No partner in The Hague

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Palestinian Authority President Mahmoud Abbas' spokesman recently announced the PA's intent to demand that the prosecutor of the International Criminal Court at The Hague file charges against senior Israelis for the "crime" of approving the construction of 650 residential units in Beit El.

This recent demand for criminal proceedings against Israelis joins a list of dozens of Palestinian complaints to the ICC about imaginary "crimes" of Israeli politicians and soldiers. The Palestinians have not held back against allies of Israel, and several months ago, they demanded the filing of criminal charges against US Ambassador to Israel David Friedman for the "crime" of verbally supporting the [potential legal rights of Israel in Jerusalem and Judea and Samaria.](https://www.israelhayom.com/2019/06/17/greenblatt-israel-has-the-right-to-annex-parts-of-west-bank/)

The Palestinian demands for criminal charges against Americans will go unfulfilled; alas, the same cannot be said of the complaints against Israelis. The difference between the cases stems not from a stronger legal case for the Americans but rather from a superior strategy that is based on understanding that the ICC is a hostile political organization. Israel, by contrast, is guided by a failed strategy that insists on viewing the ICC as a legitimate legal institution.

The American strategy expresses itself in three areas. First: A complete refusal to cooperate with the ICC, anchored in US legislation. Second: A campaign to delegitimize the ICC that includes transferring US responsibility for dealing with the ICC to security officials rather than lawyers and presenting the ICC as an undemocratic, unaccountable, illegitimate institution that endangers the sovereignty of the United States and the constitutional rights of its citizens. Third: Concrete threats against The Hague, beginning with diplomatic and economic sanctions, through bilateral agreements with other countries blocking cooperation with the ICC against Americans, and ending in a threat to liberate Americans with force should they be arrested at the request of The Hague.

The American policy has proved its success. The US responded to the ICC prosecutor’s request to open a full investigation of the alleged crimes committed by American soldiers in Afghanistan by canceling the visas of ICC teams and threatening additional steps. Soon after, The Hague judges decided to close the case and terminate the investigation on the grounds that, without American cooperation, there could be no reasonable expectation of convictions. Kenya and other countries have won similar victories when they refused to cooperate with an ICC that is viewed, even by its supporters, as a failure that suffers from political bias. In the ICC, there is a great fear of not only of further loss of legitimacy but also of more cases collapsing in light of the noncooperation of relevant states.

It is in this light that we can understand why Israel keeps failing with the ICC. The ICC prosecutor, who has already surrendered to Palestinian demands and opened a preliminary investigation against Israeli "criminals," can be expected to request permission from the ICC judges to open a full investigation. The case concerning alleged Israeli crimes in the Mavi Marmara flotilla incident remains open despite its legal weakness. All this is the result of an Israeli strategy that rewards the ICC with legitimacy instead of fighting it.

Israel’s state attorneys are engaging in "informal" cooperation with ICC lawyers to try to convince them that the ICC lacks legal jurisdiction to act against Israelis. These claims are correct but the American experience shows that they will be ineffective. Israel’s lawyers arranged for ICC teams to enter Israel even though canceling visas has proved effective. Israel has no legislation that warns those who would arrest Israelis, and Israeli lawyers tasked by the state with dealing with the ICC challenge are convinced that legal responses that failed everywhere else in the world will suddenly come to Israel's aid.

Worst of all, these lawyers are blocking Israeli policy actions out of fear of future Palestinian complaints to the ICC. In doing so, they are encouraging the ICC to escalate its moves against an Israel that is proving weak and conciliatory. The ICC already has gathered enough complaints against Israelis; blocking further complaints cannot help, and is, at any rate, impossible. And it is important to remember that in nearly two decades of operation, the ICC has arrived at final and successful convictions in only two cases. A country that surrenders its state interests out of the fear of embarrassing criminal proceedings comes out at a loss.

It’s not too late to embrace an effective Israeli strategy vis-à-vis the ICC. It requires only determination to fight a political battle, ending the lawyers’ treatment of the ICC as a professional legal institution, and an uncompromising struggle against the legitimacy of the failed institution.