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Refuting the Palestinian Allegation to the ICC that Israeli Settlements Are a War Crime

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Headquarters of the International Criminal Court at The Hague (*UN Photo/Rick Bajornas*)

- Israel's settlement activity cannot be considered as a "war crime" in the context of the ICC Statute. The overriding criteria established by the Statute for war crimes include the requirement that such activity be "part of a plan," "done on a large scale," and be "of sufficient gravity as to justify further action by the Court." Israel's settlement activity does not fill any of these overriding criteria. Therefore, the allegation of a war crime cannot be considered admissible by the Court.
- Israel's settlement activity is conducted in accordance with the requirements of international customary law, which enables the legitimate use of state and non-private owned land and property, pending resolution of the conflict. Strict

measures are taken by Israel's investigative and judicial authorities to ensure that violations of laws and norms are duly investigated and prosecuted. Israel's ongoing legal and juridical supervision fulfills the complementarity requirement of the ICC Statute.

- The most important legal document used to evaluate the legality of Israel's settlement activity has been the 1949 Fourth Geneva Convention. As clarified by the ICRC Official Commentary to that document, the population transfer prohibition set out in the Convention was specifically drafted to address a repeat of the mass, forced population transfers conducted by the Nazis during the Second World War. As such, it is not applicable to Israel's settlement activity.
- The "transfer" prohibition in Article 8 of the ICC Statute does not reflect established international law inasmuch as it was deliberately tailored and manipulated to address Israel's settlement activity. As such, Israel's settlement activity cannot be seen to fulfill the Statute's overriding requirement that such a crime be within the "established framework of international law."
- The Oslo Accords established an agreed legal regime enabling each party to conduct planning, zoning, and construction activities within the areas under its respective jurisdiction, pending the outcome of the permanent status negotiations. Israel's investigative and judicial institutions regulate all such construction activity, including, where necessary, investigating and prosecuting violations. Such activity fulfills the complementarity requirement of the ICC Statute.
- Israel's official governmental commission to investigate the legality of construction in the territories established strict criteria prohibiting seizure and use of private property in violation of international law and requiring that construction be carried out in accordance with the law. The observance of such criteria fulfills the complementarity requirement of the ICC Statute.

Introduction

The announcement by ICC Prosecutor Fatou Bensouda of her decision to open an investigation of war crimes against Israel's military and political personnel, pursuant to Palestinian referrals, involves two alleged spheres of activity:¹

1. Allegations that Israel's military committed war crimes during the course of the 2014 "*Protective Edge*" operation against Hamas-ruled [Gaza](#), including what the Prosecutor describes as "intentionally launching disproportionate attacks, willful killing, willfully causing serious injury, and intentionally directing attacks against objects or persons using the distinctive emblems of the Geneva conventions."

In addition, the investigation includes allegations that Israel's military committed war crimes in 2018 by what the Prosecutor describes as a "disproportionate use

of force that rises to the threshold of an international crime” committed by Israeli authorities since 2018 to disperse demonstrations along the Gaza border fence.

2. The second sphere of Israeli activity is the alleged war crime of “facilitating the transfer of Israeli civilians into the West Bank since June 13, 2014.”

The analysis below refutes the allegation by the Palestinians and by ICC Prosecutor Bensouda that Israel’s settlements are a war crime.

Military Actions in the Gaza Sphere

As with all military actions by Israel’s army, the issue of proportionality and necessity of any military action *vis-à-vis* Hamas in the Gaza area, in response to the threats posed by the Hamas forces are, by necessity, duly analyzed and investigated by Israel’s military and civil legal authorities.

Any specific allegations of misconduct, whether by commanders or by individual soldiers during the course of any such military action, are, as a matter of course, investigated by the responsible and appropriate investigative authorities, whether in Israel’s military or civil legal systems.

By the same token, suspicions of wrong-doing, misconduct, violation of orders, or commission of war crimes, if found to be well-founded, are referred to the appropriate legal authorities for judicial processing, whether within Israel’s military justice system or whether within Israel’s civil legal system.

