Is the ICC a threat to Israel? Here's what is at stake: - opinion

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On 3 March 2021, the prosecutor of the International Criminal Court announced that she was [opening a formal investigation](https://www.jpost.com/israel-news/strategic-affairs-ministry-unveils-website-to-fight-icc-jurisdiction-662427) into the situation of the “State of Palestine.”

This follows a much-awaited decision, on 5 February 2021, when Pre-Trial Chamber I of the ICC ruled that Palestine is a state (in the context of the Rome Statute, the founding treaty of the ICC), and that based on various UN declarations, the territory to be considered for the purposes of an investigation is the “territory occupied by Israel since 1967 – namely, Gaza, east Jerusalem and the West Bank.”

There would be [much to say](https://www.jpost.com/israel-news/icc-is-probing-israelis-for-war-crimes-what-happens-now-analysis-660859) about the deficiencies of the February 5 decision itself as a basis for the prosecutor to move forward with the investigation. The actual discussion on the merits is less than 20 pages, despite the diversity and complexity of issues that the judges had to deal with. The judges ultimately chose to rely exclusively on an arbitrary selection of nonbinding political pronouncements from the UN to determine Palestine’s statehood and territory and decided to give no consideration to the Oslo Accords, despite these accords constituting the very basis of the Israeli-Palestinian relationship in the past 25 years.

Beyond the legal analysis of the decision, many among those who support Israel believe this decision is evidence that the ICC is biased against Israel and antisemitic. Prime Minister Benjamin Netanyahu called the judges’ decision “pure antisemitism,” a criticism he reiterated after the prosecutor’s announcement. More generally, for many, especially in Israel, ICC involvement is seen as a threat to Israel.

As we have argued elsewhere, we don’t believe that analyzing these issues through the lens of antisemitism or anti-Israel bias, irrespective of the actual reality of these accusations, is the most efficient way to approach the ICC strategically. It leads to refusal to engage with the Court and therefore to de facto abandoning the narrative battleground to those who wish to use the ICC to attack Israel.

We also believe that such an approach shows a lack of understanding of the way the ICC operates on a number of levels. To take a futile but illustrative example: many critics of the decision pointed out that the decision was issued on a Friday afternoon, suggesting that the ICC had done it on purpose as an affront to all the Jews of the world getting ready to celebrate the Shabbat. Yet, all ICC practitioners and followers know that the Court regularly issues major decisions on Fridays. One can question this practice, but it has nothing to do with an anti-Israel bias.

To understand whether and how the ICC constitutes a threat, it is crucial to take a step back and reflect on the nature of the institution itself. First, as a court of justice and not merely a court of law, the ICC by definition produces legitimacy and illegitimacy through its decisions. Going further, the ICC is symbolically the first permanent international criminal court with a universalist ambition (if not yet a universal reach) in the history of mankind. It is founded on moral principles that aim, to put it simply, at ending impunity for gross human rights violations, and which are expected to give the ICC a moral aura that radiates throughout the institution, its daily work and its decisions.

The State of Israel is therefore facing a court of justice which is more than a court: it is an emanation of Western good conscience, deems itself to be authorized to say what is “good” or “bad” conduct on the international level and therefore to judge which conduct is legitimate or illegitimate.

This Western good conscience is materialized by the central role of the victim in the process. The ICC is structured around the suffering of victims in whose name the fight against impunity is led. This central moral and procedural role of the victim allows them, in the name of their suffering, to act as a sort of meta-watchman of the work of the prosecutor and as a judge of the actions of the judges.

The prosecutor plays a particular role: she is perceived as the spearhead in the fight against impunity and can claim to act in the name of victims, thus cloaking herself with a higher moral authority.

This means that there is a deceptively simplistic idea that if one is against impunity, one must necessarily support the prosecutor, and already denounce those who are merely under investigation as acting outside of what is morally acceptable, before any formal judicial decision.

This is, of course, a negation of due process and ignores the fact that the prosecutor is simply one party to the proceedings and cannot be deemed to possess absolute truth.

Another consequence is that all those who support the Office of the Prosecutor (states, NGOs, etc.) in a given investigation can mechanically try to claim the same moral authority as the prosecutor, which they can then use as a sort of “moral shield” against any critics who might legitimately question their underlying political motives.

This automatic support for the prosecutor has political consequences, even before any trial, in terms of the denunciation of the State of Israel. This is where the strategic threat lies: Any action of the Court may impact the political, cultural and economic relations between Israel and the outside world.

More specifically when it comes to Israel, the ICC constitutes not only a strategic threat, but also an existential one. Indeed, historically, what founds the acceptance of the State of Israel for a number of stakeholders of the international community is not its historical legitimacy, but its moral legitimacy as a country of victims. As soon as the Court would say that the victims are transformed into perpetrators, then, for these stakeholders, the whole basis for the existence of Israel would crumble. And that is the goal of Israel’s opponents.

THIS UNPACKING of the nature of the strategic and existential threat that the ICC constitutes for Israel is key to determining how the State of Israel should position itself vis-à-vis the Court.

We believe that Israel does not have the luxury of ignoring the Court, with the idea that by not engaging, it will be able to denounce any decision as being itself illegitimate. Such an attitude is ill-founded because, deep down, it presupposes an equal playing field.

On the contrary, Israel must treat what is happening at the ICC with the utmost seriousness and avail itself of all possible avenues to challenge, in the most professional way, the technical allegations leveled against Israel and its leaders and to propose a counter-narrative.

In this way, Israel can actually benefit from the legitimacy that the ICC produces by its very existence to strengthen its own positions and narratives.

Approaching the ICC with casualness and disdain will have as a consequence that the illegitimacy of Israel will become permanently crystallized, which would then lead to a weakening of the state.