

Judicial Reforms and the Threat of International Criminal Court Prosecution

By Prof. Eugene Kontorovich and Adv. Avraham Russell Shalev



1 Introduction

The threat of International Criminal Court (ICC) prosecution has, in recent years, been repeatedly invoked by Israeli and foreign critics of various legislative proposals,¹ including those with no connection to the Israel-Palestinian conflict.² The ICC has emerged as a particularly important theme in the ongoing debate about possible reforms to Israel's judicial system. Many have claimed that any change in the current selection mechanism and powers of the Supreme Court, the powers of the attorney general, or even the narrowing of certain aspects of administrative review, would expose Israeli soldiers and officers to criminal prosecution at The Hague.

For example, former attorney general Avichai Mandelblit, an opponent of removing the veto power of state lawyers over government policies, warned: "Israel will lose international legitimacy for its military operations and will no longer be shielded from accusations of war crimes."³ Dr. Gil-Ad Noam, the deputy attorney general for international law, described the Israeli judicial system as the country's legal "iron dome," which the judicial reform endangers.⁴ Opposition leader Yair Lapid claimed that, should the proposal pass, Israeli soldiers and reservists will face potential charges whenever they travel abroad.⁵ The premise of these arguments is that the ICC has thus far not undertaken such war crime prosecutions because of the specific details of Israel's legal system, and, in particular, the "judicial revolution" of Aharon Barak, which the reforms seek to repel.

The ICC threat proved influential in swaying some military officials and reservists to voice opposition

- 1 "An Open Letter to the Israeli Government Condemning Annexation," *Opinio Juris*, June 11, 2020.
- 2 Odeh Bisharat, "The Criminals Who Passed the Nation-State Law Must Be Tried at the ICC: Opinion," *Haaretz.com*, August 5, 2018.
- 3 Gidi Weitz, "Former Israeli AG: The Judicial Crisis Is Designed to Stop the Netanyahu Trial." *Haaretz.com*, February 3, 2023.
- 4 Protocols of Constitution, Law, and Justice Knesset Committee, December 2, 2023.
- 5 Attila Shomfalvi and Moran Azulai, "Lapid: I Oppose Refusing Order, But I Won't Live in an Undemocratic State," *Ynet*, March 26, 2023.

to the reform proposals.⁶ Hundreds of IDF lawyers sent a letter to the government, warning against the reform's implications for ICC prosecution.⁷ Defense Minister Yoav Gallant hinted at the ICC issue when he called to halt the legislative process due to security concerns.

The argument connecting ICC prosecution to judicial reform has been taken as self-evident. On closer examination, however, there is no legal basis for believing that the likelihood of adverse ICC action is significantly increased by enacting the government's proposed reforms, let alone the small, highly modified components being discussed at the time of this writing. Worse, the ICC argument undermines Israel's principled objections to the tribunal's jurisdiction. It legitimizes ICC interference against Israel, regardless of whether any judicial reform is implemented, undermining years of diplomacy that portrayed the Court as illegitimate. While judicial reform would not affect the prosecution of international war crimes, the opponents of the reforms who have invoked the specter of the ICC to buttress their case and alarm the military may have instead created a self-fulfilling prophecy by increasing the likelihood of ICC prosecution of soldiers.

2 ► **The ICC Cannot Prosecute Israeli Soldiers because It Lacks Jurisdiction**

The ICC has no authority over Israeli soldiers, regardless of the details of Israel's legal system, for one simple reason: the Court only has jurisdiction over countries that accept its jurisdiction by ratifying its constitutive treaty, known as the Rome Convention. The ICC is not a global criminal court, but a treaty body, which can only exercise criminal powers delegated to it by member countries. Israel, like its allies, the United States and India, has never joined the ICC, out of longstanding concerns about systemic bias in the Court. The only way the Court could exercise jurisdiction over Israeli nationals is in the case of war crimes committed in the territory of a state party, a situation that simply does not arise.

