

Breaking the Cycle of Impunity: A Call for ICC Investigation into War Crimes and Genocide in the Israel-Hamas Conflict Post-October 7, 2023

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Abstract

The conflict between Israel and Hamas from October 7, 2023, presents a unique test case for assessing the efficacy of international criminal law in the prevention of types of serious international crimes. This study takes an analytical approach to international criminal law, drawing on primary legal sources, official documents, authoritative interpretations, and recent judicial decisions, including the arrest warrants issued by the ICC Pre-Trial Chamber against leaders on both sides in November 2023. The study, by systematic examination of the reports from international organizations and technological verification of the evidence, seeks to see how these actions by Hamas and Israel forces fulfill the actus reus and mens rea of violations of international criminal law

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constituting war crimes, crimes against humanity, and potentially genocide under the jurisdiction of the ICC. Rather than simply the recent ICC arrest warrants on starvation as a method of warfare and deliberate attacks on civilians, we'll be looking deeper into other violations, including the use of prohibited weapons, destruction of cultural property, and systematic patterns that could rise to genocide. The findings establish that both are international criminals, which calls for thorough investigations by the ICC; these prosecutions, however, face major jurisdictional, evidentiary, and political hurdles. These findings show that international criminal law might always moderate modern armed conflicts, through effective prosecution of violations against international humanitarian law, even if the first tentative steps to accountability have begun through the issuance of arrest warrants for key leaders on both sides of the conflict.

Keywords: Crimes against Humanity, Genocide, Hamas, International Criminal Court, Israel, War Crimes.

Introduction

The devastating events of October 7, 2023, and the subsequent days have presented the international criminal justice system with one of its most significant tests ever. The attacks by Hamas and Israel's subsequent military response have resulted in unprecedented civilian casualties, wide-scale destruction, and allegations of grave international crimes by both parties. The latter case of this war presents a peculiar challenge to the effectiveness of criminal law on an international scale in securing the prosecution of such offenses, especially when the struggle involves a combination of state and non-governmental actors who control asymmetrical warfare.

The Israeli-Palestinian conflict, nurtured by decades of territorial disputes and political strife, has often found itself at the center of accusations of war crimes and crimes against humanity. However, the current intensification poses distinct challenges for international

criminal justice. Now, the ICC faces unprecedented challenges in holding accountable both state and non-state actors for the commission of such crimes. The recent actions of the ICC, such as the issuing of arrest warrants of the high-ranking officials, in various other contexts, are examples of the ICC's will to consider international crimes no matter the political situation.

This willingness to address international crimes is evident in the ICC's recent actions regarding the current conflict. Therefore, the Court's best decision was to enter the matter under the Prosecutor's authority under Article 15 of the Rome Statute. The ICC Pre-Trial Chamber I's recently announced decisions, which issued arrest warrants against Israeli officials (Prime Minister Netanyahu and Defense Minister Gallant) and Hamas leaders (Mohammed Deif), are among the most significant developments in applying international criminal law to the conflict. On November 21, 2024, the Chamber found reasonable grounds to believe that Netanyahu and Gallant bear criminal responsibility for the war crime of starvation as a method of warfare and for intentionally directing attacks against civilian populations. Likewise, the Chamber issued a warrant against Deif for war crimes, including intentional killing, taking hostages, and committing acts of sexual violence.

The investigation in this paper goes beyond the aforementioned charges to analyze possible additional violations that could form the basis for amended or supplementary charges. While the current warrants are concerned with starvation and deliberate attacks against civilians, our investigations show evidence of further international crimes, from the systematic use of weapons prohibited to massive collective punishment and destruction of cultural property, followed potentially by patterns of conduct amounting to genocide. The documented evidence in this paper supports and proposes that these

additional charges provide a more complete framework for holding to account the full scope of international crimes committed during the conflict.

Article 61(9) of the Rome Statute provides the procedural route for amending existing charges; it allows the Prosecutor to amend the charges with the leave of the Pre-Trial Chamber based on new evidence. The additional evidential basis raised in this paper may warrant such amendments, since ongoing investigation is uncovering further evidence of systematic violations of international humanitarian law.

Building on this foundation of recent ICC actions and the potential for expanded charges, this paper deals with an important question: In what way do the actions of both Hamas and Israeli forces enact the material¹ and mental elements² of international crimes within the jurisdiction of the ICC? This question is of particular interest in light of recorded patterns of civilian casualty, systematic destruction of protected objects, and the findings of the pre-trial chamber on starvation being a method of warfare and command responsibility.

The study employs a legal-analytical methodology based on primary legal sources, official documentation, authoritative interpretations of international criminal law, and recent judicial decisions. While this method does address the precision in legal operations, we must also note a few of its limitations. These include: first, an absence of access to evidence within active conflict zones, in light of factors influencing its comprehensiveness; second, the partial perspective that is likely appearing through reliance on secondary sources and official reports; third, challenges running purely from a

¹ *Actus Reus*.

² *Mens Rea*.

legal-analytical perception created by several divergences between political and legal components of international criminal law. In conjunction with these, we try to meet some of our limitations through supplementing our analysis with reports from various international organizations, collating documented patterns of behavior, cross-referencing multiple sources, and utilizing technological instruments for evidence verification.

I. Conceptual and Theoretical Framework

It also seems that, rather than characterization of the conflict under international humanitarian law, the authors who devote themselves to understanding the existing situation have given more attention to setting out the applicable legal framework, one with unique complications arising from the various statuses of the territories involved and the natures of the parties to the conflict. Accordingly, the legality reflects that the noteworthy scholarly debate has essentially been whether this case is construed under International Armed Conflict (IAC) rules, Non-International Armed Conflict (NIAC) rules, or within a matrix of both.

The legal qualifications of the Gaza conflict hinge upon several considerations: the status of Gaza in territorial views, Israel's extent of relations with that territory, and the Hamas position as a non-state actor. Many legal scholars contend, at large, that applicable legal international armed conflict is based solely on the territorial aspect of the conflict and the ongoing effect that Israel imposes on Gaza's borders, airspace, and maritime access. This position has been consistently supported by leading authorities in international humanitarian law, including Dinstein's analysis of the effective control

doctrine and the applicability of occupation law.³ The International Committee of the Red Cross has similarly sustained that Israel remains an occupying power under the Fourth Geneva Convention, because Israel continues to control Gaza's external borders, airspace, and territorial waters, and furthermore, regulates the movement of goods and people.⁴

Non-state armed groups like Hamas are embroiled in the present complexities of the applicable legal regime. Whereas Northern Ireland's primary approach to international humanitarian law could suggest NIAC application to non-state actors, the specific context of the war complicates a straightforward application.⁵ The obligations set out for Hamas mainly arise from customary international humanitarian law, which prohibits direct attacks against civilians, hostage-takings, or any egregious violations, regardless of the formal classification of the conflict.

