

Offense is the Best Defense: Israel's ICC Strategy

Adv. Avraham Russell Shalev



May 2024

On May 20th, 2024, the ICC Prosecutor applied for arrest warrants against Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Galant. The Prosecutor also applied for warrants against Hamas arch-terrorists Yahya Sinwar, Mohammed Deif and Ismail Haniyeh. Such arrest warrants mark a new zenith in the diplomatic assault against the Jewish state that has been steadily escalating since Hamas' murderous attack on October 7th, 2023.

Officially, Israel rejects the ICC's jurisdiction over Israeli nationals as Israel is not a member of the Rome Statute and no sovereign Palestinian state exists.¹ However, there are worrying indications that the Israeli government may adopt an unofficial policy of cooperation with the Court, to disprove the allegations made against Israeli conduct in Gaza. Signs of a potential détente with the ICC can be gleaned from ICC Prosecutor Karim Khan's unprecedented visit to Israel in November 2023. Although his visit was not preceded by any ICC or Israeli government press releases, it was the subject of extensive secret talks between Israel and the Prosecutor's Office for several months at least.²

This paper argues that collaboration with the ICC will not reduce the very high chances of arrest warrants being issued against Israeli officials – but will give those charges great weight and legitimacy when they come. Instead, Israel must adopt a policy of non-cooperation and even offense. The ICC has never successfully prosecuted a case without the cooperation of the accused's state.

The ICC was recognized as a potential strategic threat against Israel from the drafting of its foundational Rome Statute. In the more than two decades that have passed, the

1 "Israel rejects the ICC's decision regarding the scope of its territorial jurisdiction on the Israeli-Palestinian conflict", Ministry of Foreign Affairs, 07.02.2021. <<https://www.gov.il/en/departments/news/israel-rejects-icc-decision-7-february-2021>>

2 Bob, Yonah Jeremy. "Exclusive: The Secret Dialogue between ICC and Israel, Months of Negotiations Led to Surprise Visit." *The Jerusalem Post* | *JPost.Com*, www.jpost.com/israel-news/article-775955. Accessed 05 May 2024.

ICC has shown itself determined to prosecute Israelis, even contrary to its own rules, procedures, and general international law. The ICC has fully cooperated with the Palestinian weaponization of international institutions to criminalize Israeli self-defense and impose unilateral concessions on Israel.

It is incumbent on Israeli policy-makers to fully internalize the fact that the ICC is a political body and that no legal arguments can deter the Court from prosecuting Israeli nationals. As the State of Israel officially rejects the ICC's jurisdiction over Israeli nationals, any legal proceedings are invalid and illegitimate and must be treated as an assault on Israeli sovereignty. As such, this paper sets out the ICC's long history of systematic anti-Israeli discrimination; reviews the Court's role in the Palestinian diplomatic campaign against Israel; provides models of successful campaigns of non-cooperation adopted by other states vis-à-vis the ICC, and, concludes with practical strategies to thwart potential anti-Israel arrest warrants.

▶ 1 | The ICC's Institutional Anti-Israel Bias

A | The Criminalization of Jewish Communities in the Rome Statute and ICC Practice

A review of the ICC's relationship towards Israel over its two decades of existence demonstrates a fundamental bias and double standard toward the Jewish state. This bias is not a function of any specific prosecutor. Rather, it is an institutional feature, found even in the Rome Statute, the ICC's foundational document.

Owing to the Jewish people's tragic history during the Holocaust, the State of Israel was among the early supporters of the idea of an international court designed to punish the most heinous international crimes.³ However, Israel initially refused to sign the Rome Statute as it became apparent that the Arab states had politicized the Rome Conference and introduced language that departed from existing international law specifically to criminalize Jewish communities in Judea and Samaria.

At the insistence of the Arab states, Article 8(2)(b)(viii) adopted the following definition of population transfer as a war crime: "*The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this*

3 See Statement by the Head of the Delegation of Israel Judge E. Nathan, Rome Conference, Official Report Vol. II, 17 July 1998, p. 122. Israel's declaration upon signature of Rome Statute on 31.12.2000. [[Here](#)]

territory.”⁴ The terms “directly or indirectly” were added to the original definition of transfer found in the Fourth Geneva Convention, which reads: “*The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.*”⁵

The relevant prohibition in the Fourth Geneva Convention was adopted in response to mass forcible deportations and population transfers conducted by Nazi Germany, the Soviet Union, and their allies during the Second World War.⁶ The Arab states demanded that the prohibition’s language be modified to tailor it to criminalize Israelis freely choosing to live in Judea and Samaria. It was widely understood at the time that the “population transfer” prohibition in the Rome Statute was specifically designed to target Israel.⁷

Since then, the ICC has demonstrated that Article 8, drafted solely for Israel, will also only be applied to Israel. The Turkish government has encouraged large-scale settlement of Turkish citizens in occupied Northern Cyprus. Even though the ICC has jurisdiction over Cyprus going back two decades, the ICC Prosecutor has consistently neglected to act on complaints by Cypriot refugees about Turkish violations of war crimes based on Article 8.⁸

The ICC’s investigation into Russia’s invasion of Crimea in 2014 and of the rest of Ukraine in 2022 is also illustrative. In November 2016, Ukraine’s chief prosecutor announced that his government documented the transfer of over 72,000 Russian settlers to the Crimean peninsula.⁹ The ICC has opened an investigation against Russia based on Ukraine’s ad hoc acceptance of the Court’s jurisdiction into events beginning in November 2013 and onward. However, despite the Prosecutor’s cursory mention of Russia’s settlement enterprise in Crimea in the ICC’s 2017 Preliminary Examination, the issue is nowhere to be found in its final 2020 Preliminary Examination Report.¹⁰

