

Text of a talk given by Pete Weatherby KC to the Manchester Amnesty group

Monday 12 Feb 2024

The text is almost verbatim. The views expressed are Pete's alone. To the best of his knowledge and belief the facts are correct up to the date of the talk, and have been verified so far as reasonably possible. References are included.

According to the Gaza Health Ministry, by last Friday, 340 health workers have been killed and 99 arrested, and 123 ambulances have been destroyed by Israeli forces since 7 October <https://aje.io/hc54vr?update=2694689>

On the same day, last Friday, the Committee for the Protection of Journalists stated that at least 85 journalists have been killed in attacks, 4 more are missing, 16 have been injured and 25 arrested, in the same period. <https://cpj.org/2024/02/journalist-casualties-in-the-israel-gaza-conflict/>

Israel has refused access to the world's media, unless they are embedded with their troops of course, a ban upheld by the Israeli Supreme Court: <https://www.article19.org/resources/israel-and-palestine-allow-international-media-access-to-gaza/>

There have been credible accusations that Israel has targeted journalists, although that is of course denied: <https://www.aljazeera.com/program/inside-story/2023/12/16/is-israel-deliberately-targeting-journalists-in-gaza>

Over the weekend Israel accused one of the Al-Jazeera reporters in Gaza of being a Hamas commander. I have no idea whether this is true. It may be, it may not be. But Israeli allegations seem to emerge at convenient times to them, with dubious evidence, or as we shall see, no evidence, with world opinion turning against them over the imminent threat to attack Rafah. I will return to all that later.

According to the UN 154 of their workers have been killed by Israeli attacks, an unprecedented number in any previous conflict. It is of note that a large proportion of them died at home. By agreement, the UN provides names and addresses of all their UNRWA (UN Relief and Works Agency) staff to Israel. Confirmed by a Daily Telegraph report, in previous conflicts, this has meant that Israel has avoided UN casualties. Not this time: <https://www.telegraph.co.uk/global-health/terror-and-security/majority-of-un-workers-killed-in-gaza-died-off-duty-data/>

As of recent days, Israeli spokesperson, Eylon Levy, on the BBC, referred to UNRWA, the main humanitarian agency in Gaza of course, as a Hamas front. The Israeli govt has called for its head, Mr Lazzarini to resign, and the Speaker of the Knesset has cancelled a meeting with the UN G-S Mr Guterres, publicly calling him a "lost cause". (Times of Israel, 11 Feb). Once again, attacks on the main UN relief agency, with little or no evidence, at times of convenience.

The Palestinian Red Crescent Society HQ has been repeatedly attacked and their personnel targeted: at least 14 have been killed, despite their ambulances being well marked: <https://www.middleeastmonitor.com/20240209-israel-targets-red-crescent-headquarters-in-gaza/>

The PRCS has publicly alleged their personnel are being targeted: a war crime: <https://reliefweb.int/report/occupied-palestinian-territory/palestine-red-crescent-society-demands-accountability-killing-four-its-paramedics-gaza>

According to the Palestinian Ministry of Health more than 28k people have been confirmed killed in Gaza, including more than 12k children and 8k women. At least a further 7k are missing. More than 68k have been injured. A further 400 have been killed and 4.5k injured in the West Bank. The loss of civilian life in Ukraine has been terrible, but the figures in Gaza are multiple times worse. For eg in 2y of war 500 Ukrainian children have lost their lives, each one a terrible tragedy, but a different scale to the 12k in Gaza, since 7 Oct.

By 6 Feb, the WHO, the UN Office for the Coordination of Humanitarian Affairs and the Palestinian authorities, have calculated that more than half of residential homes in Gaza have been destroyed or damaged, 390 education establishments, 267 places of worship, and only 13 of 35 hospitals are even partially functioning.

85% of the population has been internally displaced, 1.7m are in refugee camps. <https://www.aljazeera.com/news/longform/2023/10/9/israel-hamas-war-in-maps-and-charts-live-tracker>

According to the British Red Cross, partner to the PRCS, only 2 Gazan hospitals are still able to provide proper medical services, and I quote: “Gaza is at risk of a complete medical shutdown”: <https://www.redcross.org.uk/stories/disasters-and-emergencies/world/whats-happening-in-gaza-humanitarian-crisis-grows>

According to the Palestinian Prisoners Society 6,940 Palestinians have been arrested in the West Bank since 7 October <https://aje.io/hc54vr?update=2694649>

I have not been able to trace a reliable figure for Palestinian prisoners overall, but it currently appears to be around 10k, with a large number in so-called administrative detention – detention without charge – and widespread allegations of mistreatment and a number of detention deaths <https://www.amnesty.org/en/latest/news/2023/11/israel-opt-horrifying-cases-of-torture-and-degrading-treatment-of-palestinian-detainees-amid-spike-in-arbitrary-arrests/> No doubt you will have since footage of scores of Palestinian men, half naked and shackled, under Israeli army detention in the street and camps.