International criminal jurisprudence has clarified and enforced obligations that non-state actors have long borne under international humanitarian law in complex modern conflicts, particularly through Common Article 3 of the 1949 Geneva Conventions—the foundational provision governing non-international armed conflicts that requires all parties to apply minimum humanitarian standards. This development is exemplified in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, particularly in the Tadić case, where the Appeals Chamber confirmed

³ Ilias BANTEKAS and Safaa S. JABER, "The Human Rights Obligations of Belligerent Occupiers: Israel and the Gazan Population" (2025) *Journal of Conflict and Security Law*, Vol. 30, Issue 1, p 107.

⁴ Israel and the Occupied Palestinian Territory: The Law of Occupation Must Be Respected" Statement (19 July 2024), online: ICRC.

⁵ Françoise HAMPSON, "Is there a Need to Adapt Legal Categories to Contemporary Realities?", in *Collegium*, No. 40, Autumn/Automne 2010, p. 115.

that serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II can give rise to individual criminal responsibility.⁶ Similarly, the ICC's approach in the Afghanistan investigation case has demonstrated the Court's willingness to hold non-state armed groups accountable for violations of humanitarian law.⁷ The Rome Statute's Article 8(2)(c) and (e), governing war crimes in non-international armed conflicts, explicitly criminalizes conduct by parties to such conflicts, without distinguishing between state and non-state actors, thereby providing enforcement mechanisms for pre-existing obligations upon armed groups under international criminal law.

This development reflects a growing realization that, for the protection of civilian populations, it is necessary to hold all parties to armed conflicts to basic humanitarian standards, irrespective of status.

It is not prudent to ignore the convergence of the two legal frameworks on the question of individual criminal responsibility for international crimes, since the material elements of various crimes and the applicable modes of liability may differ depending on the acts in question. Throughout this analysis, we will specify the basis for applying particular legal standards to specific acts and how this affects determinations of criminal responsibility.

Also, the relationship between international humanitarian law (IHL) and international criminal law (ICL) provides the foundational

⁶ International Criminal Tribunal for the former Yugoslavia, "Tadić Case: The Judgement of the Appeals Chamber - His Appeal Against Judgement Denied, Duško Tadić is Found Guilty on Nine Additional Counts; Decision on Sentencing to be Rendered at a Later Date" Press Release No. TH/P.I.S./419-e, Case No. IT-94-1 (15 July 1999), online: ICTY. pp. 1-2.

⁷ International Criminal Court, Pre-Trial Chamber II, "Public Redacted Version of Prosecution's Application under Article 58 for a Warrant of Arrest against Abdul Hakim HAQQANI" Case No. ICC-02/17-225-Red, Situation in the Islamic Republic of Afghanistan, Office of the Prosecutor (23 January 2025), online: ICC, paras. 14, 16, 161, 162.

framework for analyzing international crimes in contemporary armed conflicts. Understanding this relationship is crucial for evaluating how violations of humanitarian law become prosecutable international crimes, particularly in complex situations such as the Israel-Hamas conflict.

International humanitarian law and international criminal law operate as distinct yet interconnected legal regimes. Whereas IHL establishes the main set of rules governing conduct in armed conflict, with its focus on State obligations, ICL does so for individual criminal responsibility; this dichotomy is even more apparent when determining serious violations that amount to international crimes.⁸ The transformation of IHL violations into international crimes reflects what scholars term the "individualization of international law," where collective state obligations are translated into individual criminal responsibilities. This change has been astutely identified by Cassese in his important book examining international criminal law, where he states that it involves the original state obligations being converted into individual criminal responsibilities.⁹ This change indicates a momentous shift from the traditional state focus of international law to individual accountability for violations of international norms. The Rome Statute embodies the individualization of responsibility by declaring that persons, not states, are to be held criminally responsible for the most serious international crimes, thereby bridging the gap between states' general responsibility under international law and the punishment of individuals under international criminal law.

⁸ Alain-Guy TACHOU-SIPOWO, "Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the Rome Statute" (2014) *Canadian Yearbook of International Law*, Vol. 51, pp. 301-302.

⁹ Antonio CASSESE, "The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise" (2007) *Journal of International Criminal Justice*, Vol. 5, Issue 1, p 110.

More than the establishment of a simple breach of IHL obligations is necessary to transform violations of humanitarian law into international crimes. Under the Rome Statute, such a transformation demands proof of specific objective and subjective elements that distinguish international crimes from other violations. For instance, war crimes require a direct nexus to an armed conflict and subjective knowledge on the part of the perpetrator of relevant factual context evidence of that conflict. An internationally recognized law jurisdiction requirement nexus is quite clearly bounded and defined through international criminal jurisprudence and in international criminal law by international criminal jurisdictions in relevant cases such as the ICTY Kunarac case. The Appeals Chamber in the Kunarac case defined the nexus requirement to be satisfied if the crimes were "closely related to the armed conflict" and the crimes did not need to be committed in armed confrontation, nor did the accused need to be in "combatant" status.¹⁰ The ICC conducted a more specific review of the standard in the Katanga case. They considered the standard to allow them to define when nexus existed within the specific facts where the armed conflict played a substantial part in the perpetration of the crime itself or the manner in which the crime was committed.¹¹ This evolution in international criminal jurisprudence stemmed from respecting the nature and mode of the underlying war crimes framework to include not just law of war battlefield actions, but also actions that are seen in the context of a wider armed complexities of

¹⁰ The Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgement, Case No. IT-96-23 & IT-96-23/1-A, ICTY (12 June 2002).

¹¹ International Criminal Court, "Germain Katanga Found Guilty of Four Counts of War Crimes and One Count of Crime Against Humanity Committed in Ituri, DRC" Press Release No. ICC-CPI-20140307-PR986 (7 March 2014), online: ICC.

hostilities events, including actions that are primarily aimed at civilians in occupied or contested territories.

It should be accepted that state accountability, as opposed to individual criminal liability, does not equate an infringement of humanitarian law with a war crime. The system of grave breaches of international humanitarian law delineates that foundation for individual criminal liability; it represents the pivotal link between state obligations under the Geneva Conventions and personal liability under international criminal law. This link is critical to ensure only the most egregious violations of humanitarian law, ones that affect civilians and hors de combat, will trigger individual criminal liability. The grave breaches regime, found in Articles 50, 51, 130, and 147 of the Geneva Conventions, creates the basis for universal jurisdiction over specified acts such as willful killing, torture, and destruction, and provides a consistent international standard to prosecute war crimes. In addition, the grave breaches regime will also prevent the dilution of international criminal law and distinguish between violations that might be regulatory, and acts so serious that they shock humanity's conscience, and will, therefore, ensure resources are focused on the most serious violations of humanitarian protection.