4 Emphasis added

5 Fourth Geneva Convention, Article 49

6 ICRC Commentary to the Fourth Geneva Convention (1958), Article 49. [[Here](#)]. See Rostow EV. *American Journal of International Law*. 1990;84(3):717-720. doi:10.1017/S000293000000485; and J Stone, *Israel and Palestine: Assault on the Law of Nations* (John Hopkins University Press, Baltimore and London

7 Herb Keinon, FM Advisor Baker: ‘Initialed agreement does not Commit Israel,’ JERUSALEM POST, Jan. 4, 2001; Michael Cottier and Elisabeth Baumgartner, ‘Article 8(2)(b)(viii)’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (CH Beck 2016) 407 ;Jöbstl H. An Unlikely Day in Court? Legal Challenges for the Prosecution of Israeli Settlements under the Rome Statute. *Israel Law Review*. 2018;51(3):339-363. doi:10.1017/S0021223718000158 p. 343

8 “Cypriot Group Files War Crimes Complaint against Turkey at International Criminal Court.” *New Europe*, 14 July 2014, www.neweurope.eu/article/cypriot-group-files-war-crimes-complaint-against-turkey-international-criminal-court/.

9 “Ukrainian Prosecutor Called Exact Number of Occupants in Crimea.” QHA Ukrainian News Agency. 23 November 2016), <http://qha.com.ua/en/politics/ukrainian-prosecutor-called-exact-number-of-occupants-in-crimea/ukrainian-prosecutor-called-exact-number-of-occupants-in-crimea/139491/>

10 See Sec. 101 of OTP Report on [Preliminary Examination Activities](#) (2017). Compare with [Report on Preliminary Examination Activities](#) (2020).

B | The ICC's Pro-PA Slant

The Palestinian Authority first filed a declaration accepting the jurisdiction of the ICC in January 2009, in the aftermath of the “Cast Lead” Gaza operation.¹¹ In an extremely unusual step, then-Prosecutor Luis Moreno Ocampo began a public consultation process of “Palestine’s” statehood status. At a meeting in 2009 with the NGO Coalition for the ICC, Ocampo suggested an alternative formula for the recognition of Palestinian statehood under international law, contrary to the accepted Montevideo Convention criteria for statehood.¹² Various anti-Israel NGOs and academics, such as Al-Haq (which was in 2021 designated by Israel as a terrorist organization due to its ties with the PFLP), promptly took Ocampo up on his path to circumventing the ICC’s procedures.¹³ In September 2010, the Prosecutor created an online journal along with UCLA to “invite” academics to submit legal justifications for Palestinian membership in the ICC.¹⁴

In 2012, the Prosecutor officially rejected the PA’s membership, while inventing new criteria according to which “it is for the relevant bodies at the United Nations to make the legal determination whether Palestine qualifies as a State to accede to the Rome Statute.”¹⁵ This position lacked any basis in the Rome Statute, which specifically created the ICC as a legal institution independent of the UN. Votes in the latter body can be on political grounds, whereas the Rome Statute’s definition of statehood is strictly legal.

This of course was a signal to the Palestinian Authority to pursue recognition of statehood before the General Assembly (under the UN Charter, only the Security Council can admit new members). In December 2012, the GA passed the non-binding resolution 67/19 granting the PA “non-member observer state” status to the UN.

When Fatou Bensouda became Prosecutor in 2012, she continued to court the PA into joining the ICC. In another unusual 2014 op-ed in *The Guardian*, she said quite plainly that the GA resolution would allow the PA to accede to the Rome Statute should it choose to do so.¹⁶ The PA lodged such a declaration on 1 January 2015 and was accepted as an ICC member state on April 1st 2015.¹⁷

11 A. Kashan, ‘Declaration Recognizing the Jurisdiction of the International Criminal Court’, 21 January 2009, available [online](#)

12 The situation in Palestine. *Opinio Juris*. (2012, April 6). <https://opiniojuris.org/2012/04/05/the-situation-in-palestine/>

13 Haq position paper on issues arising from the Palestinian Authority’s submission of a declaration to the prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute. 13.10.2010, [\[here\]](#)

14 <http://uclalawforum.com/gaza>

15 “The Situation in Palestine”, the Office of the Prosecutor. 03.05.2012. <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>>

16 Fatou Bensouda, “The Truth about the ICC and Gaza”, *the Guardian*. 29.08.2014 <https://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>

17 State of Palestine, ICC-01/18. <<https://www.icc-cpi.int/palestine#:~:text=On%20%20January%202015%2C%20Palestine,Palestine%20on%201%20April%202015.>>

In another unprecedented move, in 2018, the Pre-Trial Chamber ordered the Court to launch a public outreach campaign to Palestinian victims. This came several months after the PA submitted a request for the Prosecutor to investigate Israeli actions in “Palestine”. In other words, the Court began an outreach campaign almost immediately to Palestinian victims, before even ruling on issues of jurisdiction or moving to the stage of investigation.¹⁸

All of these lapses and violations of protocol undermine the idea that the ICC is a good-faith actor. The ICC has demonstrated that it is committing to pursuing the case against Israel, whether or not the rules allow for it. There may be many institutional political reasons for the ICC’s actively reaching for an investigation of Israel. The ICC has been accused of unfairly targeting African states, based largely on African states comprising the absolute majority of cases currently before the Court.¹⁹ The former prosecutor Fatou Bensouda herself acknowledged charges of anti-African bias.²⁰ However, most Western countries are not widely engaged in armed conflict, and major powers like the U.S. have proved willing to retaliate against ICC investigations in ways the Court finds personally painful. Targeting Israel allows the Court to pursue a mid-level Western power and thus restore its credibility.

