

War Crimes in Palestine and the International Criminal Court



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Ireland-Palestine Solidarity Campaign

EXECUTIVE SUMMARY

In 2015 the situation in Palestine was referred to the International Criminal Court (ICC). After a preliminary examination, in December 2019 the Prosecutor of the ICC Fatou Bensouda declared, “I am satisfied that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip.”

The three areas in which the examination identified crimes were the conduct of hostilities arising from the Gaza conflict of 2014; Israel’s ongoing settlement programme; and Israel’s use of lethal and non-lethal violence against Palestinian demonstrators participating in the Great March of Return at the Gaza border fence.

As Palestine remains under military occupation and Israel is not a signatory of the Statute of Rome, the Prosecutor has asked the Pre-Trial Chamber to rule on the territorial extent of its jurisdiction before launching a full investigation. A decision is expected in mid-August.

Israeli and US attacks on the court

Following the ICC finding that war crimes are being committed, the court has come under attack from Israel and the United States. Israeli Prime Minister Netanyahu has denounced its finding as “pure anti-Semitism” and has called for the court to be subject to sanctions. In support of Israel the US administration actually imposed sanctions on ICC officials, announced its own investigation into what it alleged was ICC corruption, and declared the ICC “a kangaroo court.”

EU High Representative for Foreign Affairs Josep Borrell described these attacks as “unacceptable and unprecedented in scope and scale,” and 67 states – including Ireland – co-signed a statement reaffirming their commitment to the ICC.

Ireland must defend the ICC from attack

Now that the ICC is under unprecedented attack it is more vital than ever that Ireland continues to use its international influence to defend it. Furthermore, Ireland must commit to support the court if it moves towards the prosecution of individuals and make clear that it will act upon any international arrest warrants issued by the ICC.

Should Israel, with the backing of the US and others, establish that the principles and practices of international humanitarian law do not apply to them, then law and peace will be based upon nothing more than coercive power.

It would be beyond shameful if a mechanism established to protect us all was to be smashed in the service of a criminal, racist and colonial state that is determined to seize another people’s resources and deny them right to live freely in their own land. Ireland must rise to its responsibility to defend the ICC.

ICC involvement with Palestine

On 1 January 2015, the Government of Palestine accepted the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". On the 16 January 2015 the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation were met.

The Prosecutor's Preliminary Investigation Outcome

On 20 December 2019, Prosecutor Fatou Bensouda announced that following a thorough, independent and objective assessment, the preliminary examination into the Situation in Palestine had concluded that all statutory criteria for opening an investigation had been met:

"I am satisfied that there is a reasonable basis to proceed with an investigation into the situation in Palestine, pursuant to article 53(1) of the [Rome] Statute. In brief, I am satisfied that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip."¹

The scope of the preliminary examination highlighted as areas for full investigation the conduct of hostilities arising from the Gaza conflict of 2014; Israel's ongoing settlement programme; and Israel's use of lethal and non-lethal violence against Palestinian demonstrators participating in the Great March of Return at the Gaza border fence.

Israel however maintains that the ICC has no standing as regards Palestine and consequently the Prosecutor has asked the Pre-Trial Chamber of the ICC to confirm the scope of the territory over which the court should exercise its jurisdiction. It is expected that the Chamber will make its ruling on this when it returns from summer recess in mid-August. Should it rule that the ICC has full jurisdiction over all of the occupied territory of Palestine

¹ <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>

the International Court will face a backlash from Israel and its supporters. There will be attempts to delegitimize and demonise it. Indeed, these attempts have already commenced.



Israeli shelling of Gaza during Operation Protective Edge in 2014 will form part of the ICC investigation.

Israel, the US and the ICC

Israel is not a signatory of the Rome Statute and claims the ICC has no jurisdiction to exercise its authority in Palestine. Israel refuses to engage directly with the court but has instead enlisted allied states and NGOs to present its case whilst publicly it denounces the court and its prosecutor as biased and antisemitic.