The principle of distinction in IHL acquires additional significance when examined within the framework of international criminal law. While IHL provides the basic rule on distinction between civilians and combatants, international criminal law articulates specific metrics as to when such a violation of this principle amounts to war crimes, both direct targeting of civilians and indiscriminate attacks, with the latter requiring more nuance regarding the attacker's *mens rea*. The development of these standards by the ICTY, particularly in the Galić and Gotovina cases, is particularly instructive for today's context. In the Galić case, the Appeals Chamber established fundamental

precedents for how we engage in an examination of indiscriminate attacks on a civilian population, which here concerned criminal responsibility for campaigns of sniping and shelling designed to terrorize civilian populations in Sarajevo.¹² The Trial Chamber stressed that the principle of distinction does not only require avoiding intentional targeting of civilians, but also requires ensuring that military operations are intended to ensure the conduct of the operation is not done with the primary purpose or intent of spreading terror to the civilian population. The Gotovina case built on these definitions and standards by considering the legality of artillery attacks on civilian areas, and delineating criteria for when a military objective can justify civilian casualties, including when feasible precautions were taken, and it could be determined if the expected civilian harm would be considered "excessive" in relation to the expected military advantage.¹³ These precedents are especially important today in terms of urban warfare, as they provide concrete legal standards for assessing military conduct in urban areas where populations are concentrated, and there is often a murky area between military necessity and unlawful targeting.

Crimes against humanity are in a class of their own, demanding proof of widespread or systematic attacks against civilian populations pursuant to a state or organizational policy.¹⁴ This threshold requirement plays a dual role: it ensures the international character of the crimes while also providing the framework for individual

¹² Prosecutor v. Stanislav Galić, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, Appeals Chamber, Case No. IT-98-29-A, ICTY (21 March 2005), para. 2.

¹³ Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Judgement Summary, Trial Chamber, Case No. IT-06-90-T, ICTY (15 April 2011), p 3.

¹⁴ Tilman RODENHÄUSER, "Beyond State Crimes: Non-State Entities and Crimes against Humanity" (2014) *Leiden Journal of International Law*, Vol. 27, No. 4, pp. 920-923.

accountability. The Policy requirement, as developed in the jurisprudence of the ICC, makes the distinction between isolated criminal acts and those that amount to international crimes, especially in situations where state involvement may be indirect or obscured. The perpetrator must have knowledge of the broader attack, though they need not share the overall policy's purpose. This mental element ensures criminal responsibility attaches only to people who understand the context of their actions within larger patterns of violence.

Genocide, regarded as the gravest crime under international law, requires special intent (*dolus specialis*) to destroy, in whole or in part, a protected group.¹⁵ This high level of mentation makes genocide unique in the canon of international crimes, as well as more complex when it comes to evidentiary issues. The protected groups are narrowly delineated—nationals, ethnics, racials, and religious—showing that the international community perceived that the targets of genocide were basic attributes of humanness.

Having established the fundamental elements of international crimes, it is crucial to understand the mechanisms through which these crimes are prosecuted and how responsibility is attributed. The ICC's jurisdiction functions with clearly outlined parameters, taking both the legal and practical views. The principle of complementarity stands at the heart of that system of jurisdictional functions and requires the Court to find that national proceedings are unavailable or inadequate to address certain conduct.¹⁶ This is, among other things, pragmatic and political in ensuring complementarity with state sovereignty by

¹⁵ Payam AKHAVAN, "The Crime of Genocide in the ICTR Jurisprudence" (2005) *Journal of International Criminal Justice*, Vol. 3, No. 4, p. 992.

¹⁶ Thordis INGADOTTIR, "The ICJ Armed Activity Case -- Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions" (2009) *Nordic Journal of International Law*, Vol. 78, No. 4, p. 583.

taking up the accountability for serious international crimes. As recently confirmed by Pre-Trial Chamber I, the Court's jurisdiction can be exercised on the basis of territorial jurisdiction, without requiring the acceptance of jurisdiction by non-party states.

Military and civilian leaders bear criminal responsibility when they neglect their duty to stop or address unlawful acts perpetrated by personnel within their command structure. It considers that, not infrequently, international crimes are committed within organizational structures where formal authority carries with it particular responsibilities. It ensures accountability upwards through layers of authority to address both direct perpetration and leadership responsibility.¹⁷

Command responsibility represents a vital bridge between IHL and ICL in attributing criminal liability. International humanitarian law primarily governs state obligations, yet it assigns criminal accountability to both military and civilian superiors who fail to prevent or sanction unlawful conduct by subordinates within their sphere of authority. This extension is particularly relevant in asymmetric conflicts where traditional military hierarchies may not exist, yet effective control over subordinates can be demonstrated through other means. International criminal tribunals have developed an articulated framework for their application in complex conflict situations, as seen in the case of *Čelebići* before the ICTY.¹⁸ This theoretical framework is important in providing the necessary analytical tools for specific acts in contemporary conflicts through the lens of international criminal law.

¹⁷ Alexander ZAHAR, "Command Responsibility of Civilian Superiors for Genocide" (2001) *Leiden Journal of International Law*, Vol. 14, No. 3, p. 593.

¹⁸ *Ibid.* pp. 607-608.

II. Non-State Actor Accountability: Hamas

Hamas's October 7, 2023 operation, which tragically resulted in the deaths of more than 1200 Israelis (including about 29 children) and the taking of approximately 240 hostages to Gaza (about 30 of whom are children),¹⁹ raises fundamental questions regarding the application of international criminal law to non-state actors claiming rights of self-determination. While Hamas officials assert their actions stem from legitimate resistance against occupation, this claimed legal basis requires careful examination under established frameworks of international humanitarian and criminal law.

The assessment of contemporary international judicial precedents is critical to understanding the vexing and precarious legal issues concerning self-determination rights asserted by armed groups. The ICC has dealt with myriad cases concerning the complex legal status of non-state actors claiming legitimate rights of resistance.

Cases at the ICC concerning how non-state actors may claim self-determination rights while committing international crimes have alluded to the legal basis underlying that notion. The Afghan investigations emphasized precedents for the deliberation on the conduct of the non-state actors, concluding that the Taliban's claims of resistance could not justify systematic violations of humanitarian law and crimes against civilians.²⁰ Similarly, in the Mali situation, the Court established frameworks aimed at assessing claims of legitimate resistance versus those of international crime, ultimately ruling that Ansar Dine's assertions of self-determination did not exempt them

¹⁹ "Dozens of Children Died in Hamas' Oct. 7 Attack on Israel, Contrary to Online Claim" Factcheck (2023), online: Factcheck.

²⁰ Peter G. DANCHIN, "Transitional Justice in Afghanistan: Confronting Violations of International Humanitarian and Human Rights Law" (2001) Yearbook of International Humanitarian Law, Vol. 4, p 29.

from criminal responsibility for destroying cultural heritage sites and committing war crimes in Timbuktu.²¹

These judicial precedents demonstrate that while non-state groups may claim a valid basis for resistance, their actions must still adhere to international legal frameworks. Thus, the ICC's jurisprudence in these cases imposes a clear restriction on when claims of self-determination can be invoked to justify violations of international humanitarian law.

The right to self-determination is a fundamental principle of international law that enables people to freely determine their political status and pursue their economic, social, and cultural development. This right is recognized in key documents, including the United Nations Charter (Articles 1(2) and 55), the International Covenant on Civil and Political Rights (Article 1), and UN General Assembly Resolutions (1514 in 1960, 2625 in 1970, and 3314 in 1974).