C | Lack of Jurisdiction and Continuing Double Standards

In April 2020, the Prosecutor concluded that the ICC indeed had jurisdiction over the “situation in Palestine”. The Pre-Trial Chamber I confirmed the Prosecutor’s findings in February 2021.²¹

In December 2019, Israeli Attorney-General Avichai Mandelblit published a memo detailing the very serious legal flaws concerning claims of ICC jurisdiction over “the situation of Palestine”. In short, despite the technical accession of the PA to certain international treaties or recognition of Palestinian statehood by some states or by the General Assembly, a sovereign Palestinian state does not exist in fact. The Palestinian Authority certainly has no effective control over East Jerusalem, Gaza, and large swaths of Judea and Samaria. The PA acknowledges this as it argues that this territory is occupied by Israel, meaning subject to Israeli control. The PA also regularly calls for the creation of a future Palestinian state, highlighting the fact that such a state does not currently exist. Even if it did exist, the PA has no de jure criminal jurisdiction over Israeli citizens, according to the binding bilateral

18 Michael Bachner and Raphael Ahren. “Israel sad to formally protest ICC’s unusual appeal to ‘Palestinian victims’, The Times of Israel. 14.08.2018. <<https://www.timesofisrael.com/israel-said-to-formally-protest-iccs-unusual-appeal-to-palestinian-victims/>>

19 Michelle Nel and Vukile Ezrom Sibiyi, “Withdrawal from the International Criminal Court”, 12 September 2017, <https://www.accord.org.za/ajcr-issues/withdrawal-international-criminal-court/>

20 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The ICC is an independent court that must be supported’, 24 November 2015. <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-icc-independent-court-must-be>

21 State of Palestine, ICC-01/18. <[5](https://www.icc-cpi.int/palestine#:~:text=On%202%20January%202015%2C%20Palestine,Palestine%20on%201%20April%202015.>></p>
</div>
<div data-bbox=)

Oslo Accords. Therefore, the PA has no jurisdiction which it can delegate to the ICC.²² Indeed, the ICC has never granted member status to a non-UN member state or to any entity whose statehood is remotely in dispute (such as Kosovo, Western Sahara, etc.).

Many of these issues were echoed by ICC Judge Péter Kovács in his dissenting opinion, in which he wrote that “neither the Majority’s approach nor its reasoning [are] appropriate in answering the question before this Chamber, and in my view, they have no legal basis in the Rome Statute, and even less so, in public international law”.²³ Similarly, the United States, along with seven leading ICC member states (among them Canada, Australia, the United Kingdom, and Germany), have taken the exceptional step of publicly rejecting the ICC’s claim of authority over Israel.²⁴ Once again, the ICC’s willingness to embrace faulty legal reasoning undermines its claims of good faith objectivity.

It is also important to stress that the very terms of the investigation itself are discriminatory towards Israel. The investigation dates retroactively to June 13, 2014, which is the day after Hamas terrorists abducted and murdered three Israeli teenagers. The investigation thus commences with the 2014 Gaza operation against Hamas but intentionally ignores the Palestinian war crime that motivated it.

Furthermore, the investigation focuses on three specific allegations of war crimes committed by Israel – the 2014 Protective Edge Operation, Israeli “settlements,” as well as the use of lethal force in March 2018 at the Gaza border. While the majority focus is on Israel, the investigation also mentions allegations of war crimes committed by “Hamas and Palestinian armed groups”.²⁵ This means that the Palestinian Authority’s systematic war crimes, such as financing terrorism, incitement, and enforced disappearances, will not be investigated.

Since Prosecutor Khan has re-entered the fray, he has made several statements indicating that he intends to put the burden of proof on Israelis to demonstrate their innocence against any allegations. Speaking in Cairo on October 30, 2023, Khan claimed it is the responsibility of Israel – which as he knows does not accept the Court’s jurisdiction to

“demonstrate that any attack, any attack that impacts innocent civilians or protected objects, must be conducted in accordance with the laws and customs of war, in accordance with the laws of armed conflict.

They need to demonstrate the proper application of the principles of distinction, precaution and of proportionality. And I want to be quite clear so there’s no

22 See “The International Criminal Court’s Lack of Jurisdiction over the So-called ‘Situation in Palestine,’” Avichai Mandelblit, Office of the Attorney General, November 20, 2019.

23 Judge Péter Kovács’ Partly Dissenting Opinion, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ Par. 3

24 See Amicus Curiae briefs submitted by relevant countries to ICC

25 See Pre-Trial Chamber I Decision, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine [[here](#)], as well as Questions and Answers on the Decision on the International Criminal Court’s territorial jurisdiction in the Situation in Palestine [[here](#)]

*misunderstanding: In relation to every dwelling house, in relation to any school, any hospital, any church, any mosque – those places are protected, unless the protective status has been lost. And I want to be equally clear that the burden of proving that the protective status is lost rests with those who fire the gun, the missile, or the rocket in question.”*²⁶

Khan’s statement implies that Israel is guilty until proven innocent. It also flies in the face of the principle that decisions by military commanders are evaluated based on the (often-limited) information available to them at the time of decision. Due to the difficult circumstances and intense pressure (“fog of war”), courts worldwide are reluctant to second-guess the decisions taken by commanders.²⁷ In the same speech, Khan noted that Israel has “military advocate generals and a system that is intended to ensure their compliance with international humanitarian law. They have lawyers advising on targeting decisions.” Given that Khan acknowledges that the Israeli army has built-in mechanisms to protect civilians, it is unclear why Khan ascribes to Israel malicious intent until proven innocent. Khan has not demanded such a standard in any other conflict.

