The ICC judge who could determine Israel’s fate – analysis

February 19, 2020

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The Jerusalem Post

<https://www.jpost.com/Israel-News/The-ICC-judge-who-could-determine-Israels-fate-analysis-618126>

After over 40 legal briefs were filed last week with the International Criminal Court, attention has shifted decidedly from ICC Prosecutor Fatou Bensouda to the three ICC judges themselves who will decide Israel’s fate.

So serious and sensitive is this topic that a Wednesday panel at the Conference of Presidents of Major American Jewish Organizations, with Israeli government officials addressing the issue, was closed to the media at the last second.

Nevertheless, Israel may have a better shot to win with the three ICC judges than it did with Bensouda.

This is surprising because these same three judges ruled against Israel in the Comoros case relating to the 2010 Mavi Marmara flotilla.

In other words, if a 2-1 majority of the ICC Pretrial Chamber wanted a criminal probe of Israel for killing a mere (in relative terms) 10 Turkish passengers who violently fought with IDF troops, the chances they will give Israel a pass on the settlement enterprise and the 2014 Gaza War when around 2,100 Palestinians were killed (between 50% and 80% civilians) would seem to be low.

The three judges are Péter Kovács, Marc Perrin de Brichambaut and Reine Alapini-Gansou.

Kovács, from Hungary, voted in favor of Israel in the Mavi Marmara incident. But more importantly, he showed an approach to interpreting international law that parallels Israel’s approach and the approach of other Western countries coping with the challenge of asymmetric warfare.

In this context, asymmetric warfare refers to parties like ISIS, al-Qaeda, Hezbollah and Hamas, which purposely and systematically mingle their military forces with civilians and fight in civilian areas as part of a “human shields” strategy.

Hungary is also one of the countries that has publicly supported the idea that the ICC should not recognize a “State of Palestine” and should dismiss the war crimes allegations against Israel.

So there is a strong chance Kovács will vote against a full criminal war crimes probe.

Alapini-Gansou, from Benin, has a long career in defending human rights in Africa, but is a newcomer to the ICC, becoming a judge only in March 2018.

Moreover, though she has been exposed to blatant and one-sided human rights violations in Africa, there is nothing in her record to indicate she is familiar with the complex asymmetric warfare challenges Israel confronts.

She may not have set views. Or to the extent she does, she may be more likely to be influenced by the ICC prosecutor and by the fact that a majority of the world’s countries (close to 140 out of over 190 countries) support Palestinian statehood.

This means that Brichambaut, who spent most of his career with the French Foreign Ministry, may be the key judge.

It is possible that Brichambaut can be convinced to take Israel’s side regarding Palestinian statehood and the war crimes debate.

First, France has not yet formally recognized Palestine as a state.

Second, there is hope that he is more deeply familiar with the nuances of the Middle East and Israel’s predicaments than some other judges might be with less exposure.

Third, he spent some time working with the French Ministry of the Armed Forces, such that he may understand complex military affairs better than judges without such a background.

Israeli officials are fond of pointing out that international law is not math, and that there are many areas where there are disparate interpretations of complex issues – especially when dealing with matters like the settlements or asymmetric warfare.

Competing against these points are not only the fact that he ruled against Israel in the Mavi Marmara incident, but also that he signed the Rome Statute for France. When he signed, it was at the moment when a group of Arab countries made an eleventh-hour addition to the statute designed to target Israel’s settlements.

This last-minute addition led Israel to drop out of the ICC, but Brichambaut still went on to sign for France.

Brichambaut has also had to fend off a motion to disqualify him from being allegedly biased against a Mali man accused of using Islam for religious and gender persecution, but it is hard to say how that might translate in the Israeli-Palestinian context.

The Post has also learned that Israel is still waiting to see whether the ICC judges allow all or many of the 40 parties that filed legal briefs with it to make oral arguments, before deciding whether Israel will send official representatives to argue.

Alternatively, Israel could rely on its already submitted extensive legal brief, and hope the judges are convinced by the many legal briefs filed by other countries and NGOs that agree with Israeli views.

The judges may start to issue some preliminary rulings in the coming month, which may provide hints as to where they are leaning.