

A wolf in legal clothing?

By Aryeh Dayan, *Ha'aretz*, 15 May 2002

To judge by the sudden spate of warnings in the media in the past two weeks, there is no escaping the conclusion that the senior legal-security echelons of the State of Israel have suddenly become concerned, perhaps even alarmed, by the possibility that prominent Israelis, members of the security services as well as politicians, will have to stand trial abroad in the near future, for committing war crimes.

Attorney General Elyakim Rubinstein began to warn of this eventuality over two years ago, after Augusto Pinochet, former dictator of Chile, was arrested in London after a Spanish request for his extradition. This suggests the possibility that Israeli leaders would be arrested in this global context.

"There is a trend in the international community to internationalize the criminal issue," Rubinstein said two weeks ago, in the course of an internal discussion at the Justice Ministry, "and I'm afraid that our leaders will have to stand trial as war criminals." He was referring to the impending establishment of the International Criminal Court [ICC] in The Hague, as well as to the increasing tendency of some countries, led by Belgium, to allow foreign rulers accused of serious violations of human rights to be tried in their courts.

Rubinstein discussed this issue once again, this time at a lecture he delivered at the annual convention of the Israel Bar Association in Eilat. After declaring, with a slight note of contempt for the international community, that "a new era has burst forth in the skies of criminal enforcement, the era of international enforcement," he expressed his opinion that "the entire issue kindles red [warning] lights for the State of Israel," and announced that "we can expect a difficult period," and that "we have to prepare for it."

President of the Supreme Court Justice Aharon Barak also referred to this issue during his lecture in Eilat. Although he devoted most of his speech to explaining the policy of the High Court of Justice when it was asked to intervene in the actions of the military during Operation Defensive Shield, toward the end of his lecture, he also referred to the new era in international law. "Please remember," said Barak to those attending the convention, "that the permanent International Criminal Court has been established, and it will begin its work in July 2002. Every Israeli is subject to its judgment, although we haven't ratified the convention that establishes it."

Apparently at least one of the convention participants, Chief Military Advocate Brigadier General Menahem Finkelstein, had no need of this reminder. "We are in a dilemma, or to be more precise, we are bewildered," said Finkelstein, with rare frankness, in response to the words of the president of the High Court. In an interview to Yedioth Ahronoth, published three days later, he affirmed that the forum of the General Staff had met to discuss the subject, together with the attorney general, three months ago, and estimated that the danger of arrest and trial abroad hovers primarily over "senior members of the military" and will not affect lower-ranking officers and rank and file soldiers. "There is no reason why First Lieutenant Moshe should come to consult with us before he flies to France, said the chief military advocate. "The risk that he will land in Paris, be arrested there and be extradited to The Hague is nonexistent."

Jenin effect

The outburst of expressions of concern was sudden, but its timing was no coincidence. One reason for it was the events in Jenin, in the wake of which the American organization Human Rights Watch published a report in which it declared that IDF soldiers had apparently committed war crimes; the investigative committee that the UN secretary-general was about to send to Jenin aroused the fear among many Israelis that its conclusions would include a similar declaration. Another reason for the sudden concern was the fact mentioned in President Barak's speech: the official establishment in another month and a half, on July 1, of the ICC.

The ICC is a supra-national legal body which the UN decided to establish about four years ago, with the consent of most of the countries in the world, including Israel. Subject to many conditions and with strict limitations set down in its constitution, it will be authorized to try any person accused before it of committing three kinds of serious crimes: genocide, crimes against humanity, and war crimes. It can issue international arrest warrants against those suspected of committing these crimes, and anyone found guilty of committing them will be sent to prison by the court.

The legal and military leadership in Israel are becoming increasingly concerned that Israel will be well represented among the first suspects and accused. "Not because war crimes are committed here," they are quick to make it clear in the Ministries of Justice and Foreign Affairs, but because of "the critical and hostile atmosphere toward Israel," that prevails in most of the countries in the world, "and the prejudicial attitude toward us in international institutions."