Khan also criticized the scale and speed with which humanitarian aid entered Gaza, despite the siege being a legal and acceptable technique of warfare.²⁸ Speaking in Ramallah, the prosecutor made a similar statement, saying that “not only must the letter of the law be complied with, but also the spirit upheld.”²⁹ Of course, there are no known legal parameters to determine adherence to the “spirit” of proportionality or distinction, and “spirit” is hardly an argument in criminal matters.

Khan has taken several moves to prioritize the investigation against Israel. Khan has created a full investigative team and begun recruiting new staff for the investigation, in his words “stealing resources from other situations.”³⁰ In 2023, Khan allocated funds for the first time to the “Palestine” investigation and has since asked for additional funds. According to the Prosecutor’s Special Advisor on War Crimes, “the Palestine investigation was completely dormant before Khan took office and only moved forward because he insisted that it do so.”³¹

26 Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel, 30 October 2023, [\[here\]](#)

27 See United States v. List, et al. (*The Hostage Case*), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1295-96; In German and European law, see the [Prosecutor v. Colonel Georg Klein](#) and ECHR Application no. 4871/16 Hanan v. Germany ; In Israeli case law, see HCJ 561/75 Ashkenazi v. Defense Minister; HCJ 606/78 Ayub v. Defense Minister; HCJ 910/86 Ressler v. Defense Minister.

28 See “Legal Issues Regarding a Siege on the Gaza Strip During War”, Professor Avi Bell. 16 October 2023. [\[here\]](#)

29 Yonah Jeremy Bob, “ICC Chief Prosecutor: We must show that the law protects all”, the Jerusalem Post. 03.12.2023. <https://www.jpost.com/arab-israeli-conflict/gaza-news/article-776326>

30 Remarks by ICC Prosecutor Karim A.A. Khan KC at the opening of the 22nd Session of the Assembly of States Parties. The Office of the Prosecutor, 04.12.2023. [\[here\]](#)

31 Jon Heller, Kevin. “Responding to the Open Letter to the ASP Regarding Palestine.” *Opinio Juris*, December 8, 2023. <https://opiniojuris.org/2023/12/08/responding-to-the-open-letter-to-the-asp-regarding-palestine/>.

▶ 2 | The PA's Internationalization Strategy

The Palestinians have long pursued a strategy of “internationalization”, calling upon the international community to pressure Israel into unilateral concessions to avoid the Palestinian compromises that diplomatic negotiations would entail. This requires Israel to treat the ICC as a strategic threat, as opposed to a legitimate actor.

This lawfare strategy was articulated most clearly at the infamous NGO Forum of the 2001 Durban Conference. More than 1,500 NGOS drafted the NGO Forum Declaration and Programme of Action which set out the action plan to dismantle the Jewish state using legal and pseudo-legal means. Israel was to be tarred as a racist, apartheid, and international law-violating state, isolated and eventually destroyed. Explicitly invoking the Rome Statute, the NGO Forum Declaration:

Call[ed] for the establishment of a war crimes tribunal to investigate and bring to justice those who may be guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid which amount to crimes against humanity that have been or continue to be perpetrated in Israel and the Occupied Palestinian Territories.³²

Saeb Erekat, a senior member of the PLO Executive Committee and heard of the Palestinian negotiating team, published an influential paper in June 2015 outlining the Palestinian diplomatic struggle with Israel, along with the ICC's role in it. The goal of the internationalization campaign is for the international community to coerce Israel to withdraw to the pre-1967 lines, along with acceptance of maximalist PA territorial demands, rejection of Israeli security concerns, and the ultimate realization of the so-called “right of return”. “Internationalization” means bypassing a negotiated settlement to end the conflict by pressuring Israel to accept Palestinian claims. The ICC's role in this campaign is to criminalize Jewish communities in Judea, Samaria, and East Jerusalem, as well as to prosecute Israeli soldiers, thereby limiting Israel's ability to carry out military operations.³³

PA Chairman Mahmoud Abbas explicitly stated, in a *New York Times* editorial, that the goal of the PA's 2012 statehood bid at the UN General Assembly was to pursue diplomatic warfare against Israel:

“Palestine's admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice.”³⁴

32 NGO Forum Declaration and Programme of Action, Par. 113

33 Lt. Col. (ret.) Jonathan D. Halevi, *The Palestinian Leadership's Regression in the Peace Process*, Jerusalem Center for Public Affairs, 1 July 2015. [[here](#)]

34 Mahmoud Abbas, “The Long Overdue Palestinian State”, the *New York Times*. 16.06.2011. <https://www.nytimes.com/2011/05/17/opinion/17abbas.html>

The ICC has openly indulged the PA's use of the Court as a threat and sword over Israel's head to extract concessions. Mark Schack in an article recounts in great detail the PA's use of ICC jurisdiction as leverage over Israel, arguing that "this was the first time in history that an international actor used a possible recourse to the Court in such an explicitly coercive manner."³⁵

In brief, the PA made its first attempt to accede to the ICC several days after the conclusion of the 2008-2009 Operation Cast Lead. During the Cast Lead Operation, Israel invaded Gaza and attacked Hamas terrorists following its launching of thousands of missiles at Israeli population centers. The PA's goal, which has by now become a theme, was to limit Israel's ability to launch future military operations for fear of international investigation.

