**ICC decision clarifies: Israel needs a robust legal strategy**

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On February 6, 2021, the International Criminal Court announced that it has jurisdiction to investigate alleged war crimes committed in the West Bank, Gaza Strip, and east Jerusalem by Israelis and Palestinians since 2014.

The decision raises three important questions: Is it actually significant? How will the court likely proceed from here? And how should Israel now plan ahead?

The ICC’s Pre-trial Chamber’s judges’ majority decision on the question of what constitutes the territory of Palestine is indeed significant. It opens the door to potential indictments and uncomfortable situations for Israeli leaders and military commanders traveling abroad. However, there are two caveats.

First, the Pre-Trial Chamber’s decision embraces the earlier findings of Prosecutor Fatou Bensouda, who is leaving office in June. This seals her legacy on this important and high-profile case, which can now proceed before the court. Her successor, who has yet to be announced, will be the one to actively shape the investigation by deciding which specific acts to investigate, how many indictments to issue and against whom.

Second, Judge Péter Kovács, who presided over this panel of three ICC judges, dissented on important aspects of the decision. In his view, the court has jurisdiction only over parts of Gaza, the West Bank, and east Jerusalem subject to the Oslo Accords, which, unlike the majority opinion, he analyzes in great detail.

For Israel, this dissent carries great weight: it weakens the majority opinion, which pales in legal rigor compared to Kovács’s dissent; it conveys the existence of significant disagreement within the bench; and, it might make it more difficult for the court to investigate acts that occurred in these two areas.

Ultimately, however, this cannot prevent the opening of an investigation. The next question, therefore, is what legal path can the court now take? The most dangerous legal grounds, from Israel’s point of view, may prove to be those that relate to the settlements, though the recent decision makes no reference to them.

The ICC’s mandate is based on the principle of complementarity – it has jurisdiction to investigate and prosecute alleged crimes only when states have either been unable or unwilling to do so themselves in a fair manner. The ICC complements states in administering justice; it does not replace them.

Building settlements is part of the policy of the State of Israel, which therefore cannot claim that it is investigating and looking into potential violations of international law that relate to the settlement enterprise. This is an area where Israel is on weaker legal grounds, as complementarity and the robust Israel judicial system cannot shield it from the court’s jurisdiction.

An investigation into the settlements, however, would still have to meet the gravity threshold set under the court’s statute.

Ultimately, it boils down to what the next prosecutor will choose to prioritize, given the court’s strain on resources and its quest for greater legitimacy.

What can Israel do today?

First, try to anticipate and shape the priorities of the ICC in the coming five to 10 years. It’s unclear what channels of communication exist between states – especially non-party states like Israel – and a prosecutor regarding the scope of an investigation, but I see great value in maintaining dialogue.

Regretfully, decision-makers in Israel do not necessarily share this view, for reasons that range from sheer fatalism to the fear of conferring too much legitimacy to politicized international institutions. However, it is always preferable for Israel to lay down its narrative and arguments, directly or indirectly, and make its case.

Second, Israel should seek serious independent advice from leading legal experts. The Palestinians have been doing this for over a decade and have crafted a very smart, creative and impressive legal strategy when it comes to the ICC and other international bodies. The court’s recent decision demonstrates that such a smart and consistent legal strategy pays off.

Third, too often in this type of decision-making and strategy-building, Israel involves actors at the political level and ministerial levels who cannot agree with one another. In addition, the view that legal processes remain separate from diplomatic and strategic ones remains too prevalent. Yet the political and legal aspects are closely connected, as the timing of this ICC decision (less than two weeks after President Joe Biden’s inauguration) makes clear.

What Israel needs is a long-term strategy regarding international institutions, particularly judicial institutions such as the ICC. Dealing with problems as they come is not enough – it is time to ask the hard questions: Where does Israel see itself in the legal arena in five or 10 years? What are the objectives and how does it get there?

The recent ICC decision demonstrates the necessity behind such a mindset.