# Israel knows how to talk to ICC without legitimizing it

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Israel knows how to strike the balance between discreetly talking and trying to influence bodies like the International Criminal Court versus giving them legitimacy to persecute the Jewish state, former IDF deputy Military Advocate-General Col. (ret.) Eli Bar-On has told The Jerusalem Post.

Bar-On retired just two years ago, which means that he was the IDF’s No. 2 lawyer during the 2014 Gaza war, which the ICC is probing, and during much of the time period when Jerusalem and The Hague were feeling each other out.

The Post cannot reveal all of the quiet contacts Bar-On has had with international legal officials over the years, but when he speaks about what can be pragmatically achieved through such contacts, he speaks with a rare level of authority.

He asked rhetorically, how can we have quiet contacts with international legal officials who seem out to get us?

Answering his own question, the former deputy military advocate-general said, “Israel knows how to do this pretty well. There are decent tools to do this discreetly with them. There is a spectrum between a complete boycott of them and full cooperation – there are lots of points in between.

“There are international organizations and human rights bodies that will not speak up about injustice to Israel, because they are political tools and their process for making decisions is tainted. Still, there is a value to finding ways to back-channel with them,” Bar-On said.

Explaining further, he stated, “There are messages you can only do through direct in-person dialogue. And there is something very antagonizing about not speaking at all.”

In his no-nonsense manner, he noted, “These are people making decisions which impact us. This is a fact that there is a probe. If we can slow it down and impact the political decisions, so they know what our issues are with them, and where they are making mistakes – if there is a way to do this, there is no reason not to go and give them this data.”

There are third-party individuals as well as civil society organizations who know how to speak with both the Israeli side and groups like the ICC, said Bar-On.

Outflanking those who would impose limits on whom Israel talks to, he said, “Even with Hamas or Hezbollah, you have plenty of ways to convey accurate messages through third parties. It is a great way to defuse tensions. Or someone else speaks to someone for me and I deny it and say he did this himself.”

ICC Prosecutor-elect Karim Khan

“I must admit I found it hard to understand the optimistic reactions in Israel about Karim Khan. I don’t believe there is a basis to think he will act in a better way for Israel than [current ICC Prosecutor Fatou] Bensouda did,” he emphasized.

Pressed that as a defense lawyer, Khan might have greater sympathy toward defense arguments about holes in cases, even if he is not particularly a friend of Israel, he said, “So he was a defense lawyer. So he knows all of the tricks, he knows how the defense maneuvers and acts, and he knows how to combat” these defense tactics.

In other words, this would not necessarily help Israel.

“He would not have merited this amount of support [from the ICC’s member states who are not sympathetic to Israel] if they thought he would have a polar opposite view” about going after Israel.

“People were relieved with Khan compared to Fergal Gaynor from Ireland, who represented the victims from Palestine, who could have been appointed. He would have had a conflict of interest,” he stated.

Bar-On stressed, “I have nothing against his integrity, but no one knows why some think he’s better for Israel.

“I was very surprised the ICC decision was published so fast,” he said. “I think Bensouda did it with Khan’s consent. Maybe he pushed her to do it. Maybe he didn’t want to start his term with pressure against opening a criminal investigation. Now, he can decide the pace and how to do it, which is basically what she wrote in her decision.”

At the same time, Bar-On remains pro-dialogue, saying, “It is very important that we find a way to engage him, even if not openly. There is no reason to antagonize him.”

Bar-On suggested Khan would take his time before making any major moves, given “the pandemic, limited resources, the already existing workload, and that it is a complex probe both regarding factual and legal issues.

“We need to speak to him and let him see how Israeli legal processes work, to be impressed with our integrity and legal professionalism. He comes from the UK, which has a legal system which in many ways is very similar to ours and sets the foundations of our legal system,” he said.

He added that the British connection is even more important since recently Bensouda closed a criminal war crimes probe into allegations of violations of international law by members of the British military who fought in Iraq. This was despite the fact that the British legal system closed almost 100% of the cases it examined.