The PA's use of the ICC threat became even more explicit during the July 2014 Operation "Protective Edge" in Gaza. One day before the operation was launched, which was preceded by the Hamas kidnapping and murder of Israeli teenagers as well as rocket barrages against Israeli towns, PA Chairman Abbas threatened that the PA would involve the ICC should Israel respond.³⁶ Once the war began, senior PLO official Hanan Ashrawi stated: "We have a decision to accede to the Rome Statute... All we need to do is send the letter... If this assault continues and doesn't stop, you can see it sooner rather than later."³⁷ The PA's strategy was to provide Hamas with diplomatic immunity against Israel – any action against Hamas would potentially endanger Israeli soldiers before the ICC. As such, Hamas declared its support for the PA's ICC campaign.³⁸ Even following the October 7th massacres, Hamas has continued to call upon the ICC "to overcome political pressure and assume its responsibility to hold Israeli officials accountable for the killings and atrocities in the Gaza Strip."³⁹

Towards the end of August 2014, the PA began threatening that should the Security Council not adopt a timetable for an Israeli withdrawal to the pre-1967 lines, it would move forward with its ICC strategy. Finally, on December 30, 2014, the PA, using Jordan, put forth a draft resolution at the Security Council. Draft Resolution S/2014/916 was voted down and the next day Abbas signed the Rome statute.⁴⁰

35 Schack, Marc. "Going to The Hague's as Coercive Leverage: The Palestinian ICC Policy during the 2014 Operation Protective Edge." *Journal of international criminal justice* 15.2 (2017): 319-342.

36 'Abbas to Israel: Those Who Fear Courts Must Refrain from Committing Crimes', Middle East Monitor, 7 July 2014, available at <https://www.middleeastmonitor.com/news/middle-east/12599-abbas-to-israel-those-who-fear-courts-must-refrain-from-committing-crimes>

37 Raphael Ahren, "Palestinians threaten to join International Criminal Court over Gaza", the Times of Israel, 17.07.2014. <https://www.timesofisrael.com/pa-threatens-to-join-icc-other-international-treaties-over-gaza/>

38 'Hamas Declares Support for Palestinian Bid to Join International Criminal Court', The Guardian, 23 August 2014, available at <http://www.theguardian.com/world/2014/aug/23/hamas-backpalestinian-bid-international-criminal-court>

39 "Hamas urges ICC to hold Israel accountable over 'crimes' in Gaza", Anadolu Agency. 26.12.2023. <https://aa.com.tr/en/middle-east/hamas-urges-icc-to-hold-israel-accountable-over-crimes-in-gaza/3092249>

40 See UN Press Release, 'Note to Correspondents in Response to Questions on Documents Submitted by the Permanent Observer of Palestine', 2 January 2015, available online at <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-02/note-correspondentsresponse-questions-documents-submitted> (visited 1 December 2016).

M. Abbas, 'Declaration Accepting the Jurisdiction of the International Criminal Court', 31 December 2014, available online at https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf (visited 1 December 2016).

The terms of the resolution required Israel to unilaterally accept all Palestinian demands, without PA reciprocity. Israel was to agree to withdraw and create a Palestinian state within 12 months based on the pre-1967 lines, the division of Jerusalem, the “right of return” and the full withdrawal of Israeli forces. Such terms would have Israel fully surrender to Palestinian terms, without gaining anything in return. In other words, Israel would give up land, without receiving peace.

The ICC has fully cooperated with the PA and turned itself into another front in the diplomatic war on Israel. In a Questions and Answers document released by the ICC on February 15, 2021, responding to criticisms, the Court deceptively claimed that “the Chamber neither adjudicated a border dispute under international law nor prejudged the question of any future borders.” However, the Court itself based its territorial rulings on various non-binding UN resolutions that refer to “Palestinian territory occupied since 1967”. The ICC ruling, while technically non-binding with regards to borders, will become another non-binding ruling to circularly prove Palestinian title to all territory disputed since 1967.⁴¹

The ICC’s willing weaponization against Israel means that Israel must treat the Court as a strategic threat rather than a neutral legal institution.

▶ 3 | How should Israel respond?

While Israel has officially declared a policy of non-cooperation with the ICC, it has not always adhered to it in practice.⁴² Senior Israeli legal officials have termed this strategy “a dialogue”, as opposed to “cooperation”.⁴³ In 2016, Israel allowed an ICC delegation to visit Tel Aviv, Jerusalem, and Ramallah. However, cooperation didn’t prevent or discourage the ICC’s hostile moves against Israel, most notably its 2019 jurisdiction decision. On the contrary, the ICC “depends almost entirely on state cooperation in order to bring suspected perpetrators to justice.”⁴⁴

While there is a possibility that the ICC will issue indictments of several Hamas terrorists for

41 Questions and Answers on the Decision on the International Criminal Court’s territorial jurisdiction in the Situation in Palestine [\[here\]](#). For the circular reliance on political declarations, see “The evolving language used in UN Resolutions relating to the West Bank, Written Statement submitted by the International Association of Jewish Lawyers and Jurists under ICJ Practice Direction XII in the Advisory Proceedings on the “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem” as initiated by UNGA A/RES/77/247. P. 43. [\[here\]](#)

42 “Israel ‘will not co-operate’ with ICC war crimes investigation”, BBC, 9.04.2021. <https://www.bbc.com/news/world-middle-east-56687437>

43 Hodaya Karish-Hazony, “The lights don’t turn off in the office: the effort against Hague”, Makor Rishon. 19.01.2020. <https://www.makorishon.co.il/news/197999/> [Hebrew]

44 Hillebrecht, Courtney, and Scott Straus. “Who Pursues the Perpetrators? State Cooperation with the ICC.” Human Rights Quarterly 39, no. 1 (2017): 162–163. <http://www.jstor.org/stable/44488976>.

war crimes to give the impression of balance, Israel has little to gain from such an event. Israel has much more to lose from indictments of its nationals than to gain from indictment of Hamas terrorists. Hamas is recognized by Western states as a murderous terrorist organization so indictment will have no reputational effect. On the other hand, indictments will be a boon to the delegitimization campaign against Israel, reinforcing the false image of it as a law-violating rogue state. In any case, there is little chance that Hamas officials will turn up in the Hague to be tried. One need only look at the Special Tribunal for Lebanon trials carried out *in absentia* against Hezbollah terrorists for the 2005 assassination of the Lebanese Prime Minister.⁴⁵

The failures of ICC investigations of two other democratic states - Kenya and the United States - demonstrate that a strategy of non-cooperation or even active resistance to the ICC can work.

