and gather evidence of war crimes, crimes against humanity, and genocide being committed in the Gaza Strip.

*Sixth, Israel must submit a report on all steps it has taken to abide by the measures imposed by the court within one month of the judgement. South Africa will have the chance to respond to this report.*

Israel has failed to report to the ICJ and never stopped any of its attacks against Palestinian civilians. The Court has the right to request any information with regard to the provisional measures in accordance with Article 78 of the Statute.<sup>88</sup> The Court requested that Israel provide information on its implementation and adherence to

6/01/%D9%85%D9%83%D8%AA%D8%A8-%D9%86%D8%AA%D9%86%D9%8A%D8%A7%D9%87%D9%88-%D8%B1%D8%AF%D8%A7%D9%8B-%D8%B9%D9%84%D9%89-%D8%AE%D8%B7%D8%A7%D8%A8-%D8%A8%D8%A7%D9%8A%D8%AF%D9%86-%D8%A7%D9%84%D8%AD%D8%B1%D8%A8-%D9%84%D9%86-%D8%AA%D9%86%D8%AA%D9%87%D9%8A-%D9%82%D8%A8%D9%84-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D8%B9%D9%84%D9%89-%D8%AD%D9%85%D8%A7%D8%B3.

<sup>85</sup> *Has Israel done enough to stop incitement to genocide?* [في عام 2024، قال القاضي روبرت أ. ج. فيلدي، رئيس المحكمة الدولية للعدل، في قراره: "إن إسرائيل لم تفعل ما يكفي لإيقاف التحريض على الإبادة الجماعية في غزة"، BBC News (Aug. 27, 2024), <https://www.bbc.com/arabic/articles/ckg1dlxgrzjo>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> ICJ Statute art. 78.

the Court's measures within one month. Unfortunately, the ICJ did not grant South Africa's request for the following measures.

① The court did not rule on a ceasefire in the war in the Gaza Strip.

It is unfortunate that the Court did not grant South Africa's request for a ceasefire, as halting the attacks is crucial to allow the delivery and distribution of humanitarian aid to Palestinian civilians. Although the Court ordered Israel to allow civilians to receive basic supplies, it is extremely difficult to deliver aid amid ongoing bombardment and destruction of key roads in northern and southern Gaza.

② Not escalate military operations any further.

Israel continues to bomb the Gaza Strip, killing many Palestinian civilians. As stated by South Africa's lawyers, an average of 247 Palestinians are killed and 629 wounded, while 3,900 Palestinian homes are damaged or destroyed daily.<sup>89</sup> Meanwhile, the Israeli military has continued to escalate its attacks against Palestinians, resulting in their death or injury, while those who are spared suffer from famine, disease, and food shortages.

③ Take steps to punish those who have been involved in genocide.

Israel has maintained that it is acting in self-defense, implying its refusal to hold accountable those involved in the killing of innocent Palestinians.

④ Avoid actions that would complicate or prolong the case.

Israeli officials have consistently stated that the war in Gaza will continue until Hamas is totally destroyed. Due to the urgency of the situation in the Gaza Strip and continuous bombardment causing a large number of civilian deaths daily, the Court instead granted South Africa's request for provisional measures. Moreover, in its previous rulings, the Court has granted applicants' request for provisional measures. The precedents include *Gambia v. Myanmar*,<sup>90</sup> *Ukraine v. Russia*,<sup>91</sup> and most notably the case of *Bosnia and Herzegovina v. Yugoslavia* (Serbia and Montenegro).<sup>92</sup>

<sup>89</sup> South Africa v. Israel, at 59-60.

<sup>90</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. 3 (Jan. 23), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20191212-ORA-02-00-BI.pdf>.

<sup>91</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. Rep. I, 230 (Mar. 16).

<sup>92</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Provisional Measures, 1993 I.C.J. 3 (Apr. 8).

In the case of *South Africa v. Israel*, on January 26, 2024, the Court ruled in favor of South Africa's request of provisional measures.<sup>93</sup> This ruling has helped maintain the peace and security in the Gaza Strip to some extent, which the Security Council has failed to do because the US has vetoed any declaration and decision against Israel. In fact, the US has used its veto 60 times in matters involving Israel.<sup>94</sup> Even the US vetoed a resolution by the Security Council that would condemn the attacks and call for a ceasefire in the Gaza Strip. The resolution would also allow humanitarian aid into Gaza.