None of Israel's enemy states that surround Israel has joined the ICC. But the Palestinian Authority has made the Court a central part of its campaign of "internationalization," using the well-documented anti-Israel bias in international institutions as a fertile field for a diplomatic campaign against the Jewish state.⁸

6 Amos Harel, "The Judicial Coup Endangers IDF Officers with International Law." *Haaretz*, February 9 2023.

7 Bini Ashkenazi, "Hundreds of Military Attorneys: The Judicial Coup Endangers Soldiers." *Walla*, July 2, 2023; Darkenu, "The Supreme Court is our Shield," Facebook.

8 See "The International Criminal Court and the Israeli-Palestinian Conflict," *British-Israeli Communication and Research Center*, February 2021.

In December 2014 and January 2015, the Palestinian Authority accepted the jurisdiction of the ICC under the Rome Statute, and filed requests for investigations into alleged Israeli war crimes, including military operations in Gaza, and the very existence of Jewish communities in Judea and Samaria. Under the ICC statute, only “states” – that is, countries – can join the Court.⁹ No entity that is a non-UN member has been permitted to join the Court. Even widely-recognized countries like Kosovo have not sought admission because of controversy about their status. Indeed, in 2009, the PA sought to accept the Court’s jurisdiction and was rejected, due to its non-state status.

The ICC prosecutor suggested an end-run around the states-only rule for the PA. Following the 2012 General Assembly resolution, referring to “Palestine” as an “observer state,” the prosecutor publicly invited “Palestine” to file a new declaration. This time, the ICC accepted the Palestinian declaration, relying on the General Assembly resolution.¹⁰ This, despite the General Assembly lacking any power to determine the existence of statehood or other legal facts, and statehood generally being required as an objective status determined by meeting certain real-world conditions, rather than an honorific bestowed by international bodies. Needless to say, there is no other situation in which the Court has accepted a member under such a basis.

The Court began a preliminary investigation in 2015. In April 2020, the prosecutor concluded that the ICC had jurisdiction over the “situation in Palestine.” In February 2021, the ICC’s Pre-Trial Chamber I confirmed the prosecutor’s findings. The case has not advanced since the prosecutor’s opening of an investigation in March 2021.¹¹

The position of every Israeli government, including that of Yair Lapid, has been that the ICC’s current claim of jurisdiction over Israelis is invalid under any circumstances because it lacks jurisdiction.¹² Indeed, the United States, along with seven leading ICC member states (among them Canada, Australia, the United Kingdom and Germany), has taken the unprecedented step of publicly denouncing and rejecting the ICC’s claim of authority over Israel. This highlights how fundamentally unusual the ICC’s conduct towards Israel has been.¹³

In December 2019, then-attorney-general Mandelblit issued a lengthy memorandum rejecting the ICC’s claims of jurisdiction over “the situation in Palestine.” In short, the situation did not meet the fundamental precondition to jurisdiction enshrined in the Rome Statute – a state having criminal jurisdiction over its territory and nationals that has delegated such jurisdiction to the Court. A

9 *Rome Statute*, Article 4(2)

10 See “Palestine and the Rome Statute,” *Parliamentarians for Global Action*, Accessed July 3, 2023.

11 See “Background: The Situation in Palestine,” *ICC*. Accessed July 3, 2023.

12 “PM Lapid Responds to Publication of Al Jazeera Appeal to the ICC to Investigate the Death of Shireen Abu-Akleh,” *Foreign Ministry*, December 12, 2022. “Israel ‘Completely Rejects’ Claims of Any War Crimes, Netanyahu Tells ICC,” *Israel Hayom*, July 2 2023.