A | Kenya - Noncooperation

In 2011, Kenya President Kenyatta and Deputy President Ruto were charged with crimes against humanity for their role in nationwide violence following the presidential elections on December 27, 2007.⁴⁶ The Kenyan government deployed several strategies to undermine the prosecution, including a regional diplomatic blitz against the Court, and persistent refusal to cooperate with the investigation.⁴⁷ As a result, the case against Kenyatta was dropped in December 2014 and the case against Ruto was dropped in April 2016.⁴⁸ Kenya, as a mid-level regional power, demonstrates that Israeli non-cooperation with the ICC is likely to bear fruit.

Kenya took several diplomatic steps to undermine the legitimacy of the ICC investigation. The African Union, at its summit in January 2011, issued a statement criticizing the ICC's approach towards Kenya and calling upon it to defer the investigation. Over the next two years, Kenya took its case several times to the Security Council, asking that the members vote on deferral. In 2013, the African Union once again adopted a resolution opposing ICC intervention in Kenya. The African Union also discussed a mass African withdrawal from the

45 Lysander Fremuth, Michael, Andreas Sauer Moser, and Konstantina Stavrou. "The Special Tribunal for Lebanon: After the Judgment in Ayyash et al., Justice at Last?" *Opinio Juris*, October 26, 2020. <https://opiniojuris.org/2020/10/26/the-special-tribunal-for-lebanon-after-the-judgment-in-ayyash-et-al-justice-at-last/>.

46 International Criminal Court, Situation in the Republic of Kenya, www.icc-cpi.int/kenya?ln=en

47 For full range of strategies, see Laurence R. Helfer; Anne E. Showalter, "Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC," *International Criminal Law Review* 17, no. 1 (2017): 1-46

48 Office of the Prosecutor, ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr Uhuru Muigai Kenyatta, 5 December 2014; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 5 April 2016, ICC, Trial Chamber v(A), Decision on Defence Applications for Judgments of Acquittal, Icc-0/09-01/11,

Rome Statute although no decision was taken.⁴⁹ Kenyan diplomats actively lobbied other African countries to support withdrawing from the Statute.⁵⁰ Kenya made the argument at several forums that the ICC had no respect for African sovereignty and that it was a tool of Western neo-imperialism.⁵¹

Domestically, Kenya also made moves to delegitimize the Court. Immediately following the indictments of Kenyatta and Ruto, the Kenya parliament passed two motions to withdraw from the Rome Statute as well as to repeal the relevant domestic legislation granting the ICC jurisdiction. Despite the motions' lack of legal effect on the investigation from the Court's standpoint, they sent a message of the government's determination not to engage with the ICC. Following the 2013 Kenya elections, the parliament passed two similar motions which were not signed into legislation as well.⁵² Ruto and Kenyatta, in their 2013 election campaign, ran on platforms emphasizing Kenyan sovereignty in standing up to ICC intervention.⁵³

The Kenyan government repeatedly refused to hand over evidence or allow access to witnesses.⁵⁴ The Attorney General informed the Court that a Kenya court order was required to supply financial records and other documents.⁵⁵ The Trial Chamber noted that the government had "unjustifiably frustrated" the investigation.⁵⁶ The Prosecutor acknowledged the difficulty in bringing witnesses to trial, writing of "reports received from prosecution witnesses that they have been targeted by [government] officials seeking to influence their testimony", with "[s]ome public officials in Kenya hav[ing] fostered an anti-ICC climate in Kenya ..."⁵⁷

Kenya's strategy of stonewalling does not seem to have hurt the country's international standing. However, the dismissal of charges has been described as "a major setback" and a "huge blow" to the ICC.⁵⁸

49 See Helfer and Showalter 9-15

50 Ludger Schadomsky 'The African Union Debates Its Relationship with the International Criminal Court, *DW*, 11 October 2013, <www.dw.com/en/the-african-union-debates-its-relationship-with-the-international-criminal-court/a-17151963>.

51 'President Uhuru Hits out at the West over ICC: Speech by his Excellency Hon. Uhuru Kenyatta', *Daily Nation*, 12 October 2013, <<https://nation.africa/kenya/news/president-uhuru-hits-out-at-the-west-over-icc-90349>>

52 Helfer and Showalter 15-18

53 Helfer and Showalter 36-37

54 Office of the Prosecutor, ICC, *Statement by the Prosecutor on the Decision to Withdraw Charges Against Mr. Muthuara*, n1 March 2013, <www.icc-cpi.int/Pages/item.aspx?name=OTP-statement-n-03-2013>

55 Tom Maliti, 'Kenya's Attorney General Says a Court Order is Needed to Get Kenyatta Financial Records, *International Justice Monitor*, 13 February 2014, <www.ijmonitor.org/2014/02/kenyas-attorney-general-says-a-court-order-is-needed-to-get-kenyatta-financial-records/>

56 *Prosecutor v. Uhuru Muigai Kenyatta*, 31 March 2014, ICC, Trial Chamber v(B), Decisions on the Prosecutions Applications for a Finding of Non-Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date, ICC-01/09-02/11-908, www.icc-cpi.int/iccdocs/doc/doc175519o.p

57 Bernard Momanyi, 'Kenya Witnesses Face Harassment; Institute for War & Peace Reporting, 5 June 2013, <www.iwpr.net/report-news/kenya-witnesses-face-harassment>.

