The ICC is playing politics by targeting Israel

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Sovereignty, that old-new friend, is in vogue again thanks to Brexit and the advances made by nationalists across Europe and the United States. Those of us who lament these developments should not regret the reassertion of national sovereignty, for it is intimately linked to democracy and self-determination and provides domestic legitimacy for the kind of liberal, cooperative world order we wish to see. If you want a strong international community, you need to have strong, confident nation-states in which people believes their country can be active in the world without losing its sense of self.

Sovereignty is at the heart of the International Criminal Court’s ruling that it enjoys the jurisdiction to investigate alleged war crimes in eastern Jerusalem, Gaza, and Judea and Samaria. This has been coming for some time, with chief prosecutor Fatou Bensouda having [indicated](https://www.theguardian.com/law/2019/dec/20/icc-to-investigate-alleged-israeli-and-palestinian-war-crimes) in 2019 that she wanted to open an investigation in what she [calls](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) ‘Palestine’, more than 12 months before the court established whether it had jurisdiction.

The pre-trail chamber [opinion](https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF) is keen to stress that it would be looking for potential ‘war crimes’ committed by Israel or the Palestinians. But anyone with a passing familiarity with elite attitudes to the Middle East conflict knows which of the two is likely to face greater scrutiny. The ICC can be expected to pronounce on everything from voluntary civilian settlement of Judea and Samaria to Israel’s defensive actions against Hamas in Gaza.

The United States seems to recognise what is afoot. A spokesman for the State Department [said](https://www.timesofisrael.com/us-objects-to-icc-jurisdiction-decision-on-probing-israel-hamas-for-war-crimes/):

‘The United States objects to today’s International Criminal Court decision regarding the Palestinian situation. Israel is not a state party to the Rome Statute. We will continue to uphold president Biden’s strong commitment to Israel and its security, including opposing actions that

Australia’s foreign minister Marise Payne has [expressed](https://www.foreignminister.gov.au/minister/marise-payne/media-release/icc-pre-trial-chamber-decision-jurisdiction-relation-situation-palestine) ‘deep concerns’. Noting that ‘Australia does not recognise a 'State of Palestine’', something Canberra made clear to the pre-trial chamber during its deliberations. Payne says ‘Australia does not therefore recognise the right of any so-called 'State of Palestine' to accede to the Rome Statute’.

The court’s decision not only undermines the sovereignty of Israel but could also affect the sovereignty of countries like Australia, which has ratified the treaty but now finds the court redefining that instrument without Canberra’s consent.

One voice of protest is noticeably absent: ours. UK governments, Labour and Tory alike, typically bend the knee to any global body that comes bearing the phrase ‘international law’. No one wants to be seen to be against something so obviously virtuous, but claiming to be upholding international law and actually doing so are not the same thing.

There is the ideal of international humanitarian law, much of it codified in the wake of the Holocaust and not a matter that the Jewish state needs to be lectured on by anyone; and then there is the instrumentalisation of international law by activist jurists, prosecutors, academics and NGOs, who interpret and apply global rules and norms in a fashion that suits their political preferences. In the latter instance, international law is, by Clausewitz's definition, a ‘political instrument, a continuation of political commerce, a carrying out of the same by other means’.

This is judicial activism on a global scale and the UK should oppose it — and loudly — for two reasons. For one, there is the principle that a body created by a treaty should not claim powers which that treaty does not grant it. The Rome Statute does not empower the ICC to prosecute non-party states, except where such states ‘accept the exercise of jurisdiction by the court’.

Instead the [Rome](https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf) Statute gives the court jurisdiction where ‘the state on the territory of which the conduct in question occurred’ is a ‘part[y] to this statute’, but Israel has not ratified the statute and the Palestinian Authority, which [acceded](https://www.icc-cpi.int/palestine) in 2015, is not a state. If the UK is for international law, it should be against this lawless behaviour. I have asked the Foreign, Commonwealth and Development Office for its view but have yet to hear back.

The second reason is one of self-interest. The ICC has previously probed the UK over the Iraq war. And while it decided not to open a prosecutorial investigation, it [said](https://www.icc-cpi.int/iraq) it made this decision ‘without prejudice to a reconsideration based on new facts or evidence’.

Mauritius [threatened](https://www.bbc.co.uk/news/world-50924704) to take the UK to the ICC over the depopulation of the Chagos after a 2019 advisory [opinion](https://www.icj-cij.org/public/files/case-related/169/169-20190225-SUM-01-00-EN.pdf) by the International Court of Justice called Britain’s ongoing occupation of the islands ‘unlawful’ and demanded the UK leave in order to ‘complete the decolonisation of Mauritius’. Argentina would have more to fear from any review of the Falklands war but Britain might not wish Fatou Bensouda to go raking through the decision to sink the Belgrano, for instance. While the UK is a signatory to the Rome Statute, it has an interest in discouraging politically-motivated prosecutions against unpopular countries over unpopular military actions. Israel today, Britain tomorrow.

The UK believes in a rules-based global order — except in certain [specific and limited](https://www.bbc.co.uk/news/uk-politics-54073836) ways — but it is a mistake to think of the ICC like a domestic court. It is a political body and its decision to prosecute or otherwise is shaded by concerns that would not be permitted to influence a High Court judge or Supreme Court justice. Hence the ICC has not put Syria (which is not party to the Rome Statute) in the dock, because [Russia](https://www.internationalaffairs.org.au/australianoutlook/justice-syria-international-criminal-court/) would veto any attempt by the UN Security Council to refer the atrocities committed by the Assad regime to the panel. Israel is a much easier target, loathed as it is by those who resent the notion of Jewish sovereignty in the Jewish homeland. It cannot hope to receive a fair trial.

Israel is not perfect. No country is. But it is home to one of the most activist judiciaries in the democratic world and its Supreme Court is proudly a thorn in the side of the defence minister of the day. Bensouda could scarcely be more adversarial towards Bibi than Bagatz already is. But her determination to initiate an investigation even before jurisdiction was decided is a reasonable indication of how she intends to proceed. Given the choice, I would sooner be a Palestinian terrorist in the dock of an Israeli court than a law-abiding Israeli official called before The Hague.

No doubt the court yearns to see an end to the conflict, as do we all, but its apparent attempt to jump-start that process is as knuckle-headed as Obama’s ‘daylight’ strategy towards Israel or Downing Street’s endless scolding over settlements. This train of thought starts from the flawed assumption that Israel is the impediment, when the immovable obstacle to a Palestinian state remains the Palestinians. This is why Donald Trump’s pro-Israel stance was also pro-Palestinian. By disabusing the Palestinian leadership of the self-harming delusion that they need only hold out a little longer and the Zionist entity would be gone, Trump forced them to confront the choice before them: compromise for statehood or suffer in glory. No one — not Barack, Biden, Boris nor even Bensouda — can end Palestinian suffering, only they can. It is for the Palestinians to claim their own sovereignty at the negotiating table.

An ICC vendetta against Israel will not achieve dignity, prosperity and self-determination for the Palestinians. It will only promote the suspicion that the ICC imperils national sovereignty in pursuit of political ends.