However, Article 35 of the First Additional Protocol to the 1949 Geneva Conventions states that the right of parties to a conflict, including peoples fighting against colonial domination, alien occupation, or racist regimes in the exercise of their right of self-determination, to choose methods or means of warfare is not unlimited.²² Protocol I additionally forbids acts and threats of violence targeting civilians to generate widespread fear. Therefore, Hamas' argument for legal legitimacy under self-determination principles fails to justify violations of international humanitarian law.

²¹ Faramarz YADEGARIAN and Mohammad RAZAVI, "The Evolution of the International Criminal Court's Judicial Policy on Issuing Arrest Warrants: From Uganda to Palestine" (2025) *Journal on the Use of Force and International Law*, Vol. 12, No. 1-2, pp. 288-290.

²² Theodor MERON, "The Geneva Conventions and Public International Law: British Foreign and Commonwealth Office Conference commemorating the 60th Anniversary of the 1949 Geneva Conventions" (2009) *International Review of the Red Cross*, Vol. 91, No. 875, p 619.

After examining Hamas' jurisdictional claim, it is necessary to analyze Hamas' actions in light of international legal standards. Article 2(4) of the United Nations Charter explicitly prohibits the use of force against the territorial integrity or political independence of states. Hamas has violated this article through military aggression into Israeli territory. Furthermore, Article 1 of the International Convention Against the Taking of Hostages, adopted by the UN General Assembly in 1979, explicitly criminalizes hostage-taking and threatening to harm individuals to compel another party to perform or abstain from any act.

III. State Responsibility Under International Criminal Law: Israel

Article 2(4) of the United Nations Charter, which prohibits the use or threat of force, has two exceptions. The first exception is Article 51 of the Charter, or the rule of self-defense. The second exception is the collective security system, which occurs through the decision of the UN Security Council under Chapter VII (Articles 41 and 42). Given Hamas's military aggression into Israeli territory, it is natural that, under international law, Israel has the right to self-defense. However, what matters is whether the conditions of proportionality and necessity have been met. According to legal experts, if a country that has been subjected to an armed attack defends itself with tools that have a wide range of destruction in terms of lives and natural resources, it has committed an international crime that does not fall within the framework of self-defense. Therefore, self-defense must be completely proportionate to the previous attack, both in terms of quantity and quality. Here, we need to distinguish between preemptive and preventive self-defense. Preemptive self-defense, which the doctrine of international law is agreed upon and accepts, is a defense

against an imminent and specific threat, which is legitimate under the Caroline doctrine. However, preventive self-defense is actually an attack to extinguish the embryo of potential threats that may occur in the future. This type of self-defense is not recognized under international law and falls outside the framework of Article 51 of the UN Charter. Given that Hamas was not preparing for another imminent attack and there was no specific threat, and considering Israel's actions regarding retaliation against the people of Gaza and non-compliance with the conditions of proportionality and necessity, Israel's argument regarding self-defense is incorrect.

After declaring all-out war against Hamas, Israeli army forces began advancing towards the Gaza Strip. Before launching extensive attacks, Israeli forces issued a declaration asking people and civilians to leave the area. The issuance of this declaration for civilian evacuation can be examined from three perspectives. The first perspective is that Israel argues Hamas forces have placed their ammunition depots and operational centers in civilian locations such as schools, hospitals, and residential homes. Many pieces of evidence, documents, and videos released by the Israeli army also prove this. Israel accuses Hamas of deliberately using human shields. In this regard, it can be argued that given the extensive conditions and the widespread issuance of official announcements by the Israeli army, those who do not leave the war and operational zone and voluntarily remain in this area are voluntary human shields, and such individuals are considered military personnel.²³ The second perspective is that the force that compels people to forcibly migrate has, according to the

²³ Coline PROY, "The Classification of Civilians as Human Shields: a Means to Justify Violence?" Lund University, Master's thesis, 2023, p 83.

definition in the Statute of the ICC (articles 6 and 8), committed war crimes and genocide.

The optimal solution to this predicament is the temporary relocation of individuals living in areas affected by military operations to camps located away from conflict zones, with assistance from specialized international organizations such as the United Nations High Commissioner for Refugees (UNHCR). This course of action has been implemented to some extent; however, regrettably, the delivery of humanitarian aid to these camps and conflict-affected areas has been obstructed, or refugee camps like Al-Shati have been subjected to aerial attacks, resulting in civilian casualties. The Palestinian Ministry of Health characterized the assault on this shelter as a massacre.²⁴

IV. Documented Violations and Legal Analysis

This section provides a systematic legal analysis of documented violations of international criminal law by each party to the Israel-Hamas conflict. The analysis answers the core research question found in the introduction, which is, how do both Hamas and Israeli actions meet the constitutive elements of international crimes that come under the jurisdiction of the ICC?

V. Violation of the Principle of Distinction

Reports from the Israeli military indicate that Hamas has deployed its military equipment in residential and civilian areas, and these areas serve as Hamas's operational centers for attacks on Israeli territory. Two points are crucial in this regard. The first point is that, due to the

²⁴ "Nowhere to Go": Ordinary Palestinians Live in Fear as Israel Retaliates Against Hamas" CNN (2023), online: CNN.

Gaza Strip's high population density, military bases may be located near public or residential areas. The Gaza Strip is an area of 360 square kilometers with a population of two million, which also creates extreme overcrowding. The second point is that in many released videos, the issue is not the proximity of military and civilian areas, but rather the placement of weapons and tunnels precisely in civilian locations. Therefore, Article 28(2)(b)(xxiii) has been intentionally violated by Hamas, and the issue of population density becomes irrelevant.

On the other hand, recent information indicates that in Israeli attacks since October 2023, up until today, on May 5th, 34,735 Palestinians have been killed, of which 70% were women and children. Additionally, over 78,108 Palestinians have been injured, and around 1.7 million have been internally displaced.²⁵ Israel's actions have had a severe impact on Palestinian women and children in Gaza, with 37 mothers being killed in Gaza every day.²⁶ At least 4,700 other women and children are missing and presumed buried under rubble.²⁷ This is despite children being considered civilian objects under the Fourth Geneva Convention,²⁸ Yet Israel has deliberately violated the principle of distinction, causing civilian deaths and demolishing civilian targets.

352 or 74% of Palestinian schools have been destroyed. 355,000 homes have been demolished (65% of the Gaza Strip's housing),

²⁵ UNRWA, "Situation Report #106 on the Situation in the Gaza Strip and The West Bank, Including East Jerusalem" (2024).

²⁶ UNWomen, "Facts and figures: Women and girls during the war in Gaza" (2024).

²⁷ Palestine Red Crescent Society, "Response Report As of Saturday, October 7th 2023, 6:00 PM until Wednesday, December 13th 2023, 24:00 AM" (2023).