Although the draft resolution was vetoed by the US on October 18, 2023, Resolution 2728 was passed by the Security Council, calling for a ceasefire during the month of Ramadan (the holy month in Islam) by 14 votes in favor and 1 abstaining (US).<sup>95</sup> This comes after the US has vetoed nearly all resolutions regarding Israel. Unfortunately, Israel did not abide by Resolution 2728. In fact, it ignored the resolution and continued its offensive, killing innocent Palestinians, thus disregarding international calls and orders. Although the UN resolutions are binding on member states, Israel has consistently failed to comply.

When granting the provisional measures with a 13-to-2 verdict that South Africa submitted on March 28 and May 24, 2024, the ICJ asked Israel to halt its military operation in Rafah, the place of last resort for Palestinian civilians fleeing bombardment.<sup>96</sup> South Africa also requested that the Court allow humanitarian aid to reach the Palestinians, as Israel has control of the Rafah border crossing and has been disallowing humanitarian aid from entering the Strip.<sup>97</sup> Israel still denies the Court's order to "immediately halt"<sup>98</sup> its military operation in Rafah.

The ICJ also ordered Israel to allow humanitarian aid, UN officials, and fact-finding missions to enter the Gaza Strip and to report back to the Court within one month to ensure compliance with the above-mentioned provisional measures.<sup>99</sup> Needless to say, Israel ignored the order by launching strikes on Rafah. In fact, a missile attack on a Palestinian makeshift refuge killed more than 54 civilian Palestinians and wounding many others right after the court order.<sup>100</sup>

<sup>93</sup> *South Africa v. Israel*, at 26.

<sup>94</sup> A. ALNAMI & T. AL-AJMI [أحمد علي لقيت، يمان الليلع], INTERNATIONAL ORGANIZATIONS [إي لود تامظنرم] 95 (2015).

<sup>95</sup> Ethar Shalabi, *UN Security Council Resolution 2728 on Gaza: What difference does it make?*, BBC NEWS (Mar. 27, 2024), <https://www.bbc.com/arabic/articles/c515wqgqzjeo>.

<sup>96</sup> *South Africa v. Israel*, at 68.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Anger over Israeli raid on Rafah camp Horrific scenes shock the world* [أح فرب ميخ م يلع ليئارسا ةراغ نم بضرغ] <https://www.bbc.com/arabic/articles/c515wqgqzjeo>.

The ICJ judgment granting South Africa's request for provisional measures has been hailed by the international community. The question now is what can be done against Israel which ignored the Court's judgment. Unfortunately, the ICJ itself has no enforcement mechanism for its ruling. However, the international public opinion can name and shame Israel for failing to comply with the ICJ's judgment which could help bring an end to the bombardment of the Gaza Strip and protect innocent civilians being killed daily. The question is: Will Israel cave due to international calls, the ICJ rulings and Security Council resolutions? One can only wish that it plays a role in subduing the attacks against the civilian Palestinians.

Israel has claimed that it is acting in self-defense, following the attacks by Hamas on October 7, 2023. Pro-Israel scholars have also stated that Israel is enforcing the right to self-defense under the UN Charter<sup>101</sup> as a counterargument to the Hamas attacks. Even in this course, however, Israel has seriously violated the principles of distinction, proportionality, and precaution by targeting civilian Palestinians, killing more than 40,000, injuring more than 92,000, and displacing more than 1.9 million, with thousands more still trapped under the rubble. Israel claims that Hamas' kidnapping of Israeli civilians is a violation of IHL. Even if so, that does not give Israel the right to launch a full scale attacks against the Gaza strip killing more than 40,000 civilian Palestinians and injuring many more.

The UN Secretary-General best described the situation when he said: "The Gaza Strip is a graveyard for children."<sup>102</sup> On average, one child is killed and two are injured every 10 minutes in the Gaza conflict.<sup>103</sup> The UN experts have declared that the situation in the Gaza Strip amounts to genocide, as there is an intent to "destroy the Palestinian people under occupation."<sup>104</sup> The UNICEF Spokesperson James Elder

عليه], AL HURRAH NEWS (May 28, 2024), <https://www.alhurra.com/israel-hamas-war/2024/05/27/%D8%BA%D8%B6%D8%A8-%D8%BA%D8%A7%D8%B1%D8%A9-%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%D9%84-%D9%85%D8%AE%D9%8A%D9%85-%D8%A8%D8%B1%D9%81%D8%AD-%D8%A7%D9%84%D9%85%D8%B4%D8%A7%D9%87%D8%AF-%D8%A7%D9%84%D9%85%D8%B1%D9%88%D8%B9%D8%A9-%D8%AA%D8%B5%D8%AF%D9%85-%D8%A7%D9%84%D8%B9%D8%A7%D9%84%D9%85>.

