The ICC and Israel: Damocles’ sword ready to fall?

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The history between Israel and the International Criminal Court is a long one. As soon as the court started functioning, the Office of the Prosecutor (OTP) received numerous requests from human rights organizations asking it to investigate the Israeli-Palestinian conflict in order to indict Israel.

The stakes are extremely high: Their ultimate goal is to challenge – through a discussion of Israeli military actions and of the issue of settlements – the legitimacy of the State of Israel itself.

The way that Israeli authorities have dealt with these actions is not the object of this opinion piece. The reality is that today, there are ongoing proceedings in relation to the “situation in the State of Palestine,” in which judges in July 2018 decided to put programs in place “for the benefit of the victims and affected communities in the situation in Palestine.”

This could be seen as revealing that the judges have already assumed there are victims of international crimes in the situation, putting pressure on the prosecutor.

How did it get to this point? The current phase of the proceedings started in January 2015, when the prosecutor opened a preliminary examination. In December, the OTP considered that “the Prosecutor intends to complete the preliminary examination as early as possible.”

This means that it has gathered sufficient information on the alleged commission of crimes to proceed with a decision that moves forward an investigation, a decision that is a permanent sword of Damocles over Israel.

Some observers who see the ICC as a threat might consider last month’s ICC Afghanistan decision to be a positive development. What happened? On April 22, the court rejected the prosecutor’s request to be authorized to open a formal investigation of the situation in Afghanistan. This decision came weeks after the United States threatened sanctions against any ICC personnel involved in an investigation of US citizens.

The judges concluded – despite finding reasonable grounds to believe crimes had been committed – that it would not be in the “interests of justice” to proceed further. They found that due to the difficulties faced by the prosecutor in carrying out effective investigations (because of the security situation and the lack of cooperation from relevant states), the prospects of being able to follow through with prosecutions were minimal.

A BASIC APPLICATION of this decision to the “situation in the State of Palestine” could lead to the conclusion that a formal investigation is less likely to occur. Indeed, the prosecutor is faced with similar difficulties in obtaining cooperation from relevant stakeholders and conducting investigations. From a political perspective, some might have felt reassured that the ICC would appear to yield to threats issued by the United States, especially given that US authorities have explicitly indicated they would also apply sanctions should any action be taken against Israel. These circumstances could lead to believing that Israel is now safe.

However, it would be hasty to think so.

First, it should be pointed out that the prosecutor will arguably not be under any obligation to obtain authorization from a pre-trial chamber to open a formal investigation. Indeed, the situation was referred to the prosecutor by what the court and the OTP consider to be a state party: Palestine, which acceded to the Rome Statute in January 2015 and submitted a referral to accuse Israel in May 2018.

This means that the prosecutor can probably move forward without any scrutiny by a pre-trial chamber and therefore no one can force the prosecutor to apply the Afghanistan decision.

Second, this decision was issued in a particular context which is not readily transposable to the Israel-Palestinian situation. Indeed, the prosecutor has been regularly communicating her desire to move forward with an investigation since the preliminary examination was opened in 2015. Moreover, it is one thing for a chamber to decide not to authorize an investigation; it is another to imagine that the prosecutor will adopt the same approach, particularly in such a sensitive situation.

The ICC should all the more be considered seriously, given the recent May 6 judgment on immunities, where it was found that high-ranking officials of all states, even if they have not joined the court, could not benefit from immunities from arrest and surrender to the ICC.

This judgment can been heavily criticized because it violates basic principles of treaty law and long-establishing rules on immunities.

However, it is today the applicable law of the court and has far-reaching consequences: It means that Israeli officials who travel on the territory of a state that has joined the ICC (all of Europe, most of Africa and Latin America) can never be sure that they will not be arrested on the basis of an arrest warrant issued by the court.

As a result, it would be a strategic error on the part of Israeli authorities to believe that Israel is out of the woods following the Afghanistan decision. It would be in their best interest to be ahead of the game and start anticipating how best to defend Israeli interests, which might be affected in any legal proceedings at the ICC.
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