

ISRAEL AND THE ICC

Richard J. Goldstone*

The Government of Israel and many of its citizens have a reasonable suspicion of bias against Israel by the United Nations and other international organizations. This is partly the consequence of partial treatment in respect of the Middle East by the United Nations General Assembly, Security Council and Human Rights Commission. Even if one makes an assumption that many of their criticisms of Israel are justified, other similar if not more serious human rights violations or infractions of international law on the part of many other members of the United Nations have been overlooked or given scant attention by those bodies. Then too, there is the anti-Israel lobby, which exhibited its power at the Durban conference on Racism and Xenophobia. That can hardly have been calculated to instill confidence in Israel with regard to international human rights organizations.

On the other hand, abhorrence for war crimes and especially genocide and crimes against humanity should resonate in every Jewish breast. It was a consequence of the Holocaust that those horrible crimes entered the lexicon of international criminal law. Israel has the most pressing historical reasons for aligning itself with any endeavor to prevent impunity for war criminals.

The issue facing Israel, in my opinion, with regard to its participation in the *International Criminal Court (the ICC)* is whether the provisions of the Rome Statute¹, which governs the ICC, sufficiently safeguard the legitimate interests of its people. It certainly should not be the policy of Israel to protect its citizens who might commit serious war crimes. In my opinion the safeguards are there. However, for the reasons I have already mentioned, I

* Judge, Constitutional Court of South Africa; served between 1994–1996 as the Chief Prosecutor of the International Criminal Tribunal for Former Yugoslavia.

1 Rome Statute of the International Criminal Court, 17 July 1998, U. N. Doc A/CONF. 183/9, *reprinted in* 37 I.L.M. 999 (1998) (hereinafter: "Rome Statute").

would understand Israel wishing to reserve judgment at least until the judges and the Chief Prosecutor will have been appointed by the Assembly of States Parties in February, 2003 and the manner in which the ICC is to operate becomes clear.

That the Government of Israel signed the Rome Statute on 31 December 2000 indicated its support for the principle of having one permanent international court to investigate and prosecute war criminals for crimes allegedly committed anywhere in the world. At the same time the Government of Israel has expressed its concern that one provision in the definition of “war crime” in the Rome Treaty was aimed at its conduct in the Occupied Territories. This provision includes among:

“Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts...

(viii) 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”².

When it signed the Rome Treaty, the Government of Israel expressed in very clear terms its reasons for supporting the Court. It stated the following:

“Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the Rome Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.

As one of the originators of the concept of an International Criminal Court, Israel, through its prominent lawyers and statesmen, has, since the early 1950’s, actively participated in all stages of the formation of such a court. Its representatives, carrying in both heart and mind collective, and sometimes personal, memories of the holocaust — the greatest and most heinous crime to have been committed in the history of mankind — enthusiastically, with a sense of acute sincerity and seriousness, contributed to all stages of the preparation of the Statute.

2 Rome Statute, art. 8(2)(b).

Responsibly, possessing the same sense of mission, they currently support the work of the ICC Preparatory Commission. At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool. Today, in the same spirit, the Government of the State of Israel signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The Government of Israel hopes that Israel's expressions of concern of any such attempt would be recorded in history as a warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole. Nevertheless, as a democratic society, Israel has been conducting ongoing political, public and academic debates concerning the ICC and its significance in the context of international law and the international community. The Court's essentiality — as a vital means of ensuring that criminals who commit genuinely heinous crimes will be duly brought to justice, while other potential offenders of the fundamental principles of humanity and the dictates of public conscience will be properly deterred — has never seized [sic] to guide us. Israel's signature of the Rome Statute will, therefore, enable it to morally identify with this basic idea, underlying the establishment of the Court.

Today, [the Government of Israel is] honoured to express [its] sincere hopes that the Court, guided by the cardinal judicial principles of objectivity and universality, will indeed serve its noble and meritorious objectives”³.

On 28 August 2002, the Government of Israel sent a communication to the Secretary-General of the United Nations informing him that “Israel does not intend to become a party to the treaty and thus has no legal obligations arising from its signature on 31 December 2000”⁴. In both signing the Treaty and

3 The State of Israel, Declaration upon signature of the Rome Statute, 1 July 2002, [<http://untreaty.un.org/ENGLISH/bible/englishinternetbible>] (last visited on 11/05/2004).

4 Communication from the State of Israel to the Secretary-General of the United Nations, 28 Aug. 2002, [<http://untreaty.un.org/ENGLISH/bible/englishinternetbible>] (last visited on 12/05/2004).

in effect later withdrawing the effect thereof, Israel followed the unfortunate example set by the United States of America.

In adopting a “wait and see” approach to the ICC, it is relevant for Israelis to take note of the following important safeguards built into the Rome Treaty. The first is what has been called the principle of complementarity. This means that if any person is alleged to have committed a war crime covered in the jurisdiction of the ICC, the courts of that person’s nationality or any other domestic court claiming jurisdiction over him or her have the right to investigate and rule on the allegations prior to any action being taken by the ICC. If the domestic procedures are taken in good faith, then regardless of their outcome, the ICC would not have any jurisdiction in the matter. In other words, the jurisdiction of the ICC is complementary to that of the domestic courts. It follows that if Israel were to become a party to the Treaty, it could insist on investigating all allegations against Israeli citizens itself and if that is done in good faith that would be the end of the matter as far as the ICC would be concerned.

Opponents of the ICC then express concern that its Chief Prosecutor and judges might improperly rule that the domestic proceedings were not conducted in good faith and in that way allow the ICC to assume jurisdiction. The nations that have ratified the Rome Treaty (as of this writing, some 83) will constitute the Assembly of States Parties. That is the “legislature” which, in effect, will control the ICC. In February 2003, it will elect the eighteen judges and the chief prosecutor. The judges, for election, will require a two-thirds majority of all the States that have ratified, whether represented at the February meeting or not. The chief prosecutor will require a 51% majority. My expectation is that the judges will be representative of the important regions of the world and that the great majority of the judges, if not all of them, will be professional and not prepared to have the Court become involved in the politics of the United Nations or other political international organizations.

The Chief Prosecutor may not take any action without the consent of a chamber of three judges and their decision is subject to appeal to another chamber of five different judges. I anticipate that the conduct of these officials will be such as to instill confidence in the fairness and absence of bias on the part of the ICC. I repeat, however, that this is a judgment that Israel can make after the Court has been in business for a reasonable period of

time. I would add that the members of the Assembly of States Parties, and especially the democracies of the world, would not themselves be prepared to support and resource the ICC if it acts in an inappropriate and political fashion. If it acted in that manner against Israel today it could act in a similar inappropriate manner against other states tomorrow.

It is highly significant that the overwhelming number of states that have thus far ratified the Rome Treaty are the democratic nations of the world. Apart from Jordan, not one member of the Arab League has ratified it. The United States, on this issue, is at odds with all of its traditional international friends. Apart from the United States and Israel, the other states, which voted against the Rome Treaty in the middle of 1998, were China, Iraq, Libya, Qatar and Yemen. This is not the kind of company, which on the issue of international justice and ending impunity for war criminals should be kept either by Israel or the United States. I strongly hope that the manner in which the ICC operates will earn the confidence of those two nations and so enable them to join the Assembly of States Parties and play an active role in the work of the Court. Both Israel and the United States might well regret any acts or conduct on their part, which are calculated to inflict damage on the credibility or work of the ICC.