Ex-US military lawyer: ICC becoming a toothache

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By [Yonah Jeremy Bob](https://www.jpost.com/Author/Yonah-Jeremy-Bob)

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Due to applying its jurisdiction too widely, the prosecutorial arm of the “[International Criminal Court](https://www.jpost.com/Tags/international-criminal-court) is becoming a toothache,” ex-US military lawyer and current Vanderbilt professor Michael Newton said on Monday.

Speaking at the Hebrew University Minerva/ICRC Conference on International Humanitarian Law, Newton argued that the ICC prosecution glossed over years of US investigations into allegations of torturing detainees in Afghanistan and millions of dollars poured into the investigations “as if they did not exist.”

How the ICC prosecution treats countries’ investigations during its preliminary reviews is crucial for Israel, as the ICC decides whether Israel’s justice system sufficiently probed alleged war crimes from the 2014 Gaza War or whether it needs to probe these allegations again.

Newton, who was involved in negotiations that created the ICC and has been involved in a variety of international criminal law tribunals and training worldwide, said the problem was that ICC Prosecutor Fatou Bensouda had misinterpreted the ICC’s Rome Stature to empower her to disregard countries’ prosecutions.

Acknowledging that the ICC’s Rome Statute empowers Bensouda to probe cases where a country fails to do so, he said that Bensouda has taken this too far.

According to Newton, if a country probes allegations using an administrative process and decides that a criminal probe is not appropriate for every allegation, the ICC’s default position should be to accept that.

In contrast, he said that Bensouda has decided that if each individual soldier she thinks should be criminally charged is not charged, and if each individual crime is not as severe as what she thinks it should be, she can then micromanage and second-guess every one of these decisions.

Newton received push back from former Hebrew University Law School dean and Israel Democracy Institute Senior Fellow Yuval Shany, who noted that the premise of the ICC needing to exist is that many countries fail to prosecute their own for war crimes.

Shany added that it was his impression that the ICC prosecution was not in a stage of reducing the number of probes it had taken on having realized it simply did not have the resources to second-guess more than a certain number of countries.

Later at the conference, the [IDF](https://www.jpost.com/Tags/IDF) prosecutor from the Hebron shooter trial, Nadav Weissman  – who has since retired from reserve service – said that Israel’s trial of Elor Azaria had showed that it means business when it prosecutes its own.

Weissman said that the trial ran from June 2016 to July 2017, including the appeal, which showed that Israeli justice moves at a respectable pace and can be “very effective.”

Noting that throughout the trial there were protests by some Israelis against bringing charges against Azaria for shooting dead an already wounded Palestinian terrorist, Weissman said that the act of a country’s own military courts trying their soldiers was important.

He said that only when a country’s own military brings its own to trial might the public in that country view the proceedings as legitimate.

The former IDF prosecutor said this was crucial because the real purpose of the legal process was not necessarily justice in one particular case, but sending the right message to all future soldiers who might consider acting like Azaria: that the law places limits on the use of deadly force.

The conference also featured a number of speakers and attendees who were heavily critical of Israel’s military justice system, and who questioned whether the IDF could credibly investigate its own.

In another panel at the conference, former US military lawyer and Southwestern Law School professor Rachel Van Landingham addressed how the US military justice system could improve its approach and image regarding prosecuting alleged war crimes by its service members.

She said that the US could enumerate “specific war crimes in its penal code, instead of relying on common law crimes in that code that are the same whether committed in Texas as they are on the battlefield in Syria.”

Van Landingham’s point was that when countries do not develop specific charges known as war crimes, the way the system sometimes deals with a military justice case does not necessarily reflect the severity of the case, and that outsiders are more likely to doubt the proceedings’ credibility.