²⁸ Abdalfatah Mohammed ASQOOL, Shahrul Mizan ISMAIL, Rohaida NORDIN, "The Protection of Children During Armed Conflicts: Israeli Violations Of International Humanitarian Law In Three Wars In Gaza" (2023) UUM Journal of Legal Studies, Vol. 14, No. 2, p 540.

resulting in the forced and permanent displacement of Palestinians. Moreover, other areas of Gaza appear to have experienced similar levels of destruction, including Beit Hanoun,²⁹ Beit Lahia,³⁰ the Old City of Gaza,³¹ Al-Rimal,³² and the Nuseirat refugee camp in the south.³³

The UN Secretary-General stated that 136 UN personnel have been killed over the 75-day period, an unprecedented occurrence in the history of the United Nations. It is evident that this scale of civilian casualties and targeting of civilians constitutes a violation of all the aforementioned principles by Israel and a breach of humanitarian law.

The systematic nature of these violations needs to be analyzed in light of the ICC's established jurisprudential framework for urban warfare. In the first instance judgment in the Bosco Ntaganda case, the Trial Chamber established specific standards for assessing civilian protection in urban contexts with a particular emphasis on the requirement for feasible precautions of possible attacks per Article 8(2)(b)(iv) of the Rome Statute.³⁴ The Trial Chamber underscored that military commanders must verify the military character of a target and assess proportionality even in an urban conflict setting where civilian and military objects may be in close proximity to each other. In fact, the Trial Chamber established that the failure to take feasible precautions resulting in a high number of civilian casualties

²⁹ OCHA, "Before and after: satellite images of Gaza showing damage caused in hostilities" (2023).

³⁰ Dominic BAILEY, Erwan RIVAULT, Daniele PALUMBO, "Nearly 100,000 Gaza buildings may be damaged, satellite images show" BBC News (2023).

³¹ OCHA, *supra* note 29.

³² Al-Haq, "Destruction of al-Rimal Neighborhood in Gaza City, an Attack on the Economic Existence of a National Group" (2023), online: Al-Haq.

³³ Bailey, Rivault and Palumbo, *supra* note 30.

³⁴ Prosecutor v. Bosco Ntaganda, Judgment of the Appeals Chamber, ICC-01/04-02/06 A4-A5 (12 September 2022), para. 114.

constitutes a war crime, independent of any legitimate military target. The Darfur investigation further developed standards around systematic attacks, in particular through the Al Bashir case, where Pre-Trial Chamber I examined patterns of displacement, the destruction of infrastructure, and the targeting of civilians to assess the systematic attack against civilian populations.³⁵ These decisions help us deepen our understanding of the current conflict, while also maintaining an emphasis on the uniqueness of this situation and strongly condemning attacks that fail to distinguish between military and civilian targets.

VI. Use of Prohibited Weapons and Methods of Warfare

The aerial bursts of white phosphorus fired by Israeli artillery over the skies of Gaza on October 12, 2023, as reported by Human Rights Watch,³⁶ as well as images circulated on Social Network X showing Israeli fighter jets equipped with M117 demolition bombs, whose use in civilian areas has caused heavy casualties,³⁷ indicate violations of the aforementioned conventions and their provisions. Additionally, the Israeli Ministry of Health has reported that serious injury or death may occur from white phosphorus use.³⁸

In another convention, the 2008 Convention on Cluster Munitions, Article 1 prohibits the use of cluster munitions by any State Party under any circumstances. According to reports from human rights organizations, due to technological advancements impacting bomb

³⁵ YADEGARIAN and RAZAVI, *supra* note 21, pp. 270-272.

³⁶ Human Rights Watch, "Israel: White Phosphorus Used in Gaza, Lebanon" (2023).

³⁷ Harry DAVIES, Manisha GANGULY, "Gaza war puts US's extensive weapons stockpile in Israel under scrutiny" *The Guardian* (2023).

³⁸ Asqool, Ismail, and Nordin, *supra* note 28, p 546.

power, the explosives being dropped on Gaza may be twice as powerful as a nuclear bomb.³⁹

The International Criminal Tribunal for the former Yugoslavia case-law set the main criteria for evaluating the use of weapons in populated areas, primarily through its Martić case, which held that M-87 Orkan rockets became indiscriminate weapons because of their large-area impacts and their inability to discriminate between civilian and military objects once employed in populated urban terrain.

The Chamber's reasoning relied on the weapon's own technical characteristics - its cluster munition warhead, large-area blooming, and large number of tail-outs - and determined that weapons of its type violate the core principle of distinction when employed even in populated urban terrain. Likewise, the Independent International Commission of Inquiry on Syria's record of barrel bomb employment during the years of 2019-2020 set comprehensive bodies of law for evaluating improvised explosive devices during urban war and believes that systematic attacks on civilian areas by inherently indiscriminate weapons constitute war crimes, even if suspected military objects are thought to be located inside affected areas.

Cluster munitions cause brain injuries, eye injuries, ear and hearing damage, mouth and jaw injuries, facial injuries, skin and soft tissue injuries, and ultimately death. Furthermore, the psychological effects experienced by survivors of cluster munitions include post-traumatic stress disorder, major depressive disorder, generalized anxiety disorder, and acute stress disorder.⁴⁰ According to a report by Amnesty International, the sale of American equipment, weapons, and

³⁹ Euromedmonitor, "Israel hits Gaza Strip with the equivalent of two nuclear bombs" (2023).

⁴⁰ Youssef FARES, Jawad FARES, Souheil GEBELLY, "Head and Facial Injuries Due to Cluster Munitions" (2014) *Neurological Sciences*, Vol. 35, p 905.

munitions to Israel in recent years, including cluster bombs,⁴¹ makes clear Israel's use of these prohibited weapons against the people of Gaza.

VII. Collective Punishment and Systematic Targeting

On October 12, 2023, in a press conference with foreign media regarding Palestinians in Gaza, over one million of whom are children, Israeli President Isaac Herzog stated that Israel does not distinguish between militants and civilians in Gaza: "This is a nation that is culpable. This rhetoric about uninvolved civilians is wrong. Absolutely wrong. And we will fight until we break their backbone."

The statements of members of the Israeli parliament regarding the collective punishment of Palestinians, which clearly demonstrate Israel's intent and purpose to violate this principle, are also provided below:

- There are no innocents in Gaza.⁴²
- The killers of Israeli women and children should not be separated from Gaza's civilians.⁴³
- The children of Gaza have brought this upon themselves.⁴⁴
- There should be only one sentence for all of them, and that is death.⁴⁵

Such official declarations and subsequent actions match strikingly similar patterns to those already examined in the international tribunals. If the Special Court for Sierra Leone provided the most

⁴¹ AmnestyUSA, "US Must Monitor Use of US Weapons in Gaza" (2023).

⁴² Avigdor LIBERMAN, "There are no innocents in Gaza" (2023), online: X Social Media Platform.

⁴³ Ketii SHITRIT, "I flatten Gaza, I have no sentiments. Because the murderers of the women and children should not be separated from the citizens of Gaza" (2023), online: X Media Platform.

⁴⁴ Jonathan OFIR, "Israeli politician: The children of Gaza have brought this upon themselves" (2023), online: Mondoweiss.

