

Israel and the International Criminal Court

**Office of the Legal Adviser to the Ministry of Foreign Affairs
June 2002**

The goals of the Court

The establishment of the International Criminal Court represents a significant development in international law. Israel is fully supportive of the goals of the Court and its desire to ensure that no perpetrator of heinous crimes goes unpunished. The idea of the Court was originally proposed over 50 years ago in the wake of the Nazi atrocities in the Second World War and Israel was among its earliest and keenest supporters, with Israeli representatives participating actively in the earliest drafts of its statute. Since then, Israel has continued to follow the development of the Court and to participate in the preparatory commissions and conferences leading to its establishment.

Areas of concern

However, alongside Israel's support for the aspirations of the Court, Israel has concerns as to how effectively these will be achieved through the Court as it has been constituted. A major concern is that the Court will be subjected to political pressures and its impartiality will be compromised. Israel has recently witnessed many international bodies, established for the highest goals such as protecting human rights and fighting racism, cynically abused and turned into political tools. Clearly, the Court could only be effective if it remains scrupulously impartial. Regrettably there are already some troubling indications that this impartiality may be compromised:

- **Rewriting principles of international law - and inventing new crimes:** While the Court was intended to address the crimes which had been recognized as being the most serious crimes in international law, in practice the Statute of the Court frequently fails to reflect those crimes accurately.

For Israel, the clearest example of distorting existing principles of international law, as part of a political agenda, is the inclusion as a war crime of: "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies". This particular offence represents neither a grave breach of the Fourth Geneva Convention, nor does it reflect customary international law. The inclusion of this offense, under the pressure of Arab states, and the addition of the phrase "directly or indirectly", is clearly intended to try to use the Court to force the issue of Israeli settlements without the need for negotiation as agreed between the sides.

- Selective lists of crimes: The list of crimes included in the Court's Statute is highly selective. Offenses such as terrorism and drug-trafficking are not included because of political disputes over their definition and scope. The paradoxical result is that a state acting against acts of terrorism may find itself under the scrutiny of the Court for the way it exercises its right of self-defense, while the terrorists themselves are outside the Court's jurisdiction.
- Appointment of judges: One area in which Israel fears that political discrimination is likely is the appointment of Judges to the court. Such appointments are, according to the Statute, to be made having consideration to "equitable geographical representation". This formula reflects the standard mode for elections in UN organs based on the UN regional groups system. As Israel is the only UN member state which is not accepted as a full member of any of the regional groups in the system, it seems that no Israel candidate - however competent - could be elected as Judge.
- The extensive powers of the Prosecutor: In attempt to bridge the gaps between civil and common law systems, the Court has adopted a hybrid approach in which the Prosecutor has extensive powers, including to initiate proceedings on his or her own initiative. Israel is concerned that these far-reaching powers are inconsistent with checks and balances necessary in any legal system and leave the role of the Prosecutor open to potential abuse.

Israel's dilemma

Israel's deep sympathy with the goals of the court coupled with its concerns regarding the effectiveness of the Statute, has created a serious dilemma for Israel regarding its attitude to the Court. In the Rome Conference at which the Statute was adopted, Israel, faced with a ruling that no reservations could be made, signed the final act of the Conference but was forced to vote against the Statute. Explaining Israel's negative vote, the head of Israel's delegation, Judge Eli Nathan, pointed to the inclusion of the crime of transferring population as an example of politicization that Israel could not accept. He concluded:

We continue to hope that the Court will indeed serve the lofty objectives for the attainment of which it is being established.

It was with this aspiration in mind that Israel signed the Rome Treaty on the International Criminal Court in December 2000, as an indication of its hope that the Court would remain true to the goals of its founders. However, along with many other states which have not ratified the Treaty, Israel is closely following the development of the Court to see whether indeed it will genuinely prove to be impartial and effective, and whether, in light of this, it can ratify at a later stage.