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Abhinav Mehrotra | March 26, 2022

# Israel-Palestine Conflict: Need for a Special Tribunal and ICC



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As the 39 states asked the alleged war criminals in Ukraine to be tried and investigated by the International Criminal Court (ICC), an important question arises concerning the jurisdiction exercised by the ICC in other jurisdictions like Palestine i.e. whether the presence of ICC is enough or there is a need to supplement their position with a special tribunal focusing on the issues that may remain unaddressed by the ICC. In simple terms, the ICC exercises jurisdiction *ratione locali* over Palestinian territories that comprise the West Bank including East Jerusalem and Gaza Strip. The term *ratione locali* refers to the capacity of a tribunal to uphold jurisdiction and apply a set of rules over facts that occurred in a particular geographical area.



Historically, Palestine's borders have arisen from the lines drawn by the armistice agreements that Israel signed with both Jordan and Egypt in 1949. Although initially, it was on the *de facto* basis, these lines have been converted into *de jure* frontiers. It was in 1972, that the Palestine Liberation Organization (PLO) was permitted by UNSC as a participant that was later changed to being recognized as Palestine in December 1988. Finally, in November 2012, they were recognized as non-member observer states.

The newly recognised jurisdiction of the ICC came about after five years of preliminary examination on Dec. 20, 2019 by Fatuous Bensouda, the former prosecutor of the International Criminal Court where she stated that she is "satisfied that there is a reasonable basis to proceed with an investigation into the situation in Palestine" which makes it the first instance where Palestinian victims will be present before an international criminal court /tribunal. However, Fatuous Bensouda added that there is a need to ascertain the exact "territory within which the investigation may be conducted."

What this implies is the doubt surrounding whether Palestine constitutes a sovereign state and whether the Palestinian resistance and struggle that is defined as "legitimacy war" be resolved entirely through an international court or there being a need for a special tribunal for not only prosecuting the perpetrators but also to dismantle the systematic institutionalized racial domination and oppression that persists in the territory especially given the fact that Israel-led counterpressure will be in full force to delay, deflect, and limit the investigation by threatening the funding of the ICC. The factors that further extenuate the need for a special tribunal include Israel's closeness with state parties to the Rome Statute such as Hungary and the Czech Republic, the continuing support of the European Union, and the backing of the United States.



Furthermore, as Israel is a sovereign state and not a member of the Rome Statute, it will deny access to international investigators from accessing certain evidence under its control, such a challenge has been faced in the past by the UN special rapporteurs and members of UN investigatory mechanisms, for example, the defunding of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

From a legal perspective, there exists a hurdle under the Oslo Accords, under which the Palestinian Authority (PA) may not exert criminal jurisdiction over Israelis. However, the prosecutor distinguished this aspect based on the distinction between prescriptive jurisdiction (the authority to create law) and enforcement jurisdiction (the authority to enforce it) as the ICC jurisdiction is a prescriptive act, whereas the inability to exert criminal jurisdiction over Israeli nationals under the Oslo Accords concerns enforcement.



The need of the hour is to strengthen the knowledge and sensitivity of the populace towards International Law Principles on Impunity through the establishment of a Special Tribunal by paying more attention to local-level efforts to deal with past violations of human rights by gathering information, of survivors telling their stories in local hearings, of having local people taking testimony. To illustrate, in South Africa, the national Truth and Reconciliation Commission had sought assistance from local NGOs to take testimony from people in those places where it was unable to be present.

In this regard, the special tribunal that gets established can seek guidance from the Joinet and Van Boven Studies who were Special Rapporteurs of the U.N. Sub commission for Prevention of Discrimination and Protection of Minorities who focused on the right to reparation for victims and at impunity by dividing the elements of investigation (right to know), prosecution (right to justice), and redress (right to reparations).

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*The views and opinions expressed in this article are those of the author.*



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