



PERSPECTIVES

THE BEGIN-SADAT CENTER FOR STRATEGIC STUDIES

The ICC's Decision to Investigate Israel Is Baseless but Dangerous

by Prof. Eytan Gilboa

BESA Center Perspectives Paper No. 1,926, February 9, 2021

EXECUTIVE SUMMARY: The decision of the International Criminal Court to investigate alleged war crimes committed by Israel in Gaza, the West Bank, and East Jerusalem is baseless but still dangerous. The ICC is yet another highly politicized UN institution, not a real court of justice. The decision and the prosecutor's conduct have both violated the Court's own rules. The ICC is also trying to investigate the US for alleged war crimes in Afghanistan. Israel and the US should coordinate an intensive campaign to delegitimize the Court and ensure that the next prosecutor, who is scheduled to begin service this summer, is professional, ethical, and honest.

The decision of the International Criminal Court in The Hague (ICC) to investigate alleged war crimes committed by Israel in Gaza, the West Bank, and East Jerusalem is baseless but still dangerous, and must be thwarted. It is baseless because only sovereign states can file complaints to the Court and Palestine is not a sovereign state. The ICC can investigate only countries that have signed the Rome Statute, which established the Court. Israel, along with the US and 70 other countries, did not join the ICC precisely because they suspected it would be another highly biased and politicized UN body. That is exactly what it turned to be.

Moreover, the ICC was founded in 2002 to investigate serious crimes against humanity and war crimes, such as genocide, committed by countries that are not investigating war crimes of their own citizens. Israel is a vibrant democracy with an independent judiciary that investigates violations of the laws of war. The Israeli-Palestinian case does not meet any of these conditions. The decision to allow the investigation and prosecution of Israelis is thus a flagrant violation of the ICC's own rules and procedures.

The ICC is a political kangaroo court. It ignores the most serious war crimes and atrocities in the world today, such as the genocide and crimes against humanity committed in Syria by the Assad regime, Russia, and Iran. It disregards Russian war crimes in Chechnya and the Crimea and those of the Houthis and the Saudis in Yemen.

The ICC's decision is dangerous for Israel because the Court is authorized to investigate only individuals and not countries. In the wake of the decision, the ICC prosecutor, Fatou Bensouda, can summon Israeli PMs, ministers of defense, senior military officers, and officials for questioning. If they refuse to appear, as they are likely to do, she can issue warrants for their arrest. Theoretically, any of the 122 ICC member states are obliged to obey the warrants and extradite those people to the Court. (Issuing arrest warrants requires approval of the Court, however. The decision states that this matter will be discussed separately later on and will require reasoned and well-supported requests from the prosecution.)

Prosecutor Bensouda does not come into this affair with clean hands. She served as Gambia's justice minister and backed a tyrannical regime that systematically violated human rights. According to the testimony of Palestinian Authority officials, including late chief negotiator Saeb Erekat, she advised them on how to seek admission to the Rome Statue and how to file a lawsuit against Israel. ICC rules require the prosecutor to conduct herself professionally, objectively, and ethically. Bensouda violated these rules, but the Court failed to take any disciplinary action against her.

In light of the legal dispute over whether the ICC has jurisdiction over the Palestinian Territories, Bensouda asked a pre-trial panel of three judges for authorization to carry out the investigation. She manipulated the panel by asking only whether Palestine is a state or not. The panel's presiding judge, Péter Kovács of Hungary, wrote a minority opinion rejecting most of Bensouda's arguments and ruling that the Court had no authority to investigate Israel. The other two judges, Reine Alapini-Gansou of Benin and Marc Perrin de Brichambaut of France, thought otherwise.

In 2020, a different pre-trial panel of ICC judges authorized Bensouda to investigate alleged war crimes committed by the US in Afghanistan. The Trump administration attacked the decision, denounced the Court and the prosecutor, revoked her visa, and threatened further sanctions against her and the justices if they dared investigate the US or Israel.

The timing of the announcement of the Court's decision provides additional proof that the ICC is a politicized and biased UN institution. The ICC was supposed to publish its decision in mid-July 2020, but postponed it until after

the 2020 US presidential election and the expected changing of the guard from Donald Trump to Joe Biden. The Court's leaders anticipated that the Biden administration's response would be more moderate than that of Trump. But if Biden does opt to do nothing, the Court is likely to investigate the US as well.

Prosecutor Bensouda ends her term this June. She may be satisfied with having obtained authorization to carry out the investigation of Israel and will probably not actually begin it. Her successor is about to be selected. The Court and the Palestinians would like to appoint someone like Bensouda, but Israel and the US must act forcefully to ensure that in contrast to that biased figure, the new prosecutor is a professional, unbiased, honest, and fair official. If such a person is appointed, he or she is unlikely to investigate either Israel or the US.

The two allies should mobilize all the countries that prior to the deliberations of the pre-trial panel submitted briefs to the ICC against Bensouda's request to investigate Israel—notably Germany, Hungary, Australia, Canada, the Czech Republic, and Brazil. These countries should join the US and Israel in protesting the Court's decision and support the naming of a suitable candidate for the job of prosecutor. Israel should ask the US Congress to condemn the ICC's decision and to warn against any investigation of the US or Israel. The US and Israel should also conduct a worldwide public diplomacy campaign to delegitimize and deter the ICC.

Eytan Gilboa has been a professor of political science and communication at Bar-Ilan University and is a senior research associate at the BESA Center for Strategic Studies. He recently published a critical analysis of the process leading to the ICC's decision, "The Palestinian Campaign against Israel at the United Nations Human Rights Council," in Israel Affairs.