The absurd malevolence of the International Criminal Court

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It’s hard to exaggerate the hypocrisy, malice and sheer absurdity of the decision by the International Criminal Court last week that the Palestinians have the authority of a state to bring a case against Israelis for war crimes.

The 60-page ruling piled nonsense upon malevolence. It constituted the response to a question posed by the ICC’s chief prosecutor, Fatou Bensouda, who wanted a green light for the criminal investigation of Israel and the Palestinians that she announced in 2019.

This was to cover war crimes allegedly committed during “Operation Protective Edge,” Israel’s military operation in Gaza in 2014, as well as Israeli settlement policy and Israel’s response to the rioting at the Gaza border.

The ICC tries individuals rather than countries, and although the Palestinians are also in the frame, it’s obvious that its principal target would be the Israelis.

The court’s purpose, as set out in its charter, is to deal with human-rights abusers in countries lacking the will or capacity to bring its people to justice.

Given that Israel virtually sanctifies human rights and the rule of law, has a record second to none of bringing its own military miscreants to justice and that its armed forces take more care than any other military in the world to protect the lives of enemy civilians, Bensouda’s planned investigation is a malicious twisting of the ICC’s foundational purpose.

Since even she recognized that there were legal doubts over whether she could bring charges, she asked the court to decide whether there was a state of Palestine in which the alleged war crimes occurred. If Palestine was not a state, the court would have no jurisdiction.

By 2-1, the court’s pre-trial chamber ruled that “Palestine is a state party to the statute”—that is, the Rome Statute under which the court was created—and that “Palestine qualifies as ‘the state on the territory of which the conduct in question occurred.’ ”

This is clearly absurd since a state of Palestine doesn’t exist—and even more absurdly, the court said it was “not constitutionally competent” to assess “matters of statehood that would bind the international community.”

Dismissing the obvious fact that a sovereign state must have authority and jurisdiction over its own territory, it said what mattered instead was the 2012 U.N. General Assembly resolution to accept “Palestine” as a U.N. non-member observer state. Yet that resolution was merely a non-binding, political statement that had no authority to create a legal entity.

Despite last week’s ruling, it doesn’t automatically follow that the prosecutor will now open her threatened investigation.

The judge who dissented was none other than the lead justice on that panel, Peter Kovacs. In his 154-page minority judgment, which will carry weight in the court’s future dealings, he threw the book at his colleagues for “acrobatics” that had “no legal basis in the Rome Statute, and even less so in public international law.”

Bensouda has yet to announce whether she will go ahead with her investigation. Even if she decides to do so, she is soon to retire, and a new prosecutor may take a different decision.

Moreover, a number of countries that have signed up to the court have begun to realize that if it can upend law and justice to persecute Israel, then it might turn on them as well.

Accordingly, Germany, Austria, the Czech Republic, Hungary, Australia, Canada, Uganda and Brazil last year petitioned the court against the proposed investigation of Israel on the grounds that the Palestinian Authority did not meet the definition of a state under the Rome Statute.

Both Britain and America also have good reason to be wary of the ICC’s potential for interference.

In 2014, Bensouda opened a preliminary investigation into alleged war crimes by British troops in Iraq, only to drop it in 2020 because she concluded that Britain had examined these claims.

Like Israel, the United States has never signed up to ICC jurisdiction. In 2016, after Bensouda launched an investigation into alleged war crimes by U.S. forces in Afghanistan, former President Donald Trump imposed sanctions on Bensouda and her top aide who faced having their American bank accounts frozen, U.S. visas revoked and travel to America denied.

Although after last week’s ruling the Biden administration voiced “serious concerns” about the ICC’s attempts to exercise its jurisdiction over Israelis, a similarly uncompromising response from either America or Britain, which might now merely lobby for a more reasonable chief prosecutor, seems unlikely.

First, both the British foreign-policy establishment and the Biden administration support the Palestinian cause. They can profess their undying commitment to Israel’s security until they’re blue in the face—and they may even believe that they mean it—but this is fundamentally undercut by their support for the Palestinians.

That’s because the Palestinian cause remains, as it always was, the destruction of Israel. They show this constantly through what they say in Arabic, how they teach their children about their goal of reconquering Israeli cities, and how they try to erase the Jewish people from their own history by telling lies about the past and destroying artifacts from ancient Israel dug up in archeological excavations.

Yet Western liberals maintain that the Palestinian cause is a worthy one. That’s why the U.S. Secretary of State Tony Blinken says the Palestinians are “entitled” to a state.

It is, in fact, hard to envisage any group that’s less entitled than the Palestinians, who are not only bent upon colonial occupation of Israel but support the murder of Israelis and preach deranged hatred against Jews.

Meanwhile, the British government continues to peddle the legal fiction that Israel is in illegal occupation of the “Palestinian” territories.

The West’s support of such falsehoods and injustice has incentivized the Palestinians’ rejectionism, terrorism and war against Israel. It has further encouraged them to try to bring about Israel’s destruction through “lawfare,” the strategy of deploying international law as a weapon of destruction and of which their case before the ICC is a major offensive front.

But there’s a deeper issue still which will make both the British and the Biden administration reluctant to admit the fundamental nature of the ICC’s flaws.

This is their commitment to the ideology behind its foundation—the belief that crystallized after the Holocaust that there had to be a way of bringing to justice human-rights abusers who were immune from redress in their own countries. This impulse fueled the post-war development of international law and trans-national legal tribunals.

But laws draw their legitimacy from being passed by nations rooted in specific institutions, history and culture. Without the anchor of national jurisdiction, laws can turn into instruments of capricious political power.

The ICC has no such national jurisdiction but is made up of many nations. That’s why, from its inception, it was in essence a political court.

That’s why it’s an existential foe of Israel—the principal target of some of the world’s many human-rights abusers who have grasped that international law provides them with a potent weapon.

And these make common cause with American Democrats and the Western political establishment through their belief in liberal universalism, the doctrine that trans-national institutions trump the authority of national ones.

The legal and moral illiteracy of the ICC’s ruling is not a temporary blip. It follows from the campaign that lies at the very core of liberal universalist beliefs: to negate the authority of the sovereign nation.

As early opponents of international law realized, however, only a sovereign nation can properly defend itself. That’s why Israel knows it must always rely only on itself. It’s a lesson that many liberal Western politicians have yet to realize.