58 BBC News "Dismissal of case against Kenya's Ruto huge blow to ICC". BBC 5 April 2016 <https://www.bbc.com/news/world-africa35974172>; The Global Observatory. "Not Guilty, Not Acquitted: Kenyan Ruling a Major Setback for ICC". 11 April 2016, <https://theglobalobservatory.org/2016/04/international-criminal-court-kenya-ruto-kenyatta/>

B | The United States: A Strategy of Offense

The United States originally signed the Rome Statute in 2000 but officially informed the UN Secretary-General in 2002 that it had no intention of ratifying the treaty. The US was concerned that its international commitments made it uniquely vulnerable to politicized investigations against it.

In 2002, the US enacted the American Service-Member's Protection Act which gives the president power to use "all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court". The act prohibits all government agencies from assisting the ICC and prohibits US military aid to state parties, except for allies and those that have signed specific bilateral agreements (Article 98 Agreements). The US has also requested that states sign Article 98 Agreements according to which they agree not to transfer American nationals to the ICC. See Annex B for the text of the Agreements.

In 2006, Prosecutor Bensouda opened a preliminary probe in Afghanistan, including American actions in its war against the Taliban and al-Qaeda. Only in 2017 did Bensouda formally request that the Court launch an official investigation.⁵⁹ American officials denounced the Court as illegitimate and threatened ICC officials with sanctions and even prosecution. Secretary of State Pompeo announced the denial of visas to unnamed ICC personnel involved in the investigation against American nationals.⁶⁰ In its 2019 decision, the ICC's pretrial chamber denied the authorization to open an investigation as such an investigation would not be in the interests of justice and had a low chance of success. As the Pre-Trial Chamber wrote: "the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited... This ... would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve."⁶¹

In March 2020, the ICC's Appeals Chamber reversed the Pre-Trial Chamber's decision and opened an investigation into the situation in Afghanistan.⁶² In response, the Trump Administration issued an executive order denying visas and imposing sanctions on Bensouda and Phakiso Mochochoko, the head of the ICC's Jurisdiction, Complementarity

59 "The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan", 20.11.2017. <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation>

60 "US to deny visas for ICC members investigating alleged war crimes", the Guardian, 15.04.2019. <https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>

61 Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019. Par 96 [\[here\]](#)

62 Afghanistan: ICC Appeals Chamber authorises the opening of an investigation, 5 March 2020 [\[here\]](#)

and Cooperation Division.⁶³ Pompeo also traveled to Afghanistan to encourage the Afghan government to request an official deferral. The Biden Administration eventually lifted the sanctions in April 2021.⁶⁴ In September 2021, Prosecutor Khan announced the resumption of investigations into Afghanistan, focusing solely on the Taliban and the Islamic State.⁶⁵

▶ 4 | Recommendations

Events going back over two decades demonstrate conclusively that the ICC is a politicized weapon against the State of Israel. Cooperation with its investigation will only grant it legitimacy and allow the Court to feign concern for due process and detached legal analysis. The Court has not been successful in its (very few) prosecutions without the active cooperation and collaboration of the accused's state. The Kenyan and American experiences demonstrate that persistent non-cooperation and offensive action can deter hostile ICC action.

Israel's new ICC strategy requires four steps:

- i Responsibility for the ICC issue must be taken out of the hands of the legal officials and placed under the control of the Prime Minister's office.** The State of Israel has repeatedly stated that it does not recognize the ICC's jurisdiction. Therefore, any legal proceedings are completely illegitimate and as such, the various legal bodies – the Attorney General, the Justice Ministry's International Affairs Office, the Foreign Ministry's legal advisors, and the Military Advocate General's International Law Department – will no longer communicate with the ICC. A special department within the PMO will be created to coordinate ICC strategy, under the direct control of the Prime Minister.
- ii Legislation protecting Israeli nationals** – the Knesset must pass legislation modeled on the American Service-Member's Protection Act. This legislation would bar any government agency from cooperating with the ICC without a government decision. The government would be authorized to take all necessary means to free Israelis detained. No government agency will collaborate with any state cooperating in legal proceedings against Israel. ICC officials will be denied entry visas to Israel. Such a bill has been proposed several times, most recently in March 2023.⁶⁶

63 "Executive Order 13928 of June 11, 2020". Blocking Property of Certain Persons Associated with the International Criminal Court. [\[here\]](#)

64 "Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court", Antony J. Blinken, April 2, 2021. [\[here\]](#)

65 Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan. 27 Sept 2021. [\[here\]](#)

66 See Proposed Law Protecting Israelis from Hostile International Tribunals – 2023. [\[here\]](#)

- iii Bilateral agreements** – The State of Israel must convince its allies to sign bilateral immunity treaties according to which neither state will cooperate with the prosecution of the other state’s national by the ICC absent that state’s consent, nor will they surrender or transfer nationals to the ICC’s jurisdiction absent that state’s consent. (A draft agreement modeled on the American agreement is attached as Annex A)
- iv Public Information Campaign aimed at building domestic consensus and exposing anti-Israel bias abroad** – While Israel has never accepted the ICC’s jurisdiction, the PA has willingly accepted it. The Court can hardly turn around now and deny jurisdiction to avoid prosecuting Palestinian crimes. The Court also has jurisdiction over Palestinian dual nationals of other member states (namely Jordan). Palestinian nationals, acting on behalf of Hamas, Fatah, and other terrorist organizations and with no affiliation, have carried out serious war crimes against Israelis and Palestinians. Israel must publicly demand that the ICC issue indictments against them while arguing that the PA is estopped from denying jurisdiction. Israel will make public the dossiers and charge sheets. Should the ICC fail to act, this will further expose the ICC’s anti-Israel bias, both in the eyes of the Israeli public and the international community.