⁴⁵ "Fire Israel's far right" Haaretz (2023), online: Haaretz.

significant judicial consideration of collective punishment since the Second World War, with several notable convictions for the war crime of collective punishment for the first time,⁴⁶ the current context of Gaza enforces unique challenges. The scale of the situation and the distinct nature of officials' policy statements transcend all patterns of cases seen in earlier international tribunals.

VIII. Starvation as a Method of Warfare

The World Health Organization and the World Food Programme have described the risk of famine and starvation as extremely serious and dangerous. They have also stated that an unprecedented 93 percent of Gaza's population is facing a hunger crisis. All of these issues are due to the blockade of Gaza and the cutting off of electricity, communications, roads, and the denial of entry for trucks carrying water, food, medical supplies, and fuel.⁴⁷ The UN Secretary-General states: "Out of every five people suffering from malnutrition, four of them are in Gaza."⁴⁸

Yoav Gallant, Israel's Defense Minister, announced on October 9, 2023, that all roads to Gaza have been blocked and that no electricity, food, water, or fuel will be allowed into Gaza.⁴⁹

Katz, Israel's Energy and Infrastructure Minister, tweeted on October 13, 2023, stating: "The Palestinians will not receive a drop of water or a battery until they leave Gaza."⁵⁰

⁴⁶ Shane DARCY, "Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?" (2010) *Journal of International Criminal Justice*, Vol. 8(1), p 29.

⁴⁷ WHO, "Lethal combination of hunger and disease to lead to more deaths in Gaza" (2023).

⁴⁸ OCHAOPT, "Remarks to the media by the Secretary-General" (2023).

⁴⁹ Yoav GALANT, "We are fighting human animals - and we act accordingly. We are laying siege to Gaza City" (2023), online: Youtube.

⁵⁰ Israel KATZ, "All the civilian population in gaza is ordered to leave immediately" (2023), online: X Social Media Platform.

Amichai Eliyahu, Israel's Heritage Minister, said: "We do not deliver Nazi humanitarian aid" and "There is no such thing as civilians in Gaza."⁵¹

Giora Eiland, an Israel Defense Forces reserve major general, former head of Israel's National Security Council, and adviser to the defense minister: In a digital publication on October 7, 2023, addressing Israel's directive on Gaza's utilities, he stated: "The supply of power, water, and diesel to Gaza has been terminated. However, this measure alone proves insufficient. For the siege to achieve its purpose, external aid must be prevented from reaching Gaza. The population faces a binary choice: remain and face starvation, or evacuate."⁵²

He has repeatedly emphasized Israel's interest in creating a humanitarian crisis in Gaza, saying: "Israel has no interest in reviving the Gaza Strip, and this is an important point that should be made clear to the Americans."⁵³

In a radio interview with The Times on October 12, 2023, he reiterated that the army should: "Put such immense pressure on Gaza that Gaza becomes an area where people cannot live. People cannot live in Gaza until Hamas is gone, meaning that Israel should not only withhold energy, diesel, water, food, but also prevent any potential aid from others in order to create a dreadful, unbearable situation that could last for weeks and months..."⁵⁴

⁵¹ "Far-right minister: Nuking Gaza is an option, population should 'go to Ireland or deserts'" Times of Israel (2023), online: Times of Israel.

⁵² Giora EILAND, "Opinion | 'A new turning point in the history of the State of Israel. Most people don't understand that'" (2023), online: Fathom Journal.

⁵³ "Interview with Giora Eiland" Kann News (2023), online: Kann News.

⁵⁴ Giora EILAND, "How Israel plan to 'destroy Hamas'" (2023), online: Youtube.

IX. Obstruction of Humanitarian Access and Healthcare

Doctors are not only being killed, but also arrested and disappeared by Israeli authorities. These include the Director General of Al-Shifa Hospital and his staff, who have been detained and unlawfully held since November 23, 2023.⁵⁵

The World Health Organization has recorded 203 attacks on health facilities resulting in 22 deaths and 59 injuries among Gaza's health workers. Only 13 out of 36 hospitals and 18 out of 72 primary healthcare centers remain operational.⁵⁶

The situation of attacks on medical facilities and buildings is so dire that UN General Assembly resolution ES10/21 of October 27, 2023, called for "respect and protection for all civilian and humanitarian facilities, including hospitals and other medical facilities... as well as all humanitarian and medical personnel."

Palestinians inside the Gaza Strip, in addition to being deprived of access to water, food, fuel, and electricity, have also been deprived of medical care and medical equipment. The World Health Organization estimates that 15 percent of women giving birth in the Gaza Strip are likely to experience severe complications, and indicates that maternal and infant mortality rates are expected to rise due to lack of access to medical care. The cessation of power and fuel supplies led to devastating consequences at Al-Shifa Hospital, where five neonates in incubators and forty patients receiving critical care in intensive care and dialysis units died as a consequence.⁵⁷

WHO's assessment recognizes a grave public health crisis in Gaza: infectious diseases have increased exponentially since mid-October,

⁵⁵ OCHAOPT, "Hostilities in the Gaza Strip and Israel | Flash Update #48" (2023).

⁵⁶ WHO, "Opt Emergency Situation Update" (2023), online: WHO.

⁵⁷ OCHAOPT, "Hostilities in the Gaza Strip and Israel | Flash Update #44" (2023) & OCHAOPT, "Hostilities in the Gaza Strip and Israel | Flash Update #42" (2023).

with a figure of over 100,000 cases of diarrheal diseases, of which half are children below 5, a 25-fold increase compared to pre-conflict figures. The territory is also plagued by pervasive respiratory infections of upward of 150,000, concurrently with epidemics of skin diseases, meningitis, chickenpox, and suspected hepatitis case presentations, emblematic of symptoms of jaundice. A study shows that immunocompromised individuals are at higher risk of such infections, particularly when malnutrition dampens immune function. Children debilitated by malnutrition are placed at increased risk of death by preventable diseases like diarrhea, pneumonia, and measles, particularly if they are denied access to health care. Those surviving are likely to coexist with irreversible outcomes, including their physical growth being stunted and their cognitive ability being blunted. Gaza's populace, once stretched to its limits, now faces death by starvation and by treatable diseases. WHO highlights the urgent need for significantly escalated humanitarian relief provision and reiterates its call for a swift conclusion of hostilities to prevent further loss of life.⁵⁸

According to a CNN report on the morning of February 29, 2024, many civilians suffering from starvation rushed towards 18 trucks carrying humanitarian food aid as they arrived. At that moment, Israeli military forces opened fire on them, resulting in at least 118 unarmed civilians being killed by Israeli forces.⁵⁹

The right of access to humanitarian aid is part of the right to life, as guaranteed by various international laws, including humanitarian law

⁵⁸ Brigit TOEBES, "Health and Humanitarian Assistance: Towards an Integrated Norm under International Law" (2013) *Tilburg Law Review*, Vol. 18, No. 2, p 131.