13 See *Amicus Curiae* briefs submitted by relevant countries to ICC.

sovereign Palestinian state does not exist, and alleged recognition by some states or by the General Assembly does not remedy this fact. Indeed, binding Israeli-Palestinian agreements expressly leaves the territorial boundaries of any future Palestinian state to a final resolution, underscoring “Palestine’s” lack of territory. Furthermore, the Palestinian Authority has no de jure or de facto jurisdiction over Area C of Judea and Samaria, Jerusalem, or Israeli nationals. In Mandelblit’s own analysis, if the ICC’s current investigation is entirely illegitimate, it therefore is not acting in accord with the law; if it were, it would not be able to indict any Israelis. If the ICC chooses to ignore international law, it will hardly care more about the details of Israel’s domestic law.¹⁴

Despite the non-existence of a Palestinian state and its own lack of de facto or de jure jurisdiction over Israeli nationals, in February 2021, the ICC established that it indeed had jurisdiction over “the situation in Palestine.” In its decision, from February 5, 2021, the Pre-Trial Chamber concluded that “Palestine” includes all of eastern Jerusalem, the West Bank and Gaza – in short, upholding the claims of territory by Palestinians maximalists. even before a formal criminal case has been launched. It is clear from this that the ICC has already decided to treat Israel as an occupying power. All of these developments – recognizing a Palestinian state, opening an investigation, concluding that settlements may constitute war crimes – occurred under the present judicial structure.¹⁵ It is evident that respect for Israel’s legal system has not stopped it from taking all the steps leading to charges against Israelis. Experience strongly suggests that it intends to take the next step, of issuing formal criminal charges – regardless of judicial reform.

3 ► **The ICC’s “Settlements” Crime Targets Israel Alone**

Targeting Israel is built into the ICC’s founding statute. The definition of war crimes in the Rome Statute (Art 8) is based largely on the Geneva Conventions and other related treaties. Article 49 of the IV Geneva Convention states that “the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Yet, Article 8(2)(b)(viii) prohibits “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 territory [emphasis added].” This amendment was inserted at the behest of the Arab states, in an effort to criminalize Jews living in Israeli communities in Judea and

14 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.

15 “Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction, ICC-OTP, December 20, 2019, *Summary of Preliminary Examination Findings*.

Samaria, the only instance in which the Rome Statute departs from Geneva Convention definitions to target a particular state.¹⁶

The experience of Cyprus, a state experiencing massive settlement by Turkish citizens, is instructive. Despite requests by northern Cypriot refugees to open an investigation into Turkish violations of war crimes based on Article 8, the ICC prosecutor has chosen to do nothing about Turkish settlements, even though it has jurisdiction going back two decades.¹⁷

Similarly, Russia's occupation and annexation of Crimea in 2014, as well as its subsequent general invasion of Ukraine in 2022, have been accompanied with a largescale settlement enterprise. In November 2016, Ukraine's chief prosecutor announced that his government documented the transfer of more than 72,000 Russian settlers to the Crimean Peninsula.¹⁸ Based on Ukraine's ad hoc acceptance of the Court's jurisdiction and the prosecutor's preliminary conclusions that Russia has indeed committed war crimes, the ICC has opened an investigation against Russia. However, despite the prosecutor's perfunctory mention of Russia's transfer of civilians to Crimea in the ICC's 2017 Preliminary Examination, the issue is glaringly absent from its final 2020 Preliminary Examination Report.¹⁹ Article 8 has Israel's name, and only Israel's name, on it.

4 ► Complementarity

Assuming the ICC had jurisdiction, it only prosecutes where the home state is "unable or unwilling" to investigate or prosecute a crime.²⁰ The complementarity doctrine in no way relates to the method of judicial selection. Indeed, it does not refer to courts at all, but to the "unwillingness" of the "state" to prosecute, which focuses primarily on the executive branch. The proposed reforms do not involve Israel's criminal justice system, its independence, or the ability of prosecutors to prosecute offences committed by its soldiers. Changing the appointment system for that of the Supreme Court does not relate to criminal trials, nor does the attorney general's veto proposed government decisions. Even the so-called "override clause" only deals with Supreme Court

16 See "Statement by the Head of the Delegation of Israel Judge E. Nathan, Rome Conference, Official Report," vol. ii, 17 July 1998, 122, and "[Declaration made upon Signature of Rome Statute](#)," December 31, 2000.