According to UNICEF “Gaza is now suffering the worst level of malnutrition for children” <https://aje.io/hc54vr?update=2694547>

According to the UN the entire population of Gaza is in food crisis and at least 576,600 are at catastrophic or starvation levels. According to the D-G of the WHO 80% of those deemed to face famine worldwide are in Gaza <https://aje.io/hc54vr?update=2694523>

On Friday, well known veteran BBC reporter Jeremy Bowen reported that the Israeli govt was blocking a massive amount of aid at the port of Ashdod, which he reported would be sufficient to feed 1.1m Gazans for a month. <https://twitter.com/BowenBBC/status/1755866529814462841>

Following weeks of reports, last week Israel admitted that it was flooding tunnels under Gaza with sea water. According to Professor Zeitoun of the Geneva Graduate Institute this is likely to damage the aquifer under Gaza causing catastrophic long-term damage to fresh water supply. <https://www.aljazeera.com/features/2024/2/3/israel-floods-tunnels-with-seawater-what-impacts-on-gazas-water-supply>

Various reports note that there is no remaining healthcare for pregnant women, babies, cancer treatment, or virtually all normal medical needs.

Those are some of the horrifying facts of what has happened in Gaza, resulting from the Israeli response to 7 Oct. All those facts come from reputable, verifiable sources, and I am happy to provide references. We should all be horrified. As one of the advocates appearing for SA in the recent Genocide case made clear, one distinguishing fact of the situation in Gaza is that it is the first to be livestreamed by its victims. We are all on notice.

Before I go on, you had an introduction about me, but a little more. Firstly, I am very pleased to be asked to lead the discussions tonight. I am from Manchester and I have lived almost my whole life here. I have been a barrister for over 30y and a KC or senior barrister for about 12 yrs, practicing from GCN Chambers.

I specialise in human rights and have appeared domestically in public inquiries and major cases into disasters including Hillsborough, Grenfell, Manchester Arena, UCPI and currently the Covid Inquiry, almost exclusively for bereaved families. However, I have also appeared and made applications in a number of international courts including ECtHR and the UN Human Rights Committee, and I have been on various international human rights missions usually through the Bar Human Rights Committee of which I am an elected Executive Committee member, often to the middle east including Bahrain, Turkey, Lebanon and Kuwait. I have not always been well received: I was refused a visa to Pakistan many years ago when I was asked to observe elections in Kashmir, I was refused entry and deported from Bahrain on my third visit to the country, and I was refused a visa to return to Kuwait after attending a political trial there, after publishing a report critical of the process. So those are my credentials if you like. The views expressed are my own.

In October, I was one of more than a thousand UK lawyers who signed an open letter to the UK government calling for it to demand a ceasefire in Gaza, and amongst other things, to stop UK arms sales to Israel. If u have not seen it, the letter sets out much of the relevant international law, and it is forthright. It is at lawyersletter.uk and worth a read. Amongst the other signatories is Blinne Ni Ghralaigh KC, the London-based, Irish barrister who so ably represented SA at the Hague, alongside SA advocates. If you have not heard her devastating submissions to the ICJ I strongly recommend you do so: it is all online.

As is well known, Gaza has been blockaded from air, land and sea by the Israelis since 2007, with the agreement of Egypt. After 7 Oct Israel tightened the siege to cut off electricity and water and stop humanitarian aid. Notoriously, Labour leader Keir Starmer asserted on live radio that Israel had the right to withhold power and water, although he has subsequently tried to explain his way out of it. Judge for yourself, it is on Youtube LBC 11 Oct 2023: <https://www.lbc.co.uk/news/sir-keir-starmer-hamas-terrorism-israel-defend-itself/>

Although aid is now entering Gaza it is at a very restricted rate and many things, particularly fuel are not allowed in: <https://www.globalr2p.org/countries/israel-and-the-occupied-palestinian-territory/>

Gaza and the West Bank have been occupied by Israel since 1967. Occupation brings legal obligations on the occupying power, which Israel has consistently denied. In the West Bank the Govt supports settlements which are prohibited under international law (A49 of the 4th Geneva Convention). There are something like 600k settlers in the WB, and Israel operates different systems of law and administration for settlers and Palestinians. Palestinians in the OPTs need permits to travel to Israel, and Israel controls tax payments to the Palestinian Authority. Israel operates a complicated system of administrative areas in the WB some under the civilian admin of the PA, but Israeli military control.

