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The International Criminal Court's Decision on Alleged U.S. Crimes in Afghanistan: Implications for Israel



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In a decision dated April 12, 2019, a Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) rejected a request by the ICC Prosecutor to proceed with an investigation of alleged crimes against humanity and war crimes by American military and intelligence professionals and by other forces who served in Afghanistan.¹

On the same day, in a White House statement, President Trump welcomed this decision and stressed:

Since the creation of the ICC, the United States has consistently declined to join the court because of its broad, unaccountable prosecutorial powers; the threat it poses to American national sovereignty; and other deficiencies that render it illegitimate.

He also added regarding Israel:

Any attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.²

Prime Minister Netanyahu, at a cabinet meeting two days later, on April 14, also welcomed this decision by the ICC, stating:

To put on trial U.S. or Israeli troops, or the State of Israel and the United States, is absurd. This is the opposite of the original purpose of the International Criminal Court.

He added that the ICC's decision was a "correction of injustice" and thanked President Donald Trump for standing firmly with Israel and its soldiers.³

The ICC Statute's requirement of authorization by judges of a Pre-Trial Chamber prior to the opening of a formal investigation by the ICC Prosecutor is necessary in cases where the initiative for an investigation emanates from the Prosecutor, rather than at the initiative of a state party to the Statute.

The aim of this PTC authorization is to serve as a filtering mechanism to prevent manifestly ungrounded investigations due to a lack of adequate factual or legal grounds. The mechanism is also intended to ensure that an investigation would indeed serve the interests of justice and not be inconclusive.⁴

As stated in the PTC's decision:

Frivolous, ungrounded, or otherwise inconclusive investigations would unnecessarily infringe on fundamental individual rights without serving the interests of justice or any of the universal values underlying the Statute...⁵

In its decision, the PTC acknowledged that there exists a "*reasonable basis to consider that war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the U.S. authorities, establish a reasonable basis to consider that crimes within the ICC jurisdiction have been committed.*"

However, the Chamber listed its reasons for rejecting the Prosecutor's request as follows:

- The time elapsed since the opening of the examination in 2006;
- The changing political scene in Afghanistan since then;
- Lack of cooperation with the Prosecutor and likelihood that this would deteriorate even more if an investigation begins;
- The need for the court to prioritize its activities that would have better chances to succeed.

The Pre-Trial Chamber concluded:

The Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result

in meeting the objectives listed by the victims favouring the investigation. Thus the Chamber concluded that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice and rejected the Prosecutor's request for authorization to investigate.⁶

Implications Regarding Israel

Clearly, this decision by the Pre-Trial Chamber has important implications regarding the general functioning of the ICC and its Prosecutor in their handling of referrals and requests to open investigations against Israel.

This, especially regarding questions as to whether the admissibility of a case, the jurisdiction of the Court, and the gravity of the alleged crimes meet the strict standards, values, and criteria as spelled out in the Statute of the ICC.

Of similar importance, as stressed by the Pre-Trial Chamber, is the need to take into consideration the prospects for and feasibility of a successful investigation and prosecution, the credibility, legitimacy and *bona fides* of the Court, its organizational and financial sustainability, and the appropriateness of investigations.⁷

In the context of the many requests and complaints regularly and ceremonially submitted by the Palestinian leadership to the Court's Prosecutor alleging crimes by Israeli military personnel and political leaders, the issue of the very credibility and *bona fides* of the Court are especially pertinent.

This is all the more evident in light of the fact that the court is being abused or manipulated by the Palestinians as part of a political campaign of delegitimization of Israel, and, in fact, the Palestinian leadership appear to have adopted the ICC and its Prosecutor as their own "back-yard" tribunal for harassing Israel, its leaders and military.

In weighing the above considerations regarding its credibility and the sustainability of its functioning, and in light of the important jurisdictional and substantive issues set out in the decision by the Pre-Trial Chamber regarding the Afghanistan case, the ICC will need to review several significant points regarding the Palestinian referrals regarding Israel.

- Since the ICC's Statute is open to "States Parties" only, and in view of the fact that there is no Palestinian state, the assumption that they can be party to the Statute and engage the jurisdiction of the Court is legally flawed, and thus cannot constitute grounds for accepting referrals of Palestinian complaints.

- The basis for accepting Palestinian accession to the Statute was a non-binding resolution of the UN General Assembly 67/19 on the “Status of Palestine in the United Nations” that upgraded the status of the Palestinian delegation to the UN to “*non-member observer state status*.”⁸ Clearly, the UN General Assembly does not have the power to establish statehood nor to serve as legal grounds for acceptance by the ICC Prosecutor or by the UN Secretary-General of accession by a non-state of Palestine to the ICC Statute.
- This is all the more pertinent in light of the fact that the same General Assembly resolution acknowledges the need for negotiations “*for the achievement of a just, lasting, and comprehensive peace settlement between the Palestinian and Israeli sides*.”⁹
- Since there exists no Palestinian state and the issue of the permanent status of the areas is a negotiating issue between the Palestinians and the Israeli sides, then the ICC cannot agree to the Palestinian referrals and their requests that it establishes its jurisdiction over **territory that is the subject of an ongoing peace negotiation process** based on the Oslo Accords, agreed upon by the Palestinians themselves and endorsed by the UN.

Conclusion

While the recent decision by the ICC’s Pre-Trial Chamber is devoted to the issue of alleged war crimes and crimes against humanity in Afghanistan, clearly the implications inherent in its decision to reject the Prosecutor’s request to open an investigation are no less relevant in the wider context of the functioning of the ICC in general, and in particular regarding Israel.

To protect the credibility, neutrality, integrity and noble aims of the International Criminal Court as set out in its Statute, the states members of the Court, as well as the Court itself cannot permit its manipulation and abuse by an irresponsible and misguided Palestinian leadership. They must do everything possible to prevent the Court from becoming one more Israel-bashing body.

That was not the intention of its founding fathers.

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Notes

1 https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF . For a brief summary see <https://www.icc-cpi.int/Pages/item.aspx?name=pr1448>

2 <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-8/>

3 <https://www.haaretz.com/israel-news/.premium-netanyahu-congratulates-trump-on-icc-decision-not-to-investigate-u-s-forces-1.7119243>

4 ICC Statute, at article 15 <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>

5 PTC decision, footnote 1 above, at paragraphs 32-34

6 See footnote 1, above, at paragraph 96

7 Ibid, at paragraphs 87-90

8 UNGA, 29 November 2012; http://ecf.org.il/media_items/503

9 Ibid, at paragraph 5

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<http://jcpa.org/the-international-criminal-courts-decision-on-alleged-u-s-crimes-in-afghanistan-implications-for-israel/>