The public warnings by Barak, Rubinstein and Finkelstein are only the exposed tip of the iceberg of concern, which is causing many senior officials in the Justice Ministry, the Foreign Ministry and the IDF to lose sleep. Secretly, all these groups, as well as others, such as the Shin Bet security services, have begun to make preparations for the possibility that politicians, military men and members of the Shin Bet will be arrested abroad, or that requests for extradition will be issued against them.

By decision of the attorney general, an inter-office committee has recently been established, headed by attorney Rachel Sucar of the State Prosecutor's Office, which has begun to collect legal and other materials that will be required in order to defend Israelis, if and when that happens. Members of the committee, in addition to attorneys Sucar and Alan Baker, the legal adviser of the Foreign Ministry, include members of the chief military advocate's office, the legal department of the Shin Bet, and the Defense Ministry. The first decision they took was to recommend to the government not to ratify its signature of the Rome Convention, which establishes the court.

Justice Minister Meir Sheerit has already declared that the government has adopted the recommendation (a step that will prevent introduction of the convention into Israeli law, but will have no effect on Israel's obligations in the international sphere).

The idea of establishing a permanent international court was born after World War II, as a result of the crimes of the Holocaust. The fathers of the idea, who gathered under the aegis of the UN in 1953, intended to establish an institution that would reflect and express willingness to fight against such crimes. The Nuremberg Court, before which some of the senior members of the Nazi regime were tried, was

established by the Allies for the purpose of trying them, and was disbanded immediately after it had completed its task.

The courts in which the former rulers of Yugoslavia and Rwanda are presently being tried were also established ad hoc. The International Court of Justice that has been functioning for years in The Hague is not a criminal court that tries the accused, but an administrative court, which discusses the behavior of nations.

The fledgling State of Israel supported the establishment of the court, and sent a delegation of important legal scholars, headed by the late Justice Haim Cohen to the 1953 conference. But the years of the Cold War were not a suitable time for implementing the idea, and discussions were frozen for four decades. They were renewed in the 1990s, in the wake of the horrors that took place in Yugoslavia, Rwanda and other places, and were concluded in 1998, when the committee that met in Rome decided to establish the court and approved the rules for its operation.

In Rome, Israel's positive attitude toward the idea of the court changed. Israel voted against its establishment, and Attorney General Rubinstein, who headed the delegation, has been waging a stubborn battle against it ever since.

The code that was approved, which specifies the crimes that can be tried before the court, adopted the list of crimes that appear in the 1949 Geneva Convention article regarding grave violations of human rights, which deals, among other things, with the behavior of occupying nations in occupied territory. Since 1967, Israel has had difficulty convincing the world that all its activities in the territories - and particularly the destruction of homes, the mass administrative detentions and the deportations - are in line with the instructions of the convention. But what turned Rubinstein into the most determined enemy of the ICC within the Israeli establishment is the fact that its constitution adopts the article in the Geneva Convention that states: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." "Israel," says Rubinstein, "cannot sign a convention that turns every settler into a war criminal and lumps together the mayor of the [West Bank] town of Ariel with a fighter-rapist from Bosnia."

Israel signed the convention. On the last day of 2000, which was also the last day on which countries could join the convention (a later signature involves a more complicated procedure, which is combined with the internal process of ratification by the country), the government of the prime minister Ehud Barak decided that Israel would join the convention. Barak, who accepted the arguments of Rubinstein and of the military establishment against the convention, was opposed at first to signing. His justice minister, Yossi Beilin, and his foreign minister, Shlomo Ben Ami, supported it, and the government decided, at the conclusion of a long discussion, to accept a compromise proposal suggested by Shimon Peres and Haim Ramon: Israel, they declared, would follow the example of the United States, which like Israel voted against the convention in Rome. But U.S. President Bill Clinton, in one of his last days at the White House, ignored the position of his military-legal establishment, and added the signature of his country at the very last moment. A minute later, Israel signed, too.

Fear of anti-Semitism

The court that is now about to be established, after 60 of the more than 130 countries which are signatories to the convention have ratified their signatures, will in fact force Israel to deal with a new international legal situation. But, as opposed to the impression one may get from Rubinstein's statements, not every settler and not every soldier who has served in the territories will find himself automatically on trial. Three of the 10 articles of its constitution significantly limit its jurisdiction. The most important of them states that only crimes committed after July 1, 2002 can be tried before the court. Another article states that it is permitted to discuss only events that have not been investigated, and whose perpetrators have not been put on trial by the country under whose auspices they acted. An Israeli citizen who is investigated or put on trial in Israel for a crime he committed during his military service, cannot be tried for the same crime in the international court.