Israel disputes it is an occupying power in Gaza and the WB. Occupation is defined under A42 of the 4th Hague Convention. Although Israel isn't a signatory to it, the convention is considered customary international law which binds Israel. Occupation is where a territory is under "effective control of hostile foreign armed forces". Although some of its allies have been prepared to support Israel's contentions, the UN, the International Committee of the Red Cross, the UNGA, the EU, the African Union, the ICC and Amnesty all consider that Israel is an occupying power in Gaza and the WB. Occupation legally requires Israel to protect local populations and have basic healthcare provisions. Prolonged occupation is also illegal of itself; a point raised by Mr Guterres UN G-S when asking the ICJ for an Advisory Opinion on the legal consequences arising from the denial by Israel of Palestinian self-determination. <https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>

One matter that has perplexed many is how the Israeli government can deny occupation whilst denying Palestinian statehood. What are Gaza and the WB, if not occupied territories?

Back to the current position.

More than half of the Gazan population have fled to Rafah, at the southernmost point of Gaza, perhaps 1.2m people on some reports, 1.5m on others, following attacks on all other areas. <https://aje.io/hc54vr?update=2694298>

By Friday Netanyahu had ordered the Israeli army to attack Rafah, and has ominously called for an 'evacuation plan' fuelling fears of a mass expulsion into the Sinai desert <https://aje.io/hc54vr?update=2694906>

Forcible expulsion, ethnic cleansing. On Sunday he appeared to suggest that those ordered or forced to flee to Rafah may now be forced to flee to other areas of Gaza previously prohibited. This is of course a desperate state of affairs.

I want now to turn to a bit of law. Not too much for reasons I will explain.

The Genocide Convention entered into force in 1951, as the first human rights treaty adopted by the UNGA, said to signify 'never again' after the atrocities committed during the 2nd WW. Israel is a signatory.

Art II sets out the definition. The recent case has helped many people understand that genocide is more than mass murder or mass killings. In essence it contains two things: a list of forbidden, heinous acts perpetrated against a national, ethnical, racial or religious group, and a specific intention to destroy the group or a part of the group.

So in terms of acts it prohibits:

- Killing members of the group
- Causing serious physical or mental harm to members of the group
- Deliberately inflicting conditions of life calculated to bring about physical destruction of the group or part of it
- Imposing measures to prevent births within the group
- Forcibly transferring children from the group to another group

Once the physical acts are determined, the specific intent to destroy the group, at least in part, must be established

Genocide is not completely straightforward therefore, and in the real world, intent is the most difficult to establish in court proceedings, and that is why cases of genocide are comparatively rare: and regrettably not because we live in a peaceful world. Genocide cases are rare therefore because as an international crime it was defined extremely narrowly, and will catch only the very worst atrocities. Is this one? Let's look carefully at that Q...

But before I move on, it is worth noting a couple of other important legal points.

Firstly, apart from the prohibition of genocide, the Convention parties, including Israel, the US, the UK, S Africa, and the other 146 State parties, have an obligation to do everything they reasonably can to prevent genocide both within AND outside of their own territory. In legal terms this means that all Convention parties have standing to take a case against another to prevent or stop a genocide.

So, this provides a proper legal basis upon which SA has taken Israel to the ICJ. The ICJ being the highest international legal tribunal of the UN, with the power to order states to stop genocidal acts.

And Secondly, the ICC has a separate jurisdiction to indict, prosecute and punish individuals who are instrumental in genocide.

On that last point, it is important to note that Israel and the US have not signed and ratified the Rome Statute, and so do not accept the ICC jurisdiction against their own citizens, although the US does seem to be enthusiastic to use it against its enemies including Mr Putin. Israel is not off the ICC hook however, because Palestine has been recognised by the ICC, a jurisdiction vehemently but unsuccessfully opposed by Israel, which gives the ICC jurisdiction

to try perpetrators of war crimes alleged to have been committed IN Israel on 7 Oct, and BY Israel in Gaza and the WB since. More on that later.

So back to the central question: has Israel committed Genocide? The fact that the Gaza situation is happening in front of cameras is a significant head start to evidencing what is actually occurring.

From my introduction reminding us all of what objectively has happened, let's examine whether the facts fit the crime.

