

## **International Criminal Court - Press Briefing by Israel Foreign Ministry Legal Advisor Alan Baker**

**Jerusalem, January 3, 2001**

On the evening of the 31st of December 2000 (last week), Israel's ambassador to the United Nations in New York was instructed to proceed to the UN and to sign the Statute of the International Criminal Court. I would like to stress from the very beginning that the signing of an international convention - and we're talking about an international convention - is not considered as "becoming a party to" the convention. International law recognizes different stages through which a state binds itself and becomes party to an international convention.

The first stage is to sign. Signing is a political identification with the aims of the convention, in this case a political identification with the aims of the establishment of an international criminal court. It doesn't involve any obligation to carry out the terms of the particular convention, in this case the statute of the criminal court. It doesn't do anything more than constitute a political identification, a moral identification, with the aims of the statute. And this is all the more relevant when we're talking about a statute which is considered to be one of the most important achievements in international law since perhaps the 1982 Convention on the Law of the Sea which was another major achievement.

In the international community, abroad, it's considered to be a most serious development. Since the end of the second world war, attempts have been made to establish a permanent tribunal to judge war criminals. As we know, after the Second World War we had the Nuremberg tribunal, which was an ad hoc tribunal set up just for the purpose of judging German war criminals. We had the Tokyo tribunal, which was set up again, ad-hoc, in order to deal only with Japanese war criminals, and every now and then, the international community has set up specific tribunals for specific purposes. We've seen the Yugoslav tribunal which is presently functioning, the Rwanda tribunal, and there's now going to be a Sierra Leone tribunal. Since the end of the Second World War, efforts have been made to set up a permanent court which will deal with individuals who have carried out the most atrocious acts, whether it's genocide, or crimes against humanity, or war crimes, or the crime of aggression. All these things to be dealt with by a permanent court, which won't have to be reconstituted every time something happens.

Israelis, and before the existence of the State of Israel, prominent Jewish lawyers, politicians, and diplomats, have been very active in this - naturally so, because of the fact that the Jewish people suffered in the Holocaust. In fact, since the early 1950s, people like Shabtai Rosenne, who's 85 but he's still functioning, Judge Eli Natan, who is a member of our delegation to this present day, the late Jakob Robinson, and Justice Chaim Cohen, were all involved in the early 1950s in the United Nations committees drafting a statute for the

international court. And so, we consider, and when I say we I mean first and foremost the Foreign Ministry, we considered it as vitally important that Israel be a part of this family of states that's signatory to the establishment of this court. It's the fitting result of half a century of work, of effort, and Israel had to be a part of this, and couldn't stay outside. Hence our efforts, with the support first of all of the Foreign Minister, Shlomo Ben-Ami, and the Director General, Alon Liel, and the former Director General, Eitan Ben-Zur, who were very active and who helped push this forward, but also the Minister of Justice, Yossi Beilin and his people, who all helped push this through. I would perhaps like to refer to others who helped: the chairman of the Knesset Foreign Relations Committee, MK Dan Meridor, the Chairman of the Legal Committee of the Knesset, MK Amnon Rubinstein, Ministers Tamir and Melchior - many people have acted in a very constructive manner to help get Israel to sign this treaty and it's very important.

When we signed, we added a political declaration. I know that it's been reported in the press that Israel signed with a reservation with respect to various elements in the statute which are problematic. The statute doesn't permit reservations, because we're talking about the statute of an international court, so clearly it has to be a document that stands on its own, without anything that could derogate from its legal effect. And so there are no reservations. What states are doing and have been doing, is, in fact, upon signing, making an interpretative or some kind of political declaration as to how they view the statute as a whole or any particular provision of it, but these don't amount to actual reservations. We entered a statement upon signature which expresses more or less what I've said, but adds a very clear provision, and I'll circulate this statement to all of you.

What it says, and I'm just quoting from one sentence, but whole of the statement is very significant and very important, - "today, the government of Israel signs the statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens."

