Tiptoeing around the ICC

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Dr. Alan Baker, who used to serve as legal counsel to the Foreign Ministry, remembers Benjamin Netanyahu's enthusiasm. The year was 2002 – the [Second Intifada](https://www.israelhayom.com/2019/12/26/israels-biggest-political-bombshells-of-the-decade/) was wreaking havoc in the streets and the IDF was operating in Arab enclaves in Judea, Samaria, and the Gaza Strip. Netanyahu was at the time foreign minister in Ariel Sharon's government, and Baker was one of a group of Israeli and Jewish legal scholars who were pushing to establish the International Criminal Court in The Hague.

It's no coincidence that Jews were at the forefront of the move to found the ICC. As far back as the 1950s, the idea had been ratting around as a lesson learned from the Holocaust, with the goal being that genocidal murderers would know that they would be held to account. So Israel had already agreed in principle to join the ICC, and all that was necessary was for Netanyahu and the rest of the cabinet to sign off. Netanyahu read the papers and listened to Baker, but as a former ambassador to the UN, he knew firsthand how inherently biased international institutions were. He was concerned that an international entity founded for the highest of purposes would turn against Israel.

Seeing what was to come, and with the US exerting its influence, Netanyahu decided on an about-face in policy, and declared that Israel would not join the ICC. Looking back, that was a wise decision. As bad as the current situation with The Hague is, it would have been much worse if Israel were a member.

Nothing in the outward appearance of the ICC, where I visited a few years ago, indicates that it is a court. Unlike the glorious old palace that housed the International Court of Justice (ICJ), also located in The Hague, the ICC moved to a high-rise office building without any special outward markings a few years ago. When I visited in 2015, a guide supplied by the court led me through the various floors on my way to meet with Phakiso Mochochoko, head of the complementary legal division and one of chief prosecutor Fatou Bensouda's deputies.

"I don't know about Israel's experience [with international institutions], but I can say that there are currently processes underway in the court. The charter's laws and principles are the only thing that guides us," Mochochoko told me.

"The processes are clear, fair, and independent," he said.

Mochochoko went on to tell me that "Even if the prosecutor were a friend of Palestinian leaders, she could not pursue a case because they are her friends. That's not how it works. There are judges."

It seems he knew more than I did about a friendship between the prosecutor and the Palestinians.

Looking for defense

In the 15 years it has been active, the ICC has only opened 11 investigations into suspected war crimes or crimes against humanity, nearly all of which were in Africa. A total of 44 people were accused and arrest warrants were issued for 36 of them. Only six of the suspects were put in prison. But plenty of investigations have ended without any trial due to lack of evidence or for other reasons.

The criminals from Africa and Europe had records that were different, to say the least, from those of IDF officers or Israeli politicians who are now suddenly in danger of being investigated. Because even if one opposes the Israeli government, its leader cannot be accused of killing 100,000 people, Joseph Kony of Uganda – one of the first criminals tried in the ICC – was accused of doing. And even though it goes against common sense, Bensouda has made it clear that if it were up to her, this is what she would do. She deems Kony and Netanyahu to be equal.

We need to go back a bit to understand why dragging Israel to The Hague is a natural step for the country's enemies. Since the 1967 Six-Day War, Israel has been the only one to claim that Judea, Samaria, the Gaza Strip, and – of course – both halves of Jerusalem are "disputed." According to the vast majority of nations, the heart of Israel is "occupied territory." Even the most supportive American administration in history is not throwing off the definition "occupied territory," preferring instead to avoid taking a stance.

From whom did Israel take these territories? The world's answer, factually ridiculous though it might be, is "the Palestinians," even if the territories in question were Jordanian. International politics and law, which are intertwined, come down on Israel in everything have to do with Judea, Samaria, and east Jerusalem. If Israel is tried because of its retention of these territories, it would have a hard time finding international legal scholars who would defend it. The Intifadas, the terrorism, the Palestinian recalcitrance, and the internecine divide between Judea and Samaria and the Hamas-controlled Gaza Strip do nothing to keep international law from deciding against Israel. Bensouda is just expressing an accepted position. The prosecutor isn't even trying to make the process appear fair; years ago, she published a piece in The Guardian in which she invited the Palestinians to join the ICC, and even explained in detail how to do so. She then proceeded to dismiss all of Israel's arguments.

Over the years, Bensouda has taken care to maintain warm ties with the Palestinians. For example, she informed PA Foreign Minister Riad Malki ahead of time that she intended to announce her decision on the Palestinian issue, but kept the information from Israel. Two weeks ago, Malki was interviewed on the Voice of Palestine radio station and said that "The court's preparatory probe into the [Israeli] settlements is nearly complete."

Jerusalem knew nothing about it. Only in mid-December did Israel learn about any of it, long after the Palestinians. The Prime Minister's Office, the Foreign Ministry, and the Justice Ministry tried to get out ahead of it, and last Friday summoned the Israeli and foreign press to an urgent briefing. But it was too little, too late.

No price was paid

The failure to wage a media battle against the prosecutor is symbolic of the entire war. For 10 years, Israel has been tiptoeing around the most important issues out of fear of The Hague. A series of decisions on defense and security and about the settlements were weighed against the question, "What will they say in The Hague?" That was the thing Netanyahu, as well as former Attorney General Avichai Mendelblit (who is an expert on the ICC) feared most.

Back when Mendelblit was Netanyahu's cabinet secretary, the two adopted a policy of "dealing shrewdly with them," as Exodus 1:10 says. Israel argued that the court was biased, but tried to persuade it by "sending messages." Israel was furious when the Palestinians joined the court, but refrained from making them pay a price. Representatives of the ICC continued to visit Israel, unchallenged. Every briefing said that the IDF was the most moral army in the world, but in effect its soldiers and commanders were attached to lawyers, with the explanation that this would protect them from future investigations.

And hanging in the air is Khan al-Ahmar, a symbol of the crashing failure of Israeli policy. The prime minister has promised dozens of times to evacuate the illegal Arab outpost, but did not act on the decision because of the threat of the ICC.

Despite the echoing failure, at meetings of an inter-ministerial staff this week one could still hear naïve, propitiatory voices. Some suggested waiting to see whether or not the judges at The Hague would agree with the prosecutor, as if any other outcome were possible. Others argued that the US policy of punishing the court – President Donald Trump revoked US visas from its representatives – still hasn't proven effective.

Israel has only one option left when it comes to the ICC, which is threatening its most vital self-defense interests. It must move from the language of law to the language of power. The court in The Hague does not dare tangle with powerful nations that everyone agrees attack human rights, like Russia or China. Rather than Israel's legal squirming, perhaps Bensouda should be put in the position of having to explain to her staff why their computers crashed one morning or where their archives vanished. These are only a few of Israel's options.

Netanyahu said this week that Israel would fight the decision to open an investigation with "every tool at our disposal." Well, unlike his declarations about Khan al-Ahmar, this statement should be followed through on, and sooner rather than later.