Firstly, there is massive loss of Palestinian civilian life, and massive numbers of injured. At least 100k or around 4% of the total population. Over two-thirds are women and children. It is not known how many are combatants, but u might think few of the women or children will fit that category, and an unknown proportion of the men, but given so many of the casualties have been killed in air attacks on civilian structures it is unlikely to be a large proportion. Israeli officials variously assert that many of those killed are so-called terrorists, and they dispute the figures of casualties on the basis that the Gazan health authorities are controlled by Hamas. The problem with this is that it is difficult to understand how the Israelis would have any idea of Palestinian casualties, and it is generally accepted that the health authority has provided reliable figures in the past. Furthermore, the authorities have not included the missing and have published the names of the dead.

So, on the first and second criteria of Genocide: mass killings and injuries, I venture to suggest that there is the clearest evidence.

On the 3rd criteria: deliberately inflicting conditions of life calculated to bring destruction on at least part of the group, what is the evidence there?

Well, lets start with cutting off water and power, preventing fuel getting in, preventing all but a trickle of aid, and in this regard I refer back to the Jeremy Bowen report I mentioned earlier, that a month's worth of aid for half the population has been stopped by Israel, at a time when all of the population face an acute famine crisis, and UNICEF say that starvation is most acute for children.

There are persistent reports of fatal diseases spreading, hardly a surprise given the water and sanitation siege, and reports from Rafah today are particularly alarming on this subject. Many experts fear that starvation and disease are likely to kill far more Palestinians than the attacks themselves. And as I have mentioned, Israel admits it is pumping seawater into tunnels, which is likely to cause catastrophic long-term damage.

Moving on to housing. In this war on 'terrorists' Israel has already internally displaced almost the whole population, and some Ministers have made no secret of the fact that they want them to leave Gaza. The evidence shows that half of the total housing stock has either been destroyed or damaged: turn on the TV and the scale of devastation is all too clear to see. Almost all of the medical facilities have been destroyed, many through direct Israeli military targeting. The British Red Cross says that there is imminent risk of total healthcare shutdown. Virtually all educational facilities have been destroyed or damaged. Universities have been systematically attacked by air strikes followed by controlled demolition by ground troops.

Aid agencies, not just aid, are also attacked. The UN G-S himself is persona non grata. Official Israeli spokespeople now openly refer to UNRWA as a Hamas front, and have called for the resignation of Mr Lazzarini its director. Not even the Red Crescent are safe, their HQ targeted and heavily bombed, their ambulances treated as military targets.

This would all be bad enough if it constituted casual disregard for humanitarian and civic institutions. But it is far worse than that: there is the clearest evidence of systematic targeting not only of civilians, but also humanitarian relief workers, medics, ambulance workers, journalists. Dehumanising the population at large, and attacking those that can provide basic emergency aid.

Add to all that the fourth criteria, the prevention of births, the fact that there is no remaining provision for mothers and babies, and we have almost a clean sweep of the prohibited acts under the convention.

The children of Gaza are not unfortunate collateral damage. The UN, the UN relief organisations and workers, healthcare staff and ambulance workers, journalists, are not all in the pay of Hamas.

So what of Genocidal intent? Well, the remarkable and pervasive and systematic extent of the attacks on Gaza – in particular on the civilians and children of Gaza, and the aid and humanitarian institutions – objectively evidences the intention on its own.

But Israeli leaders have themselves left little to the imagination. The President of Israel, Isaac Herzog, in the aftermath of Oct 7 said it was not just Hamas but “an entire nation” that was responsible, and that Israel will fight “until we break their backbone”.

He has gone on to say his words have been twisted and accused S Africa of a “blood libel” by bringing the ICJ case: a direct accusation of anti-semitism. Google what he said, decide for yourself. You may conclude that it is a bit difficult to twist those words but a matter for you.

<https://www.reuters.com/world/middle-east/israels-herzog-gaza-genocide-claim-icj-atrocious-preposterous-2024-01-09/>

<https://www.timesofisrael.com/a-blood-libel-herzog-says-icj-twisted-my-words-to-support-unfounded-contention/>

It is often said that a key problem with proving Genocide is that perpetrators rarely express their intentions explicitly. This may be the case which proves an exception.

The Israel Defence Minister Yoav Gallant described Palestinians as “human animals” and proclaimed the total siege of Gaza which cut off water, power and aid on 9 Oct. He described Israel’s fight as “a battle of civilisation against barbarism”. Of course, he too has subsequently tried to massage his comments as referring to Hamas and not the Palestinian people.