Now, let me talk about this political problem, because despite the fact that for over 50 years Israel was very active in the drafting of this statute and in fact considerable sections of it have been drafted literally by our people, by our lawyers, or together with our lawyers, at the conference that took place in Rome in 1998, in which the statute was adopted, Egypt, or principally Egypt, with the support of the Syrians, inserted a political provision into a listing of war crimes which were considered to be the most atrocious of war crimes that man is aware of. Clearly, such a listing, for such an important court, is a limited listing, it doesn't involve everything which might be a violation of the various conventions on the laws of war. It was meant to be the most serious and horrendous war crimes such as mass rape, torture, bombardment of civilian dwellings, and various other very serious war crimes. The Egyptians managed to insert a provision regarding the transfer, directly or indirectly, of population from the occupier's territory into occupied territory. We all know very clearly what this was intended to mean, and our delegation at the conference lobbied and fought against this. But the way in

which the statute was drafted and adopted at the end of the conference was merely by one single vote on everything, and we weren't able to persuade the organizers of the conference, the United Nations, to have separate votes on individual articles which might have given us a chance of at least having this particular article dealt with separately. The whole thing was either a take it or leave it option for the whole statute which was thus adopted as a whole, including the settlement provision.

On the basis of instructions we received from Prime Minister Netanyahu, Attorney General Eli Rubenstein, and the Director General of the Foreign Ministry, Eitan Ben-Zur, we were instructed to vote against the adoption of the statute. So in actual fact, in 1998, Israel was one of the seven states, together with the United States, China, Iraq, and other countries, but seven states that actually voted against it.

Since then, we've been working in preparatory committees in order to establish the various documentation needed for the court to exist, and within these committees we've managed to bring in a sort of footnote or comment to that particular provision on transfer of populations that refers the court back to international humanitarian law, and thereby closer to known position vis a vis settlements. This position is that the term "transfer of populations" doesn't refer, in actual fact, to the type of settlement activity that Israel is involved in. The type of settlement activity that is aimed at by this provision is in fact the type of movement of populations that was carried out by the Germans during the Second World War, which is covered by Article 49 of the 4th Geneva Convention, and not the type of policies that are carried out by the government of Israel. So on the one hand, we don't consider this necessarily to be relevant to us, but on the other hand, we felt it necessary to ensure that in the documentation of the court, there will be a reference back to accepted norms of international humanitarian law, and not just that obnoxious and manipulative provision that was put in by the Egyptians for purely political reasons.

The statute, as I say, has been signed by Israel, it has been signed by the United States, it's been signed by 139 states. It comes into force when it's ratified by 60 states. When I say "ratified", as opposed to signing, I mean that after having signed, a state then has to go through the process of changing its legislation, of getting its parliament and its various governmental agencies to approve the fact that that state can become party and bind itself to the convention, and then it ratifies.

As of today, 27 states have done this. In other words, states like Italy, Germany, France, and various other states, have gone through this process of making their own constitutional and legislative changes. Others are working very hard at it, for instance the British have got legislation which they have proposed to the British parliament, and they are presently dealing with it. The Spanish, for instance, in order to be able to become party, have to change their constitution, which

guarantees to the King of Spain, complete immunity from prosecution. According to the statute, nobody has immunity, neither presidents, nor prime ministers, nor foreign ministers, or army officers. Nobody. Anybody involved in genocide, crimes against humanity, or war crimes, can be placed under arrest, and placed before the court for trial.

It will enter into force only when there will be 60 ratifications. We judge that it will take about one-and-a-half to two years until the 27 ratifications grow to 60 ratifications, and then, clearly, 60 states is just a third of the total amount of states that exist, it will probably take time before the actual court starts functioning in a serious manner. But nevertheless, the day after 60 states have ratified, theoretically speaking, legally speaking, the court enters into force, the court starts functioning. Until that time, we, together with various other signatories, and those who haven't signed, will have to analyze the statute, analyze our policies, and decide whether we want to ratify the statute, and thereby bring the statute into force with respect to the State of Israel.

I think this is more or less the situation as it is now. As I said, this has been a very important achievement. For a long time, Israel has hesitated to open itself up to the international community, especially in very delicate international conventions, and therefore it's vitally important that Israel has become a full member of the international community in what is considered to be one of the most important international conventions that's been drafted in recent times. We in the Foreign Ministry and I think the government as a whole, - because the decision to sign was a decision by the government, - after a very serious, very professional, and very good debate last Sunday, urged to sign the statute. The fact that we signed together with the United States is significant. We felt that we didn't want to leave ourselves isolated, and it was important that the United States signed. The United States has also got very serious qualms with respect to this statute, and nobody's sure whether and when the United States will become a full party to it, but the fact that the United States signed together with Israel, is indicative of the close cooperation that has existed between us in this field.

We worked very closely throughout the process of the drafting of this statute, with the head of the US delegation, Ambassador David Sheffer, over the last few months in order to coordinate activities in Washington and activities here in Jerusalem in order to bring about the possibility that we could both sign, so this really is a very significant achievement.

