The Imperative To Reform the International Criminal Court

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On Friday, February 5, as Israelis and Jews around the world were marking the Sabbath, the International Criminal Court (ICC) judges published their decision regarding whether they would grant permission to the prosecutor to open an investigation for alleged war crimes in "the State of Palestine." The judges, by majority with one dissenting, found that "Palestine is a State Party to the [Rome] Statute" and that jurisdiction extends to "Gaza and the West Bank, including East Jerusalem." Simply put, the ICC prosecutor has been given the green light to investigate alleged instances of war crimes committed by the Israel Defense Forces, on one hand, and the Palestinian Authority, Hamas, Palestinian Islamic Jihad and the Popular Front for the Liberation of Palestine, on the other—thus equating the investigation of a state army bound by the laws of war and outright terror regimes.

The ICC's decision undermines legal opinions expressed by renowned international law experts from around the world, as well as seven governments—including Germany, Australia and the Czech Republic—that submitted amici briefs to the Court arguing that "Palestine cannot be considered a State," and the Court therefore does not have jurisdiction over its putative investigation. Canada also wrote a letter to the Court that argued this very same point.

Nonetheless, a majority of the ICC judges have given the ICC prosecutor permission to move forward and initiate an investigation that challenges the very founding principles of this would-be "Court of last resort"—namely, to investigate and address the world's gravest violators of human rights when no other means are available. Utilizing the Court in this way undermines the Court's foundational principle of complementarity by ignoring Israel's internationally respected legal system, commitment to the rule of law and capability of addressing alleged crimes domestically. Its decision also contradicts the Court's intended scope and ensures that its scarce resources will be utilized in a systematic delegitimization campaign against the State of Israel—a clear violation of the consensus International Holocaust Remembrance Alliance working definition of anti-Semitism.

In contrast, by applying this double standard, alleged cases of crimes against humanity committed in other conflicts are ignored, due to the Court's limited resources. For instance, in December, the ICC declared that it would not pursue an investigation of China's treatment of its Uyghur population, despite evidence of torture, internment, mass sterilization and other abuses of a million human beings. The U.S. government has even referred to China's treatment of its Muslim minority population in Xinjiang as a "genocide," yet the ICC prosecutor nonetheless claimed there was not enough evidence to pursue an investigation. Other cases of human rights abuses in countries with failed domestic justice systems, such as the cases of Iran and Venezuela, are either blatantly ignored or given little priority.

In addition to undermining foundational principles and overlooking legal expert opinions and member states' amici submissions, the Court's justification for its decision also exhibits reasonable evidence of bias—the Court reportedly engaged with members of internationally designated terrorist organizations and relied on information provided by terror-tied non-governmental organizations. Additionally, the Court's "legal argument" to open the investigation also heavily rests on UN General Assembly and UN Human Rights Council decisions, which are not international laws by definition.

Given this evidence of bias and the flawed legal foundations presented, it appears that the Court's investigation will serve one-sided political interests, and not a legal or human rights agenda. The Palestinian Authority must too be held to account for its outright violation of the internationally brokered Oslo Accords—which prohibit unilateral endeavors such as this—while it simultaneously seeks to benefit from the international status the very same agreements seek to create. Possible Israeli responses to ensure its sovereignty must be viewed in the context of these unilateral Palestinian moves.

As the Knesset's official liaison on matters concerning the ICC, I call on our allies and friends around the world, on ICC member states and on all trustees of international law and human rights to condemn this shameful endeavor and to work toward immediate reform of the ICC. The case against Israel is but a symptom of the politicization of yet another international institution serving to empower the culture of impunity in regimes where there is no means for justice. It is our collective responsibility to demand and lead this reform, and to ensure the Court realizes its mission to uphold, promote and protect universal human rights and international laws.