▶ **Annex A | Bill Proposal for the Protection of Israelis from Hostile International Organizations**

Purpose

1. The purpose of this law is to protect members of the security forces and residents of Israel from being personally harmed by hostile international organizations seeking their harm on account of actions taken in Israeli territory or on behalf of the State of Israel, whether those actions constitute an offence under Israeli law or not.

Definitions

2. For the Purposes of this Law -

“The International Criminal Court” - The International Criminal Court (ICC) and other institutions established pursuant to the Rome Statute of the International Criminal Court, dating from 17.6.1998;

“Israel’s allies” – the United States of America or any state or international entity established to be so by an Order of the Minister of Justice;

“Legal proceedings against the State of Israel” – an investigation, preliminary proceeding or any other legal proceeding taking place in a hostile international institution against any one of the following:

- (1) An Israeli citizen or Israeli permanent resident, on account of any action or omission committed on Israeli territory or on territory under Israeli control, including Judea and Samaria;
- (2) The Israeli security forces, or members of the Israeli security forces;
- (3) Any person acting on behalf of the State of Israel or any one of its agencies or entities, including local authorities;
- (4) Allies of Israel;

“Security forces” – the IDF, the Israeli Security Agency (ISA), the Israeli Secret Intelligence Service (Mossad), the Israel Police, the Israel Prison Service (IPS) or any other body involved directly or indirectly with the State of Israel’s security or with the defense of its citizens, so determined by an Order of the Minister of Justice;

“Hostile international institution” – the International Criminal Court or any other international institution so determined by an Order of the Minister of Justice in

consultation with the Knesset Foreign Affairs and Defense Committee;

“Members of the security forces” - any person acting in the past or the present on instructions, orders or directives issued by one or more of the security forces, or a person issuing an instruction, order or directive to the security forces by virtue of their lawful authority.

Protection of Israeli Security forces and Israeli Nationals

3. (a) No Israeli government agency or entity or any entity acting on its behalf shall hold direct or indirect, initiated or non-initiated, contact with a hostile international institution or with anyone working on its behalf, except by government resolution in the manner prescribed therein.

(b) Nothing in subsection (a) shall be construed as derogating from the powers conferred for the purpose of judicial proceedings for judges as defined in the Ombudsman for Complaints against Judges Law-2002.

(c) The government is authorized to use all means it deems necessary to bring about the release of any Israeli citizen or Israeli resident detained by any element in connection to legal proceedings against the State of Israel.

(d) No government agency or entity in Israel may cooperate with a state found to be assisting in providing information for legal proceedings against the State of Israel, including trade agreements, military alliances and intelligence sharing, and should such cooperation exist – shall suspend it forthwith;

(e) Notwithstanding subsection (d), the government may authorize the continuance of said cooperation, for periods of three months at a time, on grounds set down in writing and presented to the Knesset or to the Knesset Foreign Affairs and Defense Committee within a week of said authorization.

(f) No person shall apply directly or indirectly to a hostile international institution to initiate legal proceedings against the State of Israel.

Penalty

4. The penalty for violation of Article 2 is imprisonment of seven years.

Amendment to The Extradition Law

5. In The Extradition Law, 5714–1954, the following will appear after subsection 2(b):
“(c) no person present in Israel shall be extradited to a hostile international institution,

to a state or to any other foreign entity in any case where there is basis to assume that the request or order for extradition were issued in direct or indirect connection to legal proceedings against the State of Israel. For the purpose of this provision, “hostile international institution” is as defined in the Law for the Protection of Israelis from Hostile International Organizations – 5783 – 2023.

Amendment to The Entry into Israel Law

6. In the Entry into Israel Law -5712- 1952, the following will appear after subsection 2(e):
“(f) (1) No visa or permit of residence of any sort, to Israel or to territories under its control, shall be granted to any of the following:

Any person under reasonable suspicion of acting or likely to act on behalf of a hostile international institution, in direct or indirect connection to legal proceedings against the State of Israel;

Any person under reasonable suspicion of acting or likely to act, whether by his or her own design, or on behalf of any state or body that have petitioned a hostile international institution to initiate legal proceedings against the State of Israel, in direct or indirect connection to such proceedings.

(2) Notwithstanding the above, the Minister of Interior is permitted, after consultation with the Minister of Foreign Affairs, to grant visas or visitor’s visas, in accordance with whatever the Minister considers necessary to the State’s security or to its foreign affairs.

(3) For the purpose of this provision, “a hostile international institution” and “proceedings against the State of Israel” are as defined in the Law for the Protection of Israelis from Hostile International Organizations – 5783 – 2023”.

Execution and Regulations

7. The Minister of Justice is responsible for enforcing this law and is entitled to enact regulations therefor.

▶ Annex B | Bilateral Immunity Agreements

- A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity, and war crimes,
- B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
- C. Considering that the Government of the State of Israel has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
- D. Bearing in mind Article 98 of the Rome Statute,
- E. Hereby agree as follows:
 - 1. For purposes of this agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
 - 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
 - (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
 - (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
 - 3. When Israel extradites, surrenders, or otherwise transfers a person of the other Party to a third country, Israel will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.
 - 4. When the Government of X extradites, surrenders, or otherwise transfers an Israeli

national to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the State of Israel.

5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.