

Seeing Through the Fog of Justice in Israel and Palestine

Written by Mark Kersten

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MARK KERSTEN, NOV 14 2024

As is often said, the first casualty in war is the truth. Misinformation, disinformation, and propaganda are commonplace in the context of armed conflicts, as warring sides and their allies attempt to secure narratives conducive to their wartime aims. No contemporary conflict has been as rife with untruths as the conflict in the Middle East, a reality that extends to ongoing efforts to address the mass atrocities committed in Israel and Palestine. In what follows, I dispel some popular but false claims about the work of the International Criminal Court (ICC) and its investigation into the situation in Palestine.

Firstly, there is the issue of jurisdiction. Israel, the United States, and a few other states have cast doubt on whether the ICC has jurisdiction over Israeli officials. According to them, the Court cannot exercise jurisdiction over citizens of Israel because Israel has never joined the ICC. Others, like former Canadian Justice Minister Irwin Cotler, a staunch defender of Israel and opponent of accountability for atrocities committed against Palestinians, has attempted to argue that the ICC has jurisdiction over Palestinian citizens, but not Israeli ones. These claims are false.

The ICC has jurisdiction over both Israeli officials and Palestinian leaders. In 2015, Palestine became a member-state of the ICC. That same year, the Court opened a preliminary examination into the situation in Palestine. In 2021, judges determined that the ICC Prosecutor therefore has jurisdiction over Gaza and the West Bank, including East Jerusalem and an official investigation into the situation in Palestine ensued.

Because Palestine is a state before the ICC (and a state recognized by 149 of 193 UN member states), the Court has jurisdiction to investigate any citizens of Palestine, irrespective of where their atrocities are perpetrated. The Court also has jurisdiction over any atrocities committed on Palestinian territory, irrespective of the nationality of the perpetrators. As a result, the ICC has jurisdiction over Hamas and the crimes its fighters committed in Israel even though Israel is not an ICC member-state, and the Court has jurisdiction over any Israeli perpetrators of mass atrocities committed in Gaza and the West Bank. Suggestions to the contrary are not only incorrect but represent efforts to interfere with one of the only avenues for accountability in a situation rife with credible allegations of war crimes, crimes against humanity, ethnic cleansing and genocide.

Secondly, Israeli leaders have repeatedly insisted that the ICC is somehow politically opposed to Israel. This is not the case. The Court was created not to investigate states, but individuals, for their responsibility for international crimes – war crimes, crimes against humanity, genocide and the crime of aggression. Targeting Benjamin Netanyahu for prosecution is a judgement on Bibi, not on the State of Israel.

Still, could the ICC be biased against Israel? Again, no. The ICC has had ample opportunities to investigate and prosecute Israeli conduct, but declined to do so. If the Court was somehow biased against Israel, it would surely have taken the opportunity to target Israeli officials over the attacks on the Mavi Marmara and Gaza Flotilla in 2010. Yet it declined to do so. The ICC likewise declined to act over the litany of alleged international crimes committed in 2014, 2018, 2021, and so on. If anything, then, the Court has demonstrated some bias against Palestinian victims and survivors for slow walking its investigation and repeatedly refusing to issue warrants of arrest for perpetrators of atrocities against Palestinian civilians.

Thirdly, some suggest that the ICC should not investigate Israeli officials because Israel has a robust and

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independent judiciary. The suggestion here is that if Israel has a strong justice system, the ICC should back off. But this fundamentally misunderstands the basic rules and laws that govern the Court's operations.

The ICC is premised on the principle of complementarity. In brief, that means that if the ICC issues warrants for alleged perpetrators, but a relevant state is (a) actively investigating and prosecuting the same perpetrator for the same conduct as the ICC, and (b) is able and willing to do so in a genuine manner (as opposed to holding sham investigations to protect perpetrators), then any relevant ICC cases can be challenged and deemed inadmissible before the Court.

Israel has never investigated and prosecuted its leaders for war crimes committed in Gaza or the West Bank. Instead, the Israeli Defence Forces typically come up with claims that any violations of international humanitarian law were fabrications or mistakes – or, worse, indicative of such 'anti-Israeli' animus. The prevailing culture is one of impunity, especially for senior officials in the military and government.

The upshot is that if the ICC were to issue arrest warrants for Israeli Prime Minister Benjamin Netanyahu or Defence Minister Yoav Gallant on charges of the war crime of deliberate starvation of Palestinians, Israel would fail the first test. It is not investigating either senior figure for war crimes. It won't even investigate its cabinet ministers openly inciting genocide as well as the annexation and ethnic cleansing of Gaza. The quality of Israel's judiciary is irrelevant if it is ultimately inactive. A state can have the Cadillac of justice systems and yet, if it refuses to investigate and prosecute the same people for the same conduct targeted by the ICC, it fails the complementarity test, and the cases are admissible before the Court.

Finally, there are those who insist that the ICC's intervention will scupper chances of peace. But the question arises: what peace? Neither Israel nor Hamas have shown any credible interest in Palestine co-existing in peace and security with Israel. Even Israel's closest allies have accepted that the country has no interest in a Two State Solution. Canadian Prime Minister Justin Trudeau, for example, stated that "the Israeli government under Prime Minister Netanyahu has unacceptably closed the door on any path towards a two-state solution." The proof is in the expansion of settlements, the forcible expulsion of Palestinians from the homes and lands, and ongoing allegations of apartheid that were lent credibility by the International Court of Justice in its ruling on the legal consequences of Israel's illegal occupation of Palestinian territories earlier this year.

There are valid concerns about how ICC justice impacts peace negotiations and peace processes. But such worries need to be seen in context, and if there is no peace on offer, then it becomes implausible to argue that justice can undermine it. This is especially true in a situation like the long-standing conflict between Israel and Palestine, where peace has been given dozens of chances, but accountability never has. For all victims and survivors, in both Israel and Palestine, it is beyond time to see past the fog of accountability efforts, and for states to back the ICC – not because it is perfect (far from it), but because it offers a modicum of justice and accountability for Israeli and Palestinian victims who have suffered for far too long.

About the author:

Mark Kersten is a Senior Consultant of the Wayamo Foundation and an Assistant Professor of Criminology and Criminal Justice at the University of the Fraser Valley. His work focuses on the investigation and prosecution of international crimes; mass atrocity responses and prevention; the effects of judicial interventions by the International Criminal Court (ICC) on conflict, peace, and justice processes; capacity-building and domestic accountability for international crimes; and the nexus between mass atrocities and transnational organized crimes.