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

18 "Ukrainian Prosecutor Called Exact Number of Occupants in Crimea," *QHA Ukrainian News Agency*, November 23, 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/>

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

20 *Rome Statute*, Article 17 (1)(a)

invalidations of legislation, not criminal guilt or innocence.²¹ The amendment currently under discussion for administrative review based on “reasonableness grounds” will put Israel more in line with other common-law countries.²²

Even Israel’s present judicial system would not satisfy the ICC’s views of what complementarity requires, however. Foremost among the supposed crimes, the ICC is investigating the supposed crime of allowing Jews to live in Judea and Samaria. Israel’s Supreme Court, however, has never treated this as a criminal issue. Israel is not investigating or prosecuting its citizens for living in the Old City, and never will – because it does not regard it as a crime. For the ICC, complementarity is triggered by at least a criminal investigation.²³ Simply not investigating based on a considered judgement that no crime occurred would likely not be enough. And decisions about investigations are made by prosecutors, and ultimately supervised by the attorney general in a way that would not be affected by the proposed reforms. Indeed, many scholars have noted that this is part of what makes the Palestinians’ ICC tactic so powerful – no matter how good Israel’s court system is, it will never satisfy the Hague on this score.²⁴

If the passage of the reforms would mean all deference to Israeli courts were lost, it would mean the overwhelming majority of ICC member states cannot be considered to have independent justice systems. Such supposedly politically compromised systems include Canada, in which the prime minister appoints the Supreme Court judges; France, where judges to the Constitutional Council are appointed by the presidents of the Republic, the National Assembly, and the Senate; and Germany, in which Constitutional Court judges are selected and voted upon by the Bundestag and the Bundesrat.²⁵ Judicial independence has never been thought to require self-appointment, only tenure in office and political non-interference in proceedings.

Moreover, the reforms being discussed by the government (as of Spring 2023) focus on the judge-made “reasonableness doctrine” and the attorney general’s power to bind the government. The ICC is an international body with member states and a wide range of legal and political systems, including monarchies. Nothing in its jurisprudence to date suggests complementarity requires any

21 See proposed “Judiciary Basic Law Amendment and Government Basic Law Amendment,” Attorney General.

22 “Reasonableness Grounds in a Comparative View,” Talia Einhorn, submitted to Constitution, Law and Justice Committee for Discussion on June 26, 2023.

23 See OTP Situation in Iraq/UK, [Final Report](#), December 9, 2020, Conclusion, 180.

24 Yaël, Ronen. “Taking the Settlements to the ICC? Substantive Issues.” *American Journal of International Law*, 111: 57-6 (2017); David Bosco, “Palestine in the Hague: Justice, Geopolitics, and the International Criminal Court.” *Global Governance* 22:155 (2016). “Moreover, Israel has no complementarity defense on settlements; it cannot plausibly claim that it has investigated its own conduct. The Israeli Supreme Court has addressed a host of issues related to Israeli conduct in the Occupied Territories, but it has avoided the fundamental legality of settlements and has never decided whether settlement activity creates criminal responsibility. The failure of Israel’s legal system to consider these issues could smooth the way for ICC scrutiny.”