Following the ICC's decision to investigate, Israeli Prime Minister Benjamin Netanyahu chose to instrumentalise Jewish history to vilify the court:

"Pure anti-Semitism, that's what the ICC has done, and we will not bow our heads... They say Jews do not have a right to live in the land of the Jews, in the Land of Israel. Well, we

say, shame on you. The light of truth lives here and we will overcome you, just as we overcame other anti-Semites in history.”²

On a further occasion, Netanyahu called the ICC decision “a full frontal attack on the democracies” and urged a television audience in America to “ask for concrete actions, sanctions, against the international court. Its officials, its prosecutors, everyone.”³



Illegal Israeli settlements will form part of the ICC investigation.

Other leading Israeli figures have been equally preposterous in their reactions. Michael Oren, former Ambassador to the US, declared that the referral to the ICC proved that Palestine was the aggressor:

“By spurring the ICC to criminalize Israel, the Palestinian Authority has posed a strategic threat to the Jewish State. The PA must be treated as an aggressor... the PA is guilty of an act of hostility tantamount to war.”⁴

The US has also denounced the court as a political body. US Secretary of State Mike Pompeo declared in February that, “The ICC and the world will see that we are determined to prevent having Americans and our friends and allies in Israel and elsewhere hauled in by this

² Quoted in <https://moguldom.com/250549/black-icc-prosecutor-looking-into-war-crimes-by-israel-responds-to-netanyahu-attacks/> 22 January 2020, and <https://harbingersdaily.com/jewish-leaders-blast-icc-probe-into-israel-demonstrably-antisemitic> 23 December 2019

³ <https://www.haaretz.com/israel-news/.premium-netanyahu-calls-to-impose-sanctions-against-international-criminal-court-1.8431418> 21 January 2020

⁴ <https://www.breitbart.com/middle-east/2019/12/23/jewish-leaders-blast-icc-probe-into-israel-demonstrably-antisemitic/> 23 December 2019

corrupt ICC.” Then, having threatened the ICC with “exact consequences,”⁵ in June Pompeo cited the ICC investigations into Afghanistan and Palestine as justifications for an executive presidential order imposing sanctions upon ICC officials and their families. At the same time Pompeo denounced the ICC as “a kangaroo court” and launched his own investigation into alleged ICC corruption.⁶ EU High Representative for Foreign Affairs Josep Borrell described these attacks as “unacceptable and unprecedented in scope and scale,”⁷

Six other western states – Germany, Australia, Canada, Austria, the Czech Republic and Hungary have also challenged the ICC’s jurisdiction, frequently coupling together the contention that Palestine does not constitute a state along with the entirely spurious proposition that proceedings at the ICC would endanger prospects of a negotiated peace. Germany’s petition to the ICC stresses its support for a “negotiated two-state solution and hence the goal of an independent, democratic, sovereign and viable state of Palestine”⁸ yet fails to recognise that it is the culture of Israeli impunity that makes such an outcome an impossibility.

Ireland and the ICC

Ireland is a signatory of the Rome Statute of the ICC and has been a strong supporter of the court since its creation. It is welcome that responding to the US attacks on the ICC in June, Ireland co-signed a statement of sixty-seven states reaffirming its commitment to the ICC.⁹

In a 2017 statement then-Tánaiste and Minister for Foreign Affairs Simon Coveney stated “I believe that, by its very existence, the Court promotes and upholds not only the rule of law but also provides an essential means of ending a culture of impunity. It contributes in a most fundamental way to the cause of international peace and security”.¹⁰

⁵ The International Criminal Court’s Illegitimate Prosecutions, Press Statement, Michael Pompeo, 15 May 2020, <https://www.state.gov/the-international-criminal-courts-illegitimate-prosecutions/>

⁶ <https://www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions> 11 June 2020

⁷ Quoted in <https://www.aljazeera.com/news/2020/06/scores-countries-icc-face-sanctions-200624025450554.html> 24 June 2020

⁸ <https://www.haaretz.com/israel-news/.premium-germany-offers-to-join-deliberation-in-icc-case-on-israel-palestine-15> February 2020