⁵⁹ "The UN Security Council (UNSC) has expressed 'deep concern' after nearly 120 Palestinians lost their lives in an Israeli attack on civilians waiting to receive humanitarian aid southwest of Gaza City" *PressTV* (2024), online: *PressTV*.

and human rights instruments.⁶⁰ Around 5,500 women across Gaza, of the 52,000 pregnant women in Gaza, give birth monthly under highly unhealthy and unsafe circumstances. Women give birth in the middle of events in makeshift situations like temporary tent encampments, their own homes, the streets under rubble, or where any semblance of health care is forfeited (whatever is left of these facilities). The lack of clean water and access to supplies for labor and birth significantly increases the risk of complications during delivery and infections after delivery.⁶¹ This is the result of blocking access to Gaza, blocking humanitarian and international aid, destroying hospitals, medical facilities, and cutting off water, electricity, and fuel in Gaza.

X. Genocide Analysis: Systematic Destruction of Protected Groups

a) Perpetration of Genocide by Hamas

The acts committed by Hamas in the October 7 attack cover all three legal elements, actus reus, and mens rea. In this manner, the committed acts resulted in the death of 1,200 Israeli citizens, which is significant both quantitatively and qualitatively, and this crime was carried out with organized planning and premeditation. Therefore, all the constituent elements of genocide have been fulfilled by Hamas.

Recently, Pre-Trial Chamber I has affirmed these findings, highlighting how the systematic nature of the attacks, as well as documented statements and the methodical targeting of civilians, serves as evidence of the requisite specific intent. The Chamber found reasonable grounds to believe that senior levels of Hamas leadership, including the likes of Mr. Deif, Mr. Sinwar, and Mr. Haniyeh, acted in

⁶⁰ Toebes, *supra* note 61, p 138.

⁶¹ WHO, "Women and newborns bearing the brunt of the conflict in Gaza, UN agencies warn" (2023).

agreement to commit the October 7 Operation, which included a plan to target civilian objects and persons or other acts of violence against civilians.⁶² This reasoning is consistent with the ICTY's judgments in Jelisić, wherein the ICTY articulated that genocidal intent could be found or proven via systematic conduct directed at a protected group.

b) Perpetration of Genocide by Israel

Regarding Israel's actions in the Gaza Strip, UN experts have stated: "We believe that the Palestinian people are at serious risk of genocide."⁶³ Available evidence demonstrates that Israel's actions in Gaza encompass multiple severe impacts on the Palestinian population: widespread civilian casualties with substantial child mortality; infliction of physical and psychological trauma creating conditions threatening group survival; systematic displacement coupled with extensive destruction of residential infrastructure; denial of essential resources including food, water, and medical services; deprivation of basic necessities such as shelter and sanitation; comprehensive disruption of Gazan civilian life; and implementation of policies impeding population growth.⁶⁴

The Pre-Trial Chamber has identified good faith grounds to believe that both Netanyahu and Gallant purposely restricted or denied the transfer of humanitarian aid and medical supplies into Gaza, specifically anesthetics and anesthesia machines. The willful and intentional inaccessibility of medical supplies and medical care to the civilian population of Gaza raises serious questions of international

⁶² Situation in the State of Palestine, Pre-Trial Chamber I, "ICC Pre-Trial Chamber I issues warrant of arrest for Mohammed Diab Ibrahim Al-Masri (Deif)", ICC-01/18 (21 November 2024), para. 25.

⁶³ OHCHR, "Gaza: UN experts call on international community to prevent genocide against the Palestinian people" (2023).

⁶⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order of 26 January 2024, p 30, para. 43.

law. Considerations of historical precedent provide a frame of reference for assessing the actions of Netanyahu and Gallant. These methodologies closely mirror actions and behaviors previously assessed by an international tribunal. The International Court of Justice case regarding genocide in Bosnia established benchmarks for assessing systematic denial of the means of life as evidence of genocidal intent.⁶⁵ The Court examined the systematic restriction of humanitarian assistance, specifically to food and medical supplies, as evidence of intent to destroy a particular group. Similarly, the Rwanda Tribunal jurisprudence provided an important frame of reference to assess how systematic, deliberate, and targeted denial of medical care to a civilian population could amount to genocide.

The Gaza situation, however, brings unique factors to bear, with the most prominent of these being the sheer scale of infrastructure destruction in an urban setting and the sweeping nature of the blockade. The highly populated area of Gaza, the general destruction of civilian infrastructures, and problematic humanitarian access only further warrant consideration by international law.

The chamber concluded that this behavior resulted in doctors being compelled to operate on injured individuals and perform amputations, including on children, without anesthetics, causing extreme pain and suffering.⁶⁶ Such objectives must be elaborated in accordance with the framework set out by the ICJ in *Croatia v. Serbia*, which held that patterns of behavior may demonstrate genocidal intent when examined in their entirety. The deliberate nature of the destruction of essential

⁶⁵ David SCHEFFER, "The World Court's Fractured Ruling on Genocide" (2007) *Genocide Studies and Prevention*, Vol. 2(2), p 125, 128.

⁶⁶ Situation in the State of Palestine, Pre-Trial Chamber I, "ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant", ICC-01/18 (21 November 2024), para. 31.

infrastructure and the related denial of services has similarities with factors that international tribunals have recognized to constitute, at least in part, potentially genocidal acts when paired with specific intent.⁶⁷

The World Health Organization issued a critical warning on November 3, 2023, highlighting how limited access to adequate care would escalate maternal mortality and severely impact reproductive health, including heightened incidents of stress-induced miscarriages, stillbirths, and premature births.⁶⁸ These impacts would inflict enduring harm on Gaza's Palestinian population collectively, representing an omission contributing to genocide. Subsequently, on November 22, 2023, the UN Special Rapporteur on violence against women and girls emphasized that:

"The reproductive violence imposed by Israel on Palestinian women, infants, newborns, and children could be recognized as acts of genocide under Article 2 of the Genocide Convention." She emphasized: "States must prevent such acts and punish their perpetrators in accordance with their responsibilities under the Genocide Convention."⁶⁹

The Chamber has found that decisions allowing or increasing humanitarian assistance into Gaza were often conditional and not intended to fulfill Israel's obligations under international humanitarian law. Rather, they were responses to international pressure or specific requests from the United States.

⁶⁷ Ines GILLICH, "Between Light and Shadow: The International Law Against Genocide in the International Court of Justice's Judgement in *Croatia v. Serbia* (2015)" (2016) *Pace International Law Review*, Vol. 28, No. 1, p 119.

⁶⁸ WHO, "Women and newborns bearing the brunt of the conflict in Gaza, UN agencies warn" (2023).

⁶⁹ OHCHR, "Women bearing the brunt of Israel-Gaza conflict: UN expert" (2023).

International tribunals, particularly in the Blagojević case, have recognized that creating conditions that make life unsustainable for a protected group may constitute genocide when combined with the requisite intent. The cumulative effect of multiple acts affecting civilian survival must be evaluated against this jurisprudential background.⁷⁰

XI. Comprehensive War Crimes Documentation and Analysis

a) Hamas War Crimes: Deliberate Targeting and Hostage-Taking

The acts committed by Hamas, which include:

1. Deliberate killing of civilians in the October 7 attacks, including the killing of at least 1,200 people at an outdoor music festival.
2. Taking civilians hostage and torturing and mistreating prisoners.
3. Launching thousands of rockets without precise targeting towards Israeli residential areas.
4. Threatening to execute hostages.
5. Deploying military equipment in civilian locations and using residential buildings as military operations centers.