I know that here in Israel we're living in a pressure cooker, where the political situation is at the head of everybody's agenda and it's something of immediate worry for all of us, but outside Israel this criminal court is the most serious development in international law, and we can't divorce ourselves from such a serious development, and therefore it's so important that we did sign this document.

Question: (inaudible)

Baker: No, the question of ratification, as I say, it's a legal process. In other words, if the US ratifies, then it has to check, first of all, whether it's compatible with its law, and secondly, whether the statute includes sufficient elements to answer the interests of the United States, and we have to do the same. The statute involves very serious provisions, and anybody who reads it, it's a very complicated document, and I wouldn't presume to give a lecture on the academic level here - , it's a very complex document, and it basically means that from the moment the court comes into existence, anybody committing a crime falling within its jurisdiction, can potentially be brought before the court for trial. The statute involves several guarantees for individuals. It guarantees that any particular person should first of all be tried by his or her own national courts before being brought to the tribunal. So there are several elements within the statute that are very important. But basically, what worried the Americans is that in view of the fact that they've got thousands of soldiers throughout the world in various peacekeeping and other functions, that for any non-relevant reason, whether it's political reason or any other reason, somebody could really try and trump up a charge against any particular American and accuse him or her of a war crime and have them brought before the tribunal. The Americans are looking for some guarantee to make sure that there won't be an abuse of this statute.

Now, we have a similar interest in ensuring that this statute won't be abused, that's why we said what we said. We consider that the Egyptians abused the nature of this statute by putting in political provisions, and while we can't have these provisions deleted, these are in, and there's nothing to be done about it, we can make sure that the court functions in a non-political manner, and this is vital in order for this court to succeed. It has to be non-political, otherwise it will become another United Nations and this is something that nobody wants.

Question: (inaudible)

Baker: The statute states that it's not retroactive. In other words, the court will only deal with crimes committed after it's established, not beforehand. That's assuming that we're talking about crimes. Israel doesn't consider that any of its settlements is in violation of international law or constitutes a crime according to the statute because we don't consider that the particular provision that was put in on the transfer of populations is directed against us. We don't think it's relevant with respect to us.

Secondly, as I say, the court doesn't exist yet, and Israel hasn't yet ratified the statute and there's still time in order to consider how we're going to deal with it and within this time the whole question of the political situation is also still open. We might well find ourselves at some stage with an agreement with the Palestinians by which all the list of settlements become part and parcel of Israel's sovereign territory. There are many ifs that exist until such time as this thing

comes into existence. But clearly, I'm not saying that Israel doesn't have to think of how to deal with various problems that potentially could crop up, and I'm not just talking about the problems of settlements. You know, every now and then, regrettably, we're obliged to carry out military activity against what happens in Lebanon or anywhere else, and for the same reason that the Americans are fearful, we could also be fearful that somebody might try to prosecute an Israeli officer who happens to be travelling abroad for some action that's been carried out in Lebanon or anywhere else, and clearly we have to face this prospect and decide how we're going to deal with it.

In other words, this court is going to be established whether Israel becomes party or not. In other words, within two years, we think, this court is going to be there. Now, if Israel becomes party to it, or if Israel doesn't become party to it, it's still going to be there, and there's still going to be a potential for prosecution. If we have nothing to fear, then fine. If it's not utilized politically, which we hope and assume it won't be, and we'll certainly fight against it, then we have nothing to fear. But, in any event, we have to consider our own activities, and judge and see and ensure that what we do is in accordance with the law, and with international law, and this is what we're doing.

Question: (inaudible)

Baker: Whether Israel ratifies it or not, as soon as it comes into force, anybody outside of Israel, travelling outside of Israel, could potentially be accused and brought before the court for any of the offenses committed. If Israel ratifies, then the statute includes an "opting out" option which the French have taken up, to declare that the jurisdiction of the court, with respect to war crimes, won't be applicable for a period of seven years. Now, this option is only open for those states that become party. Now, this is obviously one of the considerations that Israel will make, if Israel chooses to ratify, and chooses to opt out of the jurisdiction of the court in respect to war crimes, then this will certainly reduce the danger that exists. If Israel does not choose to ratify, then Israel won't be able to make use of this opting-out clause, and so there could be a problem.

Q: Would you recommend as an advisor that Israel ratify this?