As such, it may be assumed that the principle of complementarity, set out in articles 17 and 53 of the ICC Statute, according to which allegations are deemed inadmissible if they are duly and properly investigated or prosecuted by the state which has jurisdiction, would apply in relation to the Palestinian allegations regarding the hostilities in the Gaza area.²

Israel’s Settlements Policy

The alleged war crime, as noted by the ICC Prosecutor in her announcement on opening an investigation, is “facilitating the transfer of Israeli civilians into the West Bank since June 13, 2014.”

Before entering into a discussion as to whether Israel’s settlement policy may indeed be considered to be a crime under the ICC Statute, it is necessary to analyze the transfer provision listed as a crime in the Statute.

Transfer as a War Crime

The action of transferring parts of a civilian population into occupied territory is included in the all-embracing title of “war crimes” under Article 8 of the ICC Statute.

The overriding criteria for all such crimes listed in Article 8 are set out in its first paragraph, which determines that “[T]he Court shall have jurisdiction in respect of war crimes **in particular when committed as part of a plan or as a large scale commission of such crimes.**”

The qualifying and overriding umbrella criterion for war crimes, including the war crime of transfer, is that all the crimes listed in article 8 must have been “committed as part of a plan” or “as a large scale commission.”

The Statute contains neither a definition of the term “plan” nor determination as to the size, extent, or scale of such plan, nor does it define the relative proportions of what constitutes “large scale commission of such crimes.”

A further qualifying criterion determining whether a crime is or is not admissible – that of the “**gravity**” of a crime – is set out in Article 17 (1) (d) of the Statute, which refers to a case that “is not of sufficient gravity to justify further action by the Court.”

This concept of “gravity” is indeed one of the basic and essential components of the aims and purposes of the Court. This is illustrated in the preambular provisions and in the first, opening article 1 of the Statute that set the tone and character of the Court as a juridical body established in order to address “unimaginable atrocities that deeply shock the conscience of humanity.”

In these opening provisions of the ICC Statute, States Parties recognize that “such grave crimes threaten the peace, security, and well-being of the world” and affirm that “the most serious crimes of concern to the international community as a whole must not go unpunished.”

It would thus appear to be clear that such qualifying and overriding criteria of the crime of transfer would, logically, preclude any action that is **not** part of a plan, or that is **not** committed on a large scale, or that is **not** of sufficient gravity. This inasmuch as such action would, of necessity, be an individual or minor-scale action that would not attain the requisite or relative level or scale as intended to be applied in this article.

In light of the above, it is highly unlikely that Prosecutor Bensouda’s presumption and allegation that “facilitating the transfer of Israeli civilians into the West Bank since June 13, 2014,” could be seen to constitute a war crime within the qualifying criteria set out in the Statute, of being “part of a plan” or done “on a large scale,” or “of sufficient gravity as to justify further action by the Court.”

Clearly, Israel's settlement policy, based on individual initiatives or incentives for those who wish to settle in any particular area, and, which in any event, is carried out on a relatively minor scale, could not be seen to enter any of the above large-scale criteria.

This especially as compared with the genuinely grave, large-scale, and massive projects of forced population transfer and settlement of millions of persons committed both during the Second World War, as well as mass transfer of populations carried out in recent years by Russia in Georgia and Ukraine, by Turkey in Northern Cyprus, by Indonesia in East Timor, by Morocco in Western Sahara, by Syria in Lebanon, by Vietnam in Cambodia, by Armenia in Nagorno-Karabakh, and elsewhere.³

Can Israel's Settlement Activity Be Considered a War Crime?

Settlement activities by Israeli citizens in the West Bank areas of Judea and Samaria are not considered by Israel to be a violation of law, since international law specifically sanctions the use, by an administering or occupying power, of non-privately owned assets in the territory, pending an agreed resolution of the permanent status of the territory.