⁹ <https://onu.delegfrance.org/We-remain-committed-to-an-international-rules-based-order> 23 June 2020

¹⁰ <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2017/july/minister-coveney-on-role-of-icc/>

These words need to be remembered now that the ICC is under unprecedented attack. In particular, Minister Coveney's statement makes clear that impunity from crimes stands in direct contradiction to establishing conditions for peace. This is what is at risk now. Should Israel, with the backing of the US and others, establish that the principles and practices of international humanitarian law do not apply to them, then law and peace will be based upon nothing but coercive power; a knee on the neck, so to speak.

For example, a likely outcome of the marginalisation or nullification of the ICC investigation is that Israel will feel emboldened with its plans to press ahead with the illegal annexation of large areas of the Palestinian West Bank. This is something which only the threat of international censure has held it back from to date. Precedents of failing to enforce international law (e.g., the ICJ ruling on Israel's Wall, 2004) or act upon war crimes investigations (e.g., The UN Fact Finding Mission on the Gaza Conflict, 2009) have only led to the further commission of war crimes and the creation of many thousands more Palestinian victims.

This document has outlined the situation of the ICC and Palestine to date. Although things have already become heated, they will become much more so should the ICC Pre-Trial Chamber rule that the Prosecutor can proceed with her investigation. In that instance, Ireland, as a signatory of the Rome Statute has an obligation to protect the court from premeditated attacks and to ensure that court officials can undertake their work without being maligned, defamed or sanctioned. As a matter of urgency, Ireland should raise its voice in the UN Security Council and directly with the US administration so that it ceases its unlawful sanctioning of ICC officials and their families.

Ireland should also support the court throughout the process, and when challenged should respond with the simple assertion that if crimes had not been committed then there would be no investigation. Ireland should absolutely refuse to engage with contrived contentions that ICC proceedings are due to antisemitism.

Ireland must further commit to support the court if it moves towards the prosecution of individuals and make clear that it will act upon any international arrest warrants issued by the ICC. In Israel itself a secret list of some 200 to 300 individuals who may face prosecution

has already been drawn up by the Prime Minister's office.¹¹ This is an admission of sorts that Israel believes the practices of its officials violate international humanitarian law, and evidence of the deterrent effect that bringing accountability to individuals can bring to states themselves.



The actions of President Trump and Prime Minister Netanyahu are undermining the ICC, creating a culture of impunity and shredding the fabric of international law.

Conclusion

In 2015 the ICC set out to investigate whether war crimes were being committed in Palestine. In 2019 the ICC concluded that war crimes were indeed being committed. In 2020 the ICC is to determine whether it has the authority to investigate the individuals who have committed these war crimes. Thusfar the international justice system for war crimes has functioned as it is supposed to. What is unusual in this case is not the functioning of the court, but the political pressure and ostracism that the court and its officials have become subject to.

These attacks on the court, whilst having vital importance for the people of Palestine's ability to achieve a life of security and peace, are also attacks upon us all. As Josep Borrell has stated, "At a time when the rules-based international order is facing increased pressure,

¹¹ <https://www.haaretz.com/israel-news/.premium-israel-forms-secret-list-of-hundreds-of-officials-who-may-stand-trial-at-icc-1.8997620> 16 July 2020

the strengthening of the international criminal justice system is more important than ever."¹²

The cornerstone of international law is interdependency and solidarity. To some extent we are each responsible for one another and hold one another's fates in our hands. The ICC recognises this and serves as a mechanism to ensure that accountability. It has never been so under threat before. It would be beyond shameful if a mechanism established to protect us all was to be smashed in the service of a criminal, racist and colonial state that is determined to seize another people's resources and deny them right to live freely in their own land. For Palestinians, for ourselves, for the world, Ireland must rise to its responsibility to defend the ICC.

¹² Quoted in <https://www.aljazeera.com/news/2020/06/scores-countries-icc-face-sanctions-200624025450554.html>