These meet all elements of the law, *actus reus*, and *mens rea* for war crimes under Article 8 of the Rome Statute of the ICC. The systematic aspect of these actions, and in particular the deliberate attacking of civilians and civilian infrastructure, meets the standards articulated under the Galić case relating to the seriousness of attacking the civilian population indiscriminately. Pre-Trial Chamber I just confirmed these findings, specifically determining that, on October 7, 2023, Hamas fighters committed mass killings at and around the

⁷⁰ Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Trial Chamber Judgement (17 January 2005); Appeals Chamber Judgement (9 May 2007), pp 7-8.

communities of Kfar Aza, Holit, Nir Oz, Be'eri, and Nahal Oz, as well as at the Supernova festival. The attackers shot at people seeking shelter and threw grenades at them. Other attackers committed the same actions at other locations.⁷¹

Additionally, the Chamber determined that a significant number of individuals, including civilians, children, and elderly persons, were abducted from many parts of Israel and ultimately held in secret locations, including privately owned apartments and underground tunnels. The abduction of these individuals was intended to negotiate their release in exchange for Palestinian prisoners held in Israel.

Some female hostages were subjected to sexual and gender-based violence in captivity, including forced penetration, forced nudity, and humiliating and degrading treatment.⁷²

b) Israeli War Crimes: Systematic Infrastructure Destruction

With the demolition of 355,000 homes (or 65% of Gaza's housing), Palestinians have been forced into migration and permanent displacement with respect to Israel's actions. When you examine the activity of destruction under one of the principles established under the Blaškić case, there are serious questions regarding military necessity and proportionality. The scale and systematic nature of the destruction may well be considered a direct violation of Article 8(2) (b) (xiii) of the Rome Statute, which prohibits destruction that is not justified by military necessity. The Chamber has established that from October 8, 2023, to May 20 of 2024, Israeli leadership, namely Prime Minister Netanyahu and

⁷¹ Situation in the State of Palestine, Pre-Trial Chamber I, "ICC Pre-Trial Chamber I issues warrant of arrest for Mohammed Diab Ibrahim Al-Masri (Deif)", ICC-01/18 (21 November 2024), paras. 17.

⁷² *Ibid*, paras. 20.

Defense Minister Gallant, were intentionally employing starvation as a method of warfare by depriving the civilian population in Gaza of objects indispensable to their survival.⁷³ The Chamber established that deprivation includes food, water, medicine, medical supplies, fuel, and electricity. When humanitarian assistance was allowed or increased, the Chamber established that it was often insufficient to improve the population's access to essential items and that there was no military necessity to justify making humanitarian access conditional.⁷⁴ Additionally, the Chamber found reasonable grounds to believe that both Netanyahu and Gallant bear criminal responsibility as civilian superiors for the war crime of intentionally directing attacks against the civilian population of Gaza. This finding was based on their failure to prevent or repress the commission of crimes or ensure the submittal of the matter to competent authorities, despite having measures available to them.⁷⁵

Conclusion

This detailed legal analysis of the Israel-Hamas conflict answers the core research question raised in the introduction with certainty: the actions of both Hamas and Israeli forces chime with the *actus reus* and *mens rea* of war crimes, crimes against humanity, and potentially genocide, which are within the jurisdiction of the ICC. We have systematically demonstrated that these crimes have occurred and meet the criteria of systematicity and widespread character required for prosecution under international criminal law.

⁷³ Situation in the State of Palestine, Pre-Trial Chamber I, "ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant", ICC-01/18 (21 November 2024), paras. 24.

⁷⁴ *Ibid.*, paras. 26.

⁷⁵ *Ibid.*, paras. 33.

In terms of Hamas, our assessment shows that the attacks of October 7, 2023, were war crimes because (1) civilians were deliberately targeted (demonstrated by the mass killings at the Supernova festival and kibbutzim); (2) hostages were taken -- in this case, 240 individuals; and (3) there was organized and systematic sexual violence against hostages. The systematic nature of the attacks, carried out under the authority of a coordinated military plan, meets the policy element of the crimes against humanity under Article 7 of the Rome Statute. Based on the methodical commission of the attacks, the systematic targeting of Israeli civilians with all the requisite intent to destroy, and the documented words, all allow for inferential evidence that can support charges of genocide under Article 6.

In regard to Israel's actions, we have shown systematic violations that amount to war crimes and crimes against humanity by: using starvation as a method of warfare (the ICC Pre-Trial Chamber has confirmed this use); systematically destroying civilian infrastructure that accounted for 65% of Gaza's housing stock; deliberately attacking protected objects, including 318 religious sites and all four universities; and systematically obstructing the provision of medical care, as evidenced by attacks on health facilities. The scale of civilian deaths (34,000; 70% are women and children) and the public statements of officials seeking to make Gaza "uninhabitable" meet the material element of genocide under Article II(c) of the Genocide Convention and the mental element of specific intent.

The ICC Pre-Trial Chamber's November 2024 arrest warrants are a watershed moment in international criminal law, setting a precedent for prosecuting senior political and military leaders of both state and non-state actors simultaneously. Our analysis notes that these initial warrants, while momentous, only relate to some of the documented international crimes. The other violations described in this study lay

the evidential grounds for additional or amended charges as the investigation advances.

The Chamber's conclusion that the humanitarian assistance restrictions were improperly founded on military necessity provides important jurisprudential guidance in future matters of siege warfare and starvation of civilians generally. Likewise, the Court's analysis of command responsibility for civilian superiors opened the door for important precedent for prosecuting political leaders in democracies.

This case illustrates the ability of international criminal law to respond to current patterns of conflict while also exposing significant enforcement limitations. The documented technological aspects of evidence collection and evidence verification provide proven methods for future inquiries into inaccessible conflict zones.

A systematic record of international crimes in this conflict, with one processing before the ICC, also sets precedents for accountability that could deter or encourage unlawful conduct in future conflicts by state and non-state actors. The specific findings regarding conduct of siege warfare and the starvation of civilians, as well as destruction of critical infrastructure, clearly laid out boundaries on the legal conduct of military operations in urban areas.

Nonetheless, the study also showed the limitations of international criminal law as a mechanism for preventing conflict in the absence of the political will to enforce it. The violations documented in the report occurred even after the ICC announced the warrants for the arrest of individuals implicated in violations.

Holding those responsible for these documented crimes accountable will give credibility to international criminal law and ensure its deterrent effect in future conflicts.

This study provides compelling evidence that international crimes have been committed by both Hamas and the Israeli forces and that

both groups must be investigated and, if warranted, prosecuted under international criminal law. The seriousness of these systematic patterns of violations, the large impact on civilian populations, and the available information from multiple independent sources clearly indicate the international community's legally binding obligations to satisfy accountability obligations by all means available.