As administrator and usufructuary of public land and property in the territories that came under its control in 1967, and pending a peaceful resolution of the permanent status of the territories as called for in UN Security Council resolutions and in the agreements between Israel and the Palestinians, Israel maintains that it may legitimately use any such state-owned or public land and property that is non-privately-owned, including for the purpose of legitimate settlement by Israeli citizens.⁴

Israel has consistently maintained that the prohibition on the transfer of parts of a civilian population into the territory, set out in article 49 of the Fourth Geneva Convention (1949), inasmuch as that provision was intended to prohibit the mass and forced transfers of populations committed during the Second World War, has never been applicable to Israel's practice of permitting settlement in the territory.

Furthermore, the Convention was never applicable to the territories that came under Israel's authority in 1967 because they were not taken from a legitimate power, since the Hashemite Kingdom of Jordan had never been internationally acknowledged to be the sovereign power over the territory. Additionally, Jordan formally renounced and surrendered all claims to sovereignty and severed administrative ties with the territory in 1988.⁵

Manipulation of the Transfer Provision in the ICC Statute

Further qualifying factors limiting the extent and nature of the war crimes listed in the ICC Statute appear in the *chapeau* [introduction] to paragraph 2 (b) of article 8, which determines that the 26 crimes listed in paragraph 2(b), including the crime of "transfer"

listed in subparagraph viii, must be “...serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.

These qualifying factors of seriousness of the violations of the laws and customs of international armed conflict, on the one hand, and their being within the established framework of international law, on the other, further limit the relevance of the crime of transfer attributed to Israel.

The criterion of seriousness is covered by the above-noted assumption that such action could indeed not be considered to enter into the criterion of gravity established by article 17 of the ICC Statute.

Additionally, the crime attributed to Israel in subparagraph 2(b) (viii) of “transfer, directly or indirectly, by the Occupying Power of parts of its own civil population into the territory it occupies” cannot be considered to constitute a crime “within the established framework of international law.”

The “established framework of international law” upon which article 8, subparagraph 2(b)viii is based, does not include the words “direct or indirect,” which were deliberately added to the text during the drafting of the 1998 Rome Convention, as a political manipulation by some Arab states specifically aimed at Israel’s settlement policies.

Article 49(6) of the 1949 Fourth Geneva Convention, the central legal provision used to evaluate the legality of Israel’s settlement activity and the source of the transfer provision, is indeed considered to be part of the “established framework of international law.” It was drafted as a response to the mass, forced transfers of populations conducted by the Nazis during the Second World War.

The official Commentary by the International Commission of the Red Cross (ICRC) to the Fourth Geneva Convention, edited by Jean S. Pictet, states that this article was:

... intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.⁶

Thus, article 49(6), inasmuch as it may be considered to reflect established international law, cannot be considered to be applicable to Israel’s settlement activity.

The text of the Fourth Geneva Convention does not contain the words “direct or indirect” in the context of its transfer provision, as the intention behind the article was clearly to address the severe, grave, and outrageous actions committed by the Nazis in Europe, and to prohibit a repeat of such activities.

The attempt to manipulate the terminology of the ICC Statute by deliberately tailoring the text of the transfer provision in order that it be applied explicitly to Israel's settlement activity clearly defies the accepted and universally understood criterion that such crime be "within the established framework of international law."

Oslo Accords as the Source of Legal Authority

While Israel maintains deep-rooted indigenous, historical, and legal claims to the territories, both Israel and the Palestinians are committed to negotiating the permanent status of the territories, as agreed in the universally acknowledged 1993-5 Oslo Accords between Israel and the PLO.⁷

This was also agreed in the 1993 Exchange of Letters between PLO Chief Yasser Arafat and Israel's Prime Minister Yitzhak Rabin, in which the PLO committed to the Middle East peace process and declared that all outstanding issues relating to permanent status "will be resolved through negotiations."

These accords established a *sui generis* legal regime – a *lex specialis* - determining shared administration of the territories, pending completion of the negotiation between them of a permanent status agreement. The accords are countersigned by the United States, the EU, Egypt, and Norway and have been endorsed by the United Nations.