And then there is Netanyahu himself, talking about Amalek, the Biblical reference to the need to exterminate a whole people. Again, a matter for you, but you may think that reference leaves little to the imagination.

And you will note, I have chosen not to cite the expressions of the far right members of the Israeli Govt, Gvir and Smotrich, but they are on a different level altogether.

If you are left in any doubt, from their own mouths, what the Israeli Govt intentions are, google Law4Palestine.org ...

It contains a database of what a variety of Israeli decision makers have said about the assault on Gaza. It is a depressing and long read: with over 500 entries. Judge for yourself whether the intentions of Israeli Govt members have been twisted or misconstrued.

So that is a whistle stop tour of the situation as it is.

I want to return to some themes and comment to open up the discussion: about international humanitarian and criminal law in general, the ICJ and the S African case, the ICC and finally, what we should all be doing now.

You may have noticed I have only referenced Hamas so far in passing. That is by intention, not omission. I am no apologist for Hamas, they must own their own actions.

For clarity, I am perfectly content to say that the targeted killing of civilians, for example at a music festival, or the indiscriminate firing of rockets toward civilian settlements, or the taking of civilian hostages, are war crimes, usually punishable under domestic laws or by the ICC. If further allegations by the Israelis are evidentially established, there are other war crimes too, including sexual crimes to which I will return, but with some caution.

There are major problems here, and the actions of Hamas and the Israelis should not be looked at in equivalence. As Mr Guterres said, 7 Oct did not come out of a vacuum. Hamas and other groups are the symptom of decades of subjugation of the Palestinians as a people. The expulsion of hundreds of thousands of people, the annexation of land, the denial of self-determination, the 17y siege of Gaza itself, are the background. Apartheid. Actions have consequences.

The BBC have for years described Hamas as “militants”. They have been strongly attacked by pro-Israel groups for failing to call them “terrorists”. Not only Iran and Hezbollah describe Hamas as the resistance, but many Palestinians too. They were elected in Gaza.

When people who criticise Israel go on mainstream media they are often asked as an opening gambit whether they agree Hamas are “terrorists”.

Why? Why is my view of that important, or yours for that matter? The reason this is part of the discourse is because labelling someone a ‘terrorist’ puts them beyond debate. They are beyond rational comprehension. They are zombies to be pursued and destroyed. So beyond what I have said about Hamas owning their own actions and the legal issues relating to what may constitute war crimes, I am not going to waste debate on meaningless ‘othering’, or more accurately, take the debate away from the real issues and into a dead end.

Whether Hamas are a resistance movement, militants, or terrorists is of no consequence to the legitimacy of Israeli actions. If Israel were right that it is acting in self-defence, it would still be bound to act with distinction, proportionality and precaution, as required by the Geneva Conventions. It has to distinguish combatants acting as such, use only force which is proportionate, and take all reasonable precautions to prevent civilian deaths, injuries and harm to infrastructure and the means of life. On all those metrics, Israel’s war is flatlining.

And if Israel did manage to destroy Hamas and other similar groups, what would that actually mean? Killing leaders, footsoldiers, destroying tunnels, seizing weapons?

What would then happen next week, or next year? If the conditions which give rise to groups such as Hamas persist, the answer is pretty straightforward.

Apart from the genocidal acts I have summarised, which have and continue to inflict massive damage on Palestinians, the Israeli response to 7 Oct has and continues to do enormous damage to Israel. Israel’s pragmatic relationships with Egypt, Jordan, Saudi Arabia and UAE are under huge strain. Despite massive support from America, its war has been very costly. There has been an exit of foreign workers, an expulsion of Palestinian workers to the WB, and hundreds of thousands of reservists have been taken away from their day jobs. The canary in the economic mine is the recent downgrading of the Israeli economy by the international

credit agency Moody's. This immediately increases the cost of borrowing and reduces the value of the economy. It may be that the war is welcome for the US arms industry, but the apparently unconditional support of the US may itself have limits. The war has led to the US and UK engaging in an ill-judged conflict with the Houthis in Yemen, which appears unwinnable, and US bases in Iraq and Syria being persistently attacked. Syria is essentially a failed state, but Iraq is trying not to be. The legal basis of US bases there is tenuous and their presence is very unpopular. The last vote in the Iraqi parliament was 170-0 to expel the US. What thread of legal basis remaining may soon be revoked. And of course, it is an election year. Biden is being regularly heckled as he goes on the campaign trail by people chanting 'Genocide Joe'. It is not only American Arabs who oppose support for Israel's war, but an increasing proportion of American Jews, with prominent and regular demonstrations. Here too, in Britain, go on any of the Gaza marches and you will see a proliferation of Jewish banners: 'not in my name'. According to a report issued in the last few days by the Institute for Jewish Policy Research, 23% of UK Jews now identify as anti- or non-Zionist, with a further 14% unsure.