“I think that the standards that Bensouda set for complementarity in this case, if implemented equally in our case, will ensure that we also achieve the complementarity” standard which bars ICC intervention unless a nation does not investigate itself, said Bar-On.

Continuing, he said, “Our mechanisms [for self-investigation] are at least as good as those of the UK. I met with people and military justice officials from all over the world – the US, Britain, Australia, the EU states and others – and I can assure you our mechanisms are among the best in the world.”

He said the ICC would be making a giant mistake if it went after the IDF.

IDF alleged war crimes dilemmas

Bar-On was pressed that the IDF did a vast number of criminal and preliminary probes of its soldiers relating to the 2014 Gaza war, but not of its higher-command-level echelon.

This could open up the IDF to ICC probes of higher commanders, even if the lower soldiers might be cleared by probes of them that Israel performed.

Bar-On responded that the IDF legal division during his tenure probed any instance “if there was a suspicion of a violation of the law.... If the orders issued are a problem and constitute a violation of the law, then we would check. But if there was no problem, then not.”

He said the ICC’s work will not be serious and thorough without understanding Israel’s decades of work, learning lessons and efforts to improve which it has undertaken to reduce civilian casualties and enhance compliance with international law in war.

Furthermore, he said the ICC must understand all of Israel’s past military history to understand the rationales for its tactics and procedures.

From an independence perspective, he said it is crucial that the military advocate-general does not report to the IDF chief, and his decisions can be reviewed only by the attorney-general and the court. He said in most Western armies, their legal officials have less independence.

“I say this unequivocally: if they are fair, we can remain calm as far as they look into the way we examine and investigate our military operations,” he said.

Settlements as war crimes?

If Bar-On is optimistic about the ICC and the IDF, the settlements are another matter.

He said, “I believe we have a case to make regarding the settlements, but it will be very hard to convince others, because there is broad agreement globally that the settlements are illegitimate and illegal according to international law.”

In contrast to probes of the IDF, which also worry other powerful Western militaries and where Israel has broad moral support, “with the settlements, we have a gap. The whole time, these Western countries were against the settlements. They always told us they violate international law. Even the US did not veto UN Security Council Resolution 2334 in 2016,” which condemned the settlements as illegal. (The ICC Pre-Trial Chamber also referred to this resolution in its decision).

Moreover, “Even if we draft the Western world to oppose an [ICC] probe, with the settlements they will be less supportive, because they have a strong political opposition to the settlements. This is a real and severe problem.”

Bar-On said, “Even people who think that the settlements are not good for Israel need to understand that the Rome Statute that labeled them as war crimes and the presumption that the court can exercise its jurisdiction over Israel, which never joined the court, is just wrong. To push this into being in the same sentence along with genocide and mass butchering, torture and rape – to equate [these with] building houses in a certain area” is nonsensical.

Bar-On said that “one tool, besides the legal arguments, is to gain legitimacy at the negotiating table. Negotiations with the Palestinians could help convince the ICC to rethink whether it is in the interests of justice” to mess up those negotiations with a war crimes case. “Will it help? I don’t know,” but he clearly viewed it as worth a try.

Arrest worries?

Despite all of the above, Bar-On said, “Right now, we do not need to worry about arrests,” saying this would be an issue only at a later stage.

However, whenever that point might come, he said Israel could mitigate the danger of arrests when traveling overseas by arranging a clarification with the particular government beforehand.

“No state wants to do an extradition; they do not want the headache,” he explained.

Bar-On is more worried about top officials possibly taking private foreign vacations without checking.

Even in that instance, he said “we have the best professional staff at the Justice Ministry, Foreign Ministry and the IDF” for handling these issues.

He also returned to the idea of using diplomatic moves to address some problems where legal moves might be insufficient.

“This is the reality. The ICC is supposed to be independent, but they also weigh political concerns. The Trump sanctions weighed on them. They waited until he left,” to decide against Israel.

“The key is a mix of approaches,” he concluded.