The Oslo Accords determine that the issue of settlements is a "permanent status negotiating issue," together with issues such as borders, refugees, water, security, and Jerusalem. Pending such a permanent status agreement, the accords permit each party to engage in planning, zoning, and building activities in the areas under its control.⁸

Any settlement activity by Israeli citizens in the territories is strictly regulated and supervised by Israel's military, civil, and judicial authorities in order to ensure that it is carried out strictly in accordance with international norms as well as legal requirements set out in planning and zoning regulations, and does not violate property rights of local Palestinian residents of the territory.

Any violation of such rules, including violation of the prohibition on the seizure of, or incursion into land and property that is privately owned by local residents of the territories, or construction in violation of planning and zoning rules, is duly investigated. As necessary, such cases are brought before Israel's courts, including the Supreme Court, which has a long history of jurisprudence reviewing any violations and ordering evacuation or demolition and compensation.⁹

Such supervision, investigation, and as necessary prosecution by Israel's legal institutions, of violations of law and regulations in the context of settlement activities by Israelis, fulfills the complementarity proviso set out in article 17 of the ICC Statute.

The 2012 Edmond Levy Commission on the Status of Building in the Territories

A further, and no less vital factor ensuring the monitoring of the legality of settlement construction, and thereby fulfilling the ICC complementarity proviso, appeared in the conclusions and recommendations of the 2012 “*Edmond Levy Commission to Examine the Status of Building in the Territories*,”¹⁰ the terms of reference of which reaffirmed at the outset the government’s determination that:

As a rule, illegal construction situated on private land will be removed, and at the same time, the appropriate professional levels [will] act towards regulating the planning status of structures located on state land.

The commission recommended *inter alia* measures to ensure the existence of proper procedures to clarify matters related to real estate issues in the areas, including land ownership disputes, in accordance with the principles of justice and fairness within the Israeli judicial and administrative system, taking into consideration applicable laws in the area.

The commission determined that all actions regarding settlement construction, including at the most senior political levels, should only be carried out in accordance with the law and with due and proper alacrity and decisiveness in order to ensure full observance of the law.

Conclusion

The allegation by ICC Prosecutor Bensouda that Israeli citizens have committed war crimes by “facilitating the transfer of Israeli civilians into the West Bank since June 13, 2014” fails to meet central, overriding criteria set out in the ICC’s Statute, for gravity, relevance, and seriousness.

The allegation fails to meet the ICC Statute’s admissibility criterion of complementarity inasmuch as Israel’s investigative and juridical institutions maintain strict supervision of construction activities in the territories, and where necessary, offenders are prosecuted.

As such, the allegations by Prosecutor Bensouda and her instituting an investigation on such issues are incompatible with the requirements of the ICC Statute and must therefore be rejected by the Court.

* * *

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Notes

¹ <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>

² See articles 17(1) and 53(1) of the ICC Statute <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>

³ For an excellent, detailed analysis of settlement activity in occupied territories throughout the world, see Eugene Kantorovich's *Unsettled: A Global Study of Settlements in Occupied Territories* 2017, Oxford University Press <https://academic.oup.com/jla/article-abstract/9/2/285/4716923>

⁴ Hague Convention respecting the Laws and customs of War on Land 1907, Article 55 <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf>

⁵ http://www.kinghussein.gov.jo/88_july31.html

⁶ https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf

⁷ 1993 Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements (Oslo 1) <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Declaration%20of%20Principles.aspx> and 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo 2), article XXXI (8) <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

⁸ Oslo 2, Annex III, article 27 <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20III.aspx#app-35>

⁹ David Kretzmer and Yaël Ronen, *The Occupation of Justice - The Supreme Court of Israel and the Occupied Territories* 2nd ed. 2021 <https://global.oup.com/academic/product/the-occupation-of-justice-9780190696023?cc=il&lang=en&>

¹⁰ <http://regavim.org.il/en/wp-content/uploads/2014/11/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria2.pdf>

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