Anyhow I digress from more legal matters.

I have dealt with Genocide and will return to it re the ICJ, but before I do I want to talk about the other international court, the ICC. Established by the 1998 Rome Statute, an international treaty adopted by 120 States, it brought the ICC into operation from 2002. Its purpose was to provide an international court to try the most serious international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Previous international tribunals had been set up retrospectively to historical atrocities: the Nuremberg and Tokyo tribunals and those relating to Yugoslavia and Rwanda amongst them.

In the Palestine/Israel context it is important to recognise that the ICC has jurisdiction – power to investigate and prosecute – acts committed by a national of a State Party, or alleged crimes committed on the territory of a State Party. That means the alleged war crimes committed on 7 Oct are within jurisdiction, despite the fact that Israel is not a signatory of the Rome Statute, because the Palestinians are. It also means the alleged war crimes committed by Israel in Gaza and the WB are under its jurisdiction because they have been committed on the territory of a State Party. Unlike the ICJ, the ICC exists to prosecute individuals, and its policy is to focus on those with greatest responsibility in fact, rather than taking account of their official position. No one over age 18 has immunity, so the ICC can prosecute heads of state.

The ICC asserts that it is not subject to political influence, and refutes widespread criticism that it predominantly targets African countries. That is beyond tonight's discussion but I will return to the ICC record on Palestine and Israel in due course.

Firstly, I will deal swiftly with what crimes are within its jurisdiction.

One. Genocide. The ICJ is hearing the Gaza case because it is an allegation by one State against another. The ICC deals with allegations against individuals, so it could for example charge Ministers and generals on an individual basis. The Rome Statute adopted the definitions from the Genocide Convention that I talked about earlier.

Two. Crimes against humanity. These are acts committed as part of a systematic attack on part of a civilian population. These include murder, enslavement, forcible transfer or ethnic cleansing, mass imprisonment, rape and other sexual offences, enforced disappearance, collective punishment, and apartheid.

Three: war crimes. Similar crimes committed in the context of war or conflicts not of an international character (which would include Gaza), and also include attacks directed at civilians, hostage taking, intentional attacks on hospitals, schools, religious buildings and historical monuments.

Four: aggression. Which is a more recent crime of State armed force against the territorial integrity of another. The perpetrator is a person in a position of effective control. It is a moot point and unlikely to be applied to Gaza because it is difficult to do so without the agreement of the UNSC, and it cannot apply to 7 Oct because Israel is not a signatory.

I think the ICC is important to the debate because the facts I related earlier appear to constitute a variety of war crimes. Although the Ch Prosecutor of the ICC, Karim Khan a British KC, has visited Israel and the WB, and stood at the Gaza border, not entering because he would need permission from Israel which was refused, there is a shocking lack of action. Mr Khan says the ICC is considering the position but no one thinks action will come anytime soon or indeed at all. As I have set out it clearly has jurisdiction, there is clear evidence before all of our eyes, and multiple allegations from all sides.

Neither Ukraine or Russia are signatories to the ICC, but by two declarations, Ukraine has accepted the jurisdiction of the ICC over crimes committed on its territory from 2013.

On 28 Feb 2022 the Prosecutor announced the opening of an investigation because he had a reasonable basis to consider crimes had been committed there, and the investigation was opened 2 days later. 15 days after that, the ICC issued arrest warrants against Mr Putin and his Children's Commissioner.

By contrast, the Govt of the State of Palestine lodged a declaration accepting jurisdiction of the ICC on 1 Jan 2015, and acceded to the Rome Statute on 2 Jan 2015. Following objections from, amongst others, the US and Israel – both non-State Parties – the ICC considered whether it had jurisdiction and issued a judgment in Feb 2021. It is notable that Netanyahu described that ICC ruling as “absurd” and “undiluted anti-semitism”, resonant of his response to the recent ICJ ruling.

Meanwhile the previous chief prosecutor had been considering whether to open an investigation into allegations relating from 2014, and in 2021, 6 years after Palestine's accession and after the ICC decision, did so. That investigation is ongoing now. Since the current conflict, the ICC has received multiple referrals from the State of Palestine and multiple other nations, and those have apparently been joined to the ongoing historical investigations.