<sup>101</sup> Jesse Lempel, *Why the ICJ Cannot Order Israel to Stop the War in Gaza as a Provisional Measure*, EJIL Talk (Jan. 8, 2024), <https://www.ejiltalk.org/why-the-icj-cannot-order-israel-to-stop-the-war-in-gaza-as-a-provisional-measure>.

<sup>102</sup> Patrick Wintour, *Gaza Becoming "A Graveyard for Children," Says UN Secretary General*, GUARDIAN (Nov. 6, 2023), [https://www.theguardian.com/world/2023/nov/06/gaza-becoming-a-graveyard-for-children-says-un-secretary-general?mod=article\\_inline](https://www.theguardian.com/world/2023/nov/06/gaza-becoming-a-graveyard-for-children-says-un-secretary-general?mod=article_inline).

<sup>103</sup> OHCHR, *Gaza: UN Experts Call on International Community to Prevent Genocide Against the Palestinian People* (Nov. 16, 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>.

<sup>104</sup> *Id.*

said: “Gaza has become a graveyard for thousands of children. It’s a living hell for everyone else.”<sup>105</sup>

As for the main case of genocide against Palestinians in the Gaza Strip, the verdict may take years, while time is of the essence. The Palestinians in the Gaza Strip do not have the luxury of time; if waiting any longer, the international community might see their entire population wiped out. Now is the time to hold Israel accountable for its crimes in the Gaza Strip and stop the bombardment. As stated above, not only is the crime of genocide occurring in the Gaza Strip, but also war crimes and crimes against humanity. Israel must answer for its crimes against the helpless Palestinians. Numerous UN agencies have sounded the alarm regarding the dire situation in the Gaza Strip with the severe issues the region faces, including widespread starvation, a proliferation of disease, the lack of basic medical supplies and medicines, unhealthy living conditions, contaminated drinking water, and an overall scarcity of clean water.<sup>106</sup> These conditions are devastating the Palestinian civilian population in Gaza. It is crucial to highlight that the people suffering the most are civilians, who were not involved in hostilities.

## VI. Conclusion

Palestinians have been facing dire situation since the war between the Hamas and Israel. Each day, hundreds of Palestinians (mostly children and women) are losing their lives. Israel’s military actions meet the objective and subjective criteria of crimes against humanity, war crimes, and genocide. In this regard, South Africa filed a case on December 29, 2023, against Israel in the ICJ, citing violation of the Convention on the Prevention and Punishment of the Crime of Genocide. It is now up to the Court to decide whether Israel’s attacks constitute genocide. However, before that, the ICJ had ordered Israel to adhere to various provisional measures and report on what it has done to adhere to them, including the delivery of basic supplies (including food, fuel, medicine, and clean water) to the 1.9 million displaced Palestinians. The situation in the Gaza Strip is unbearable. Many Palestinian refugees live in makeshift tents, which has led to the proliferation of disease. In addition, refugees have been repeatedly

<sup>105</sup> James Elder, Gaza Has Become a Graveyard for Thousands of Children, UNICEF (Oct. 31, 2023), <https://www.unicef.org/press-releases/gaza-has-become-graveyard-thousands-children>.

<sup>106</sup> WFP, UNICEF & WHO, Preventing Famine and Deadly Disease Outbreaks in Gaza Requires Faster, Safer Aid Access and More Supply Routes, Joint Press Release (Jan. 15, 2024), <https://www.unicef.org/press-releases/preventing-famine-and-deadly-disease-outbreaks-gaza-requires-faster-safer-aid-access>.

forced to flee and seek new refuge due to Israel's continuous and indiscriminate bombardment.

As shown in this paper, Israel's actions meet the objective and subjective criteria of crimes against humanity, war crimes, and genocide. They are serious violations of international human rights and humanitarian law. South Africa presented well-stated arguments in its oral proceedings, which led the Court to grant its requests regarding the provisional measures. We wish the ICJ's ruling will be positive to South Africa as well as the Palestinians, but it may take a few years. With the relentless bombardment of the Gaza Strip, time is of the essence. Israel must adhere to the Court's ruling regarding the provisional measures. Hopefully the Security Council will issue a decision to support the ICJ's ruling for enforcement.

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