25 S.-N. Cohen, S. Nataf, and A Bakshi, “Selecting Judges to Constitutional Courts — A Comparative Study.” *Kohelet Policy Forum*, 2021.

particular configuration of balance of powers, or that its complementarity analysis relates at all to fine details of domestic law, such as the Supreme Court's ability to disagree with discretionary ministerial appointments or decisions. Indeed, the Supreme Court has cited complementarity as a reason to dismiss matters involving the United Kingdom, where the government is not bound by the advice of its legal advisor and can always seek separate counsel, and which has a much narrower doctrine of "reasonableness."²⁶ Indeed, it has even cited the pendency of a criminal inquiry in Guinea as satisfying complementarity, without any discussion of the particularities of the country's legal system, which has been described by the U.S. State Department as "understaffed, corrupt, and opaque," as well as fundamentally "lack[ing] independence."²⁷ It is one thing to object to the proposed judicial reforms in whole or part, but simply not reasonable to claim they make Israel's judicial system less reliable than that of Guinea.

5 ► Conclusion

Invoking ICC action as an argument against judicial reform turns what Israel has deemed an illegitimate inquest into tools for maintaining a domestic political status quo. Any theoretical ICC charges should not be a factor in Israel's democratic decision-making. Israel's citizens must be free to design their institutional and constitutional framework by democratic mechanisms, without external coercion or threats. Certainly, invoking a democratically unaccountable biased Court that has repeatedly sought to extend its jurisdiction illegitimately is not a principled basis on which to defend the powers of the Israeli Supreme Court. And even making the argument makes ICC action against Israel only more likely – if that were possible.

The rhetoric about the ICC in the judicial reform debate gives the body far more respect and formidability than it deserves. In the ICC's twenty years of existence, it has convicted only six people of atrocity crimes.²⁸ It has been unable to impose serious sanctions on states that refuse to cooperate. In 2019, the ICC Pre-Trial Chamber rejected the prosecutor's request to open an investigation into alleged American war crimes in Afghanistan, explicitly citing American non-cooperation. The decision was subsequently overturned by the Appeals Chambers in 2020 and was swiftly met with American sanctions against ICC officials. When the prosecutor decided to

26 A. Bakshi, "Legal Advisors and the Government: Analysis and Recommendations." *Kohelet Policy Forum*, 2016. "The roles of the Lord Chancellor and the Law Officers," 9th Report of Session 2022-23, *Select Committee on the Constitution*, House of Lords.

27 *Guinea - United States Department of State*, Accessed July 2 2023.

28 See Eugene Kontorovich, "International Courts & Tribunals (Overview)," *ELGAR ENCYCLOPEDIA OF CRIMINAL LAW & CRIMINAL JUSTICE*. (forthcoming, 2023).

continue the investigation in 2020, American actions were “de-prioritized” and the sanctions lifted. This saga demonstrates the ICC’s incapacity to act in absence of state cooperation. This is not to say that adverse ICC action does not come with some diplomatic cost, but it is not some cataclysm of retribution that should swing the scales of democratic decision-making.²⁹

The ICC has declined to open investigations into far more egregious human rights violations, including genocide and crimes against humanity, focusing instead on Israel. Indeed, it has specifically declined to prosecute Russian settlements in Crimea or Turkish ones in Northern Cyprus, yet it reveals its systematic bias against Israel in the long chain of lawless decisions unfavorable to Israel, even under the unreformed judicial system. All this suggests that it is not international law, but the international politics of the lowest common denominator, that will determine its future actions regarding Israel – and those actions will almost certainly be hostile. But no part of the proposed judicial reforms will make this significantly more likely. At the same time, invoking the Court as a bogeyman in the reform debates may make adverse action more likely by signaling that Israeli elites accept its legitimacy. Indeed, when opponents of reform use it to create fear amongst Israeli servicemen, they essentially seek to give domestic legal effect to an institution Israel’s democratically-elected governments have refused to join.

29 Moreover, ICC doctrine favors pursuing charges against more senior officials given the tribunals’ extremely limited capacity. Thus if anyone has a basis to be concerned about illegitimate prosecution, it is ministers in the current government. That they do not seem overly concerned is consistent with the ICC rhetoric being crafted largely for public consumption. See Marti Flacks, “The ICC Wants Putin – Now What?” *Central for Strategic and International Studies*, March 20, 2023.