On 11 Oct 2023, a Professor at the Washington College of Law, Rebecca Hamilton, asserted: “The silence emanating from the Prosecutor ... is growing louder by the hour”, directly comparing it to the response to the Ukraine situation.

Karim Khan has not been entirely silent however. In public statements he has described the events of 7 Oct as serious international crimes that shook the conscience of humanity, whilst calling for Israel to exercise “distinction, precaution, and proportionality” in its response.

I am a supporter of the ICC project. But all systems of law require a level playing field, an equal application of the law to all, irrespective of who they are.

The US actually sanctioned Khan's predecessor for opening a case against US troops in Afghanistan. The US then actively provided support to the ICC re Ukraine, whilst opposing any case against Israel. Beyond cynicism.

When Khan took office he dropped the case against the US in Afghanistan. He issued arrest warrants against Putin within 15 days of opening a case. He has failed to take any effective action on Gaza. In my opinion he has done massive damage to the ICC. A British KC and the non-party USA have together rendered the ICC a chocolate fireguard wrt Gaza and the Palestinians. Despots across the world will breathe easier as a result. I hope there is a way back for the ICC but no one should be under any illusion it will come soon.

Before I leave the ICC I want to return to the issue of 7 Oct. I have already said, there is a case that war crimes were committed in those attacks: attacks on civilians, and the taking of civilian hostages amongst them. However, there have been a range of other crimes alleged – beheading of babies and sexual crimes amongst them. Sexual crimes are a particularly heinous feature of warfare historically and today, and must not be ignored. Sexual crimes within peacetime, within advanced legal systems such as here in the UK are poorly dealt with. Women and girls are often disbelieved or not taken seriously.

On the other hand, there are many examples of Israeli officials making serious unsubstantiated allegations in the context of this conflict and others. Some of those allegations have been denied by the victims themselves, many are without evidence. Hamas point blank denies the allegations and counter-alleges some civilians were killed by Israeli forces themselves.

What are we to make of all this? There is a clear solution. If Israel and its allies would abide by international law and sign up to the ICC, and provide it with evidence, then there is an international tribunal which could determine the facts on evidence and in a transparent way. Until then, those who support Israel will believe the unsubstantiated allegations, those who oppose Israel will not.

Why am I being so sceptical? It is often said that the best predictor of future behaviour is past behaviour. There are clear examples of unsubstantiated allegations and assertions by Israeli govt spokespeople. Lets look at a couple of recent ones.

On the day of the ICJ decision determining that Israel has a case to answer over the genocide allegations, Israeli leaders such as Netanyahu say the case was “vile” and “outrageous” and “blatant discrimination against the Jewish state”. Gallant, the Defence Minister, described SA’s case as “anti-semitic”. Israel has ramped up its attacks in Gaza since the judgment in clear contempt for it.

But also on the very day of the judgment, Israeli allegations against a dozen UNRWA staff, that they took part in the 7 Oct attacks, hit the headlines. The UN and UNRWA launched an immediate investigation and sacked the staff said to be involved. Last Friday, the Guardian published what is known, from the horse’s mouth, Mr Lazzarini, head of UNRWA. He confirmed that the identities of all 30k UNRWA staff are routinely shared with Israel on an annual basis, irrespective of whether they live and work within Israel, the OPTs or work with the hundreds of thousands of Palestinian refugees elsewhere: Jordan, Lebanon, and Syria included. No prior concerns had been raised about the 12 who are a tiny proportion of the 13k UNRWA staff within Gaza itself. When Israel made the allegations, no evidence was provided, nor has any been provided since.

So, instead of suspending those involved pending investigation, UNRWA panicked and sacked nine of them (two are dead). The remarkable coincidence that this happened on the day the ICJ judgment was published, together with the lack of any evidence provided, is disturbing of itself. But what has followed is perhaps worse: nine western nations including the UK

immediately pulled funding for UNRWA, casting the central relief agency into dire peril, despite the imminent catastrophic famine and spread of fatal diseases. Despite the immediate sackings, Israel then alleged, without a shred of evidence, that 10% of UNRWA workers were Hamas supporters, froze bank accounts, called for Mr Lazzarini's resignation, and stopped massive aid shipments at Ashdod port. Last Friday, the aforementioned Israeli govt spokesperson, Eylon Levy, not only referred to UNRWA as a Hamas front, but also said that aid was not getting to the Gaza population because it was not being distributed, and that it was false that Israel was restricting that aid. That was not true according to just about all international observers.

