

Put Canada's Interests—and the Law--First

Canada's vocal opposition to the Palestinian accession to the International Criminal Court (ICC) rends further the Harper government's already tattered claim to pursuing a principled foreign policy. The position taken by Canada also vitiates Canadian interests in the promotion of international law and in the peaceful settlement of disputes. It deprecates as well the extraordinary achievements of successive Canadian governments, including the Conservative government, in creating and supporting the Court. The Foreign Affairs department's website reads that "Canada supported the ICC effort from the very beginning and continues to support the ICC with crucial leadership, advocacy and resources." Until now. According to Israeli Foreign Minister Lieberman (Reuters January 18) "We will demand of our friends in Canada, in Australia and in Germany simply to stop funding [the Court]" .

Ottawa holds, as do Washington and Tel Aviv, that Palestine is not a state, and therefore does not qualify for membership in the Court. But it is not up to Canada, the US or Israel to decide whether other states recognize Palestine, or any other entity, and whether those recognitions are valid. In November 2012, the General Assembly voted overwhelmingly to accord Palestine "Non-Member Observer State" status in the United Nations. (Only nine states, including Canada, the US and Israel, representing about 5 percent of the UN membership and 5 percent of the world's population, albeit 25% of the UN budget, opposed such recognition). In December, 2014, ICC member countries also granted observer state status to Palestine. Earlier this month UN Secretary General Ban pursuant to what were termed "unequivocal indications from the [General] Assembly that it considers a particular entity to be a State" accepted Palestine's application to accede to the ICC treaty, making Palestine the 123rd State Party to the ICC. The Palestinian authorities accepted the Court's jurisdiction, retroactive to June 1 2014, thus covering the Gaza war of last summer.

The Court currently has statutory authority to prosecute three major crimes—genocide, war crimes and crimes against humanity. The ICC prosecutor, a respected professional, has initiated a preliminary examination of the situation in Palestine to determine whether there are reasonable grounds to proceed with an investigation. Her decision is likely to be affirmative but that is not a foregone conclusion. Earlier, before Palestine had been accorded state status, she declined a Palestinian request to open an investigation.

The ICC statute has an array of safeguards and checks and balances intended to screen out frivolous prosecutions. In fact, the Court's existence is a deterrent to frivolous prosecution by national courts. Those safeguards, a number of which were initially proposed by the United States in the treaty negotiations and supported by Canada, include

- The careful definitions of crimes, which were accepted by all participating states, with rigorous thresholds, focusing on major and deliberate atrocities.
- The requirement that accusations pass an independent review by a Pre-Trial Chamber and subsequently by an Appeals Chamber.
- And, most important, the principle of complementarity, which means that the ICC is empowered to act only when states do not acquit their duty to investigate and prosecute credible allegations of crimes by their own citizens.

The best way to avoid prosecution by the Court, therefore, is for each side to try its own alleged perpetrators. Regrettably, neither side has an exemplary record of doing so. According to Human Rights Watch, the widely respected New York based watchdog, "The Palestinian Authority is not known to have initiated any such investigations. The Israeli military prosecutor occasionally conducts investigations but hardly ever

prosecutes anyone. The most serious punishment imposed in recent years for abuse against Palestinians was a 7 ½-month prison term for an Israeli soldier who stole a credit card.”

The ICC, a court of last resort, not first preference, is an independent body, including independent of the United Nations. In this case, the court is empowered to prosecute crimes committed in or from Palestinian territory, by both Israelis and Palestinians, not only those allegedly perpetrated against the complainants. A *prima facie* case exists that Hamas’s indiscriminate targeting of Israeli population centres with rockets, which the Israelis would have little difficulty substantiating, was a war crime.

Beyond the legal arguments are policy issues and political calculations. Foreign Minister Baird has variously described the Palestinian initiative as “a huge mistake”, “misguided”, and crossing “a red line”. He claims to have told the supposedly delinquent Palestinian authorities “in no uncertain terms” that a solution to the issue can only come via direct negotiations between the parties. If history started yesterday, that would be a defensible position. But as the “peace process” has ground on decade after decade, the Israelis have annexed East Jerusalem, built security barriers on Palestinian territory, created more than 100 settlements and as many outposts on Arab land and transferred in excess of 500,000 Jewish settlers there, all of which most of the world, including Ottawa, believes violates the fourth Geneva convention, that is, are illegal. Israeli settlement policy has rendered the two state solution notionally favoured by Ottawa nugatory, and the negotiations are moribund. Ottawa’s bluster in response to the Palestinian initiative looks more like an aversion to justice than a devotion to principle.

Negotiating has been of little avail for the Palestinians; nor has fighting. Israel is the most powerful military force in the Middle East, armed with nuclear weapons, advanced American military technology and German-donated naval assets that the Canadian forces can only dream about. The Palestinians can scarcely muster militias. The Israelis are backed by the United States, still the world's super-power. The Palestinians cannot even count on the Arabs. The Palestinians are overmatched and the Israelis have little interest in negotiating. There is talk by Israeli Prime Ministerial candidates of annexation of part or all of the Occupied Territories.

Absent a peaceful solution, Israel's settlement expansion and lax attitude toward civilian casualties in Gaza and Hamas's rocket strikes, major impediments to peace and fuel for wider conflict, can be expected to continue. Moving the issue into court might be unavailing but prosecution can deter crime, while impunity certainly encourages it. Surely it is better to try to argue the issue out in The Hague than to fight it out on the Gaza plain or in the streets of Jerusalem

Pursuing a peaceful resolution of this dispute is a longstanding Canadian policy interest. The viability of the International Criminal Court is a further long term Canadian interest, one that goes beyond the Israeli-Palestinian conflict. Rather than lining up reflexively against the Palestinians and withdrawing our funding from the ICC, we should encourage the Israelis and the Palestinians to see each other in court.