Baker: We haven't yet come to a decision, because there are several other provisions in the statute that we have to deal with in order to see whether we can change our legislation. There are provisions that are difficult, and not political provisions, but legal provisions, requiring the transfer or security material from Israeli government to the court for purposes of evidence, that today our legislation doesn't permit this. And so, we're going to have to consider the extent to which we can change our legislation in order to suit it to the requirements of the statute. So there are several considerations that we have to consider yet as to whether we will be able to ratify, and when.

There's no time limit. In other words, having signed, there's absolutely no time limit as to when we can ratify. We can ratify in another 50 years, if we choose, or we can ratify in the next month or year or two years. We have to decide, and this is the work that we in the Foreign Ministry, are now going to coordinate with the Ministry of Justice, with the Army, with the various other institutions of the government here in Israel, and NGOs, to go into a series of discussions and meetings to consider the plusses and minuses of ratifying.

Question: (Regarding the authority of the Prime Minister to sign an agreement with the Palestinians)

Baker: Listen, I'd rather not enter into this, it's enough that one legal advisor is being criticized. Look, I was asked in the legal committee in the Knesset last week my opinion as to whether the Prime Minister can sign an agreement at the present juncture when there is a minority government, and I was asked as an international lawyer, and the answer that I gave was that signing or initialling an agreement, from the point of view of international law does not involve obligating a government or a state. According to international law, the law of treaties, initialling is merely authorization of the content or the text of the agreement, and therefore legally speaking the Prime Minister or the Foreign Minister or anybody can initial an agreement and it doesn't involve entry into force or any obligation. Now, if the two sides agree, signature also necessarily doesn't involve an obligation of the country if the signature is subject to approval by the parliament or approval by public referendum or something like that.

Now, in our case, from the internal legal point of view in Israel, such an important agreement, especially as it involves transfer of territory, has to receive approval by the Knesset, by the Israeli parliament, and in some cases, although the legislation hasn't been completed yet, it also has to go through a referendum. So legally speaking, whatever may be signed, without the approval by the Knesset, and referendum if necessary, it wouldn't enter into force. So this is very clear, both from the legal point of view, internally and externally.

The question of course is a political question, or a question of how it's perceived in the international community, and so the question is asked whether a signing ceremony or something like that will not give the perception that Israel is obligating itself, whilst clearly it won't be obligating itself legally. This could be a problem, because clearly, a ceremony like that might be perceived by the international community, by the public, as being some element of obligation. When it becomes clear that Israel hasn't obligated itself, and that the Knesset wouldn't or might not approve, or a new government might not approve, then there'd be a political problem, a problem of explanation, etc. And so, you know, the whole thing has some problems, but other than that I would only restrict myself to legal analysis and not get into political problems.

Question: (inaudible, about settlements)

Baker: I'm a settler. I live in a settlement. We don't think the court will very easily get itself into such a political problem, because if it does so there will many states that will be very hesitant to become party to this whole thing if it becomes clear that this is going to be a political animal. And so there are a lot of reasons why the court will have an interest in functioning in a very professional, non-political way, and so if we think about it very seriously, this provision, we don't consider it to be such a problem as is made out. And hence we decided to sign, because we really felt that the thing as a whole is far more important than any petty attempt - and you know, whilst I don't want this to be interpreted as criticism of Egypt, but it nevertheless is, because I think it was completely uncalled for, unnecessary, and has no place in the statute. But potentially, theoretically, it could be a problem. Let me just remind you that two years ago when Shimon Peres was in London, somebody asked to issue a writ of arrest against him for his being prime minister at the time of the shell exploding in Kfar Kaana in Lebanon. Nothing happened - the British didn't arrest him. But there's always this danger of someone trying to utilize, misuse this structure for a political agenda, and this is why we came out very strongly in our statement against this danger.

Question: (inaudible)

Baker: We assume that it's not just Israel's friends and influence. We think that the court itself will have no interest in its become a politicized body.

Question: (on the refugee issue)

Baker: Well, this is something else which we are dealing with in the context of the present ongoing negotiations with the Palestinians on a settlement of the problem of the refugees. What we've been offering, and what's part of the package that's being put on the table is setting up an international body that will deal with claims by individuals with compensation or whatever for their property. So this is something which, assuming that it will be agreed upon between Israel and the Palestinians sooner or later, and I don't know when and I don't know how long it will take. My children might be sitting here and talking to the press in another 20 years and saying the same thing. I don't know, I hope not, but this isn't part of the problem of the international criminal court.