There are many other such examples, but the recent treatment of UNRWA, and the unevicenced Israeli assertions that it is combatant not humanitarian, are a potent reason why everyone should be highly sceptical of other allegations made. I am not saying that all of the allegations against Hamas are false, absolutely not. I am saying that official Israeli sources have a poor record on the truth, and allegations without proper evidence and scrutiny should be treated with appropriate suspicion.

I could go on. The allegations that healthcare and educational authorities are in cahoots with Hamas are equally dubious. Given that there are hundreds of kms of tunnels, it would be remarkable if some of them were not under institutions or residences. And although the extent of popular support for Hamas in 2024 is unclear, it is plainly a large organisation which has involvement through the whole of Gazan society, and it would be strange indeed if some health workers, aid workers, and others did not have sympathies with them. But that is far from evidence of complicity with war crimes or armed actions. <https://www.theguardian.com/world/2024/feb/09/head-of-unwra-says-he-followed-reverse-due-process-in-sacking-accused-gaza-staff#:~:text=Israel%20has%20claimed%20as%20many,Israel%20that%20killed%201%2C200%20people>.

And so, finally, I return to the ICJ. As I have set out, all State Parties to the Genocide Convention have a duty to intervene if there is evidence of Genocide. Not only did SA have every right to take the case against Israel, it had a duty to do so if it was of the evidenced view that genocide was being committed in Gaza. It is difficult to see what SA has to gain for itself, it is not in any particular long-term dispute with Israel, so the official Israeli outbursts that the case itself is anti-semitic should be seen in that context.

The ICJ is the top judicial body of the UN, its jurisdiction is to determine disputes between nations. Israel is bound by its decisions. Israel sent a strong legal team to oppose the case. The panel of 15 judges represented a wide range of international legal systems, with judges from nations more or less friendly with Israel and SA. To those judges were added one from Israel and one from SA. It is of note that the Israeli judge Aharon Barak was an interesting choice because he is no friend of Netanyahu. As President of the Israeli Supreme Court he presided over what observers have described as a series of anti-Palestinian cases, but more importantly he had made public comments since Oct 7 supporting Israel's attacks in Gaza and their proportionality. <https://www.middleeasteye.net/news/israel-judge-aharon-barak-ici-legitimised-occupation> Given the first rule of judging is impartiality and not pre-judging, that was a poor start.

Nevertheless, even he supported most of the measures ordered by the ICJ.

So what in summary did the court decide and order? At this stage, the court was asked to dismiss the case on a number of bases. No one argued that SA did not have standing, the legal right to bring the case of itself. However, Israel did argue that the case should be dismissed on the basis that there was no dispute between the 2 states. The ICJ gave short shrift to that argument. Israel also argued that the case should be dismissed because it totally lacked merit. Again, the court disagreed. This is far from a full, final determination but it does mean that the Court found that there is a plausible case against Israel for the ultimate international crime. The massive majorities on the ruling: all by 15-2 or 16-1, was also telling as it cannot be argued that the judges voted according to their own countries' diplomatic positions. Whereas it was disappointing that the court did not order a ceasefire, it did make orders which, properly construed should amount to nearly the same thing. And of course, Israel has openly stated that it has no intention of stopping what it wants to do merely because the highest world court issues binding orders upon it.

As an aside, the case showed that some international actors, here S Africa, are prepared to act to prevent heinous state-perpetrated slaughter and in so doing I for one hope they set a much-needed precedent.

Finally, this. I am a senior lawyer. I have practiced human rights law domestically and on the international stage. I have a commitment to the rule of law. The law is important. But it is important not to put it on a pedestal. Firstly, because it is possible to have laws which protect all manner of inhumanity. You need look no further than nazi Germany or apartheid SA for that. But secondly, and most particularly in international humanitarian and human rights law, as I have depressingly illustrated, we are still in the age where might trumps right, where international law and binding court orders are ignored with impunity.

Yes, celebrate the achievement of SA in bringing this case, and playing a significant part in trying to stop the crimes which are ongoing. Yes, highlight and complain at the failure of the ICC to do anything positive, and apparently to apply the law differently to Ukraine as to Gaza. Yes, use the ICJ orders to challenge our own Government's support for Israel and in particular the morality and legality of arms exports, and to call for the restoration of support for aid for Gaza. But do not think progressive change can be achieved only or substantially through the law.

What Amnesty and many others are so good at – protests, campaigning, holding the feet of democratic representatives to the fire, petitions, winning the public debate – remain of central importance.