The third article is the one expected to give rise to the most fascinating legal discussions. It states that the court will be authorized to discuss crimes committed by citizens of one country within the territory of another country, on condition that the country in whose territory the crime was committed agrees to the process. This article will place anyone who settles in the Golan Heights after July 1 in a problematic position (Syria has already hinted that it will encourage the submission of claims against anyone who settles in its territory) and will once again arouse the legal debate concerning the status of the West Bank and the Gaza Strip.

If any of its citizens is put on trial for acts carried out in the West Bank and in the Gaza Strip, Israel will claim that these areas don't belong to any country, and that the ICC cannot discuss what happens in them. There will be legal scholars who oppose this position because it turns the West Bank and the Gaza Strip into "areas immune to standing trial." Even now it is clear that they will claim that the PLO [Palestine Liberation Organization], whose declaration of the independence of the territories in 1988 was recognized by over 100 countries, is the "state" authorized to agree to the submission of such claims. The decision will be submitted to judges of the ICC; membership in this court is limited to judges whose training entitles them to serve in the highest legal instance in their countries. Every country that ratified the convention will be allowed to present candidates, who will be chosen for a term if they receive the support of two-thirds of all the countries that ratified the convention. The procedure for choosing the prosecutors will be more or less similar.

For Israel, in Rubinstein's opinion, these procedures are a "recipe for trouble," and they will be influenced by an "anti-Semitic atmosphere." In his speech in Eilat, according to the version submitted to Ha'aretz by his office, he expressed "a fear of politicization, in other words, that the motives there won't be fairness and doing justice alone, but various kinds of political motives. This fear, that Israel, for political reasons on the one hand, and for reasons with an anti-Semitic basis on the other, is liable to be a victim of unjustified attempts at international enforcement - is not without grounds." Israel, says Rubinstein, must distance itself from "a forum in which there may be judges [from countries which] dislike it, not to mention [countries which are] its enemies; from a body in which the prosecutor has no commitment to its [Israel's] existential problems, etc." He asked his listeners what such judges will know about such things as degree, or need, which are relevant legal concepts in our context.

Prof. David Kretzmer, an expert on international law from the Hebrew University in Jerusalem, who as a member of the UN Human Rights Commission has been closely

involved with the entire process of the establishment of the ICC, believes that they will know quite a bit. "I am very doubtful about the arguments of the legal establishment, that the ICC will have a prejudicial attitude toward Israel," he says with clear understatement. "The court will be a respectable legal institution, which will operate according to all the rules and all the guarantees according to which serious legal institutions operate. Experience proves that such legal institutions know that they are likely to collapse the moment they lose their credibility. If the court is seen as [an institution] that operates primarily against one country, for example Israel, it will lose its credibility. I have no doubt that the prosecutor, even if he attempts to place Israelis on trial, will try not to seem like someone who places only Israelis on trial."

Nevertheless, Kretzmer believes that on July 1, a new legal era will in fact begin for Israel. "If Israelis don't commit serious crimes, or if their perpetrators are brought to trial in Israel, the Israeli establishment has nothing to worry about," he says. "But if crimes are committed and if the government authorities ignore them, there will be a basis for the fear of having to stand trial abroad."

Had the events in Jenin taken place after July 1, explained Prof. Kretzmer, they could have provided a first test case. "According to the reports of the international human rights organizations that I read," he said, "there is apparently a suspicion that there were acts committed there that are within the categories which the ICC is authorized to judge." But even if such serious incidents are repeated, they won't necessarily reach the ICC. If Israel establishes a government commission of inquiry to investigate them, and carries out its recommendations, says Kretzmer, it can claim that the crime has already been investigated, and that it should not be discussed again in the court. "Of course," he adds a reservation, "provided that it really is a serious commission of inquiry, and that its recommendations are taken seriously."