State Attorney Shai Nitzan talks to the 'Post' about a decade versus ICC

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Outgoing State Attorney Shai Nitzan opened up to The Jerusalem Post on Sunday about his frustration with the International Criminal Court, in an exclusive interview covering his decade of work fighting for Israel from the inside.

Nitzan, who just stepped down as the country’s chief prosecutor last week, told the Post that many UN and international bodies “are biased against Israel” and that the ICC ruling against Israel this past Friday was “absurd.”

He first became a key player defending Israel from the ICC in 2009, when he was already a senior official in the state attorney’s office and was placed in charge of a newly created inter-ministry committee to fight the Goldstone Report.

Back in 2009, Israel was hoping to head off the ICC’s prosecutor at the time, Luis Moreno Ocampo, from opening a preliminary investigation into the Israeli-Palestinian conflict.

Nitzan’s goal was to convince Ocampo to disregard the Goldstone Report, authored by South African jurist Richard Goldstone and which accused Israel of committing war crimes during the 2008-2009 Gaza War.

The campaign also had diplomatic aspects to it, but Nitzan and a new justice ministry team – which was created on an emergency basis to be led by Roy Schondorf – focused, among other things, on convincing Ocampo that there was still no State of Palestine, which meant he had no jurisdiction.

Nitzan and Schondorf were successful in their three-year massive legal battle, which culminated in mid-2012 with Ocampo saying that even though around 130 countries accepted Palestine, its lack of status as a state at the UN disqualified it.

Schondorf eventually rose to the position of Deputy Attorney-General for International Affairs, while Nitzan was promoted to become the State Attorney in 2013.

However, by November 2012, the Palestinians succeeded in achieving a new status at the UN General Assembly of Palestine being a state, though it was defined as a non-member one.

This appears to have been the turning point which eventually led the current ICC Prosecutor Fatou Bensouda to open a preliminary probe in 2015 and to move toward a full war crimes probe last week.

Responding to Bensouda’s decision, Nitzan said: “I think that many forums, including the UN Human Rights Council [HRC] and elsewhere in the UN, are biased against Israel. If you see sitting on a committee [judging Israel] Syria, Cuba, Libya and Venezuela – these are dictatorships which harm human rights on a large scale. And they criticize Israel? It is simply absurd.”

But “the chief prosecutor of the ICC is something else. To put Israel in the cross-hairs when there are so many countries with worse human rights records – and she is not dealing with them – it’s outrageous. There are political considerations involved, but there are legal questions: Does she have jurisdiction?”

Nitzan then reiterated Israel’s position that Bensouda and the ICC have no jurisdiction because Palestine is not a state and so could not refer the case to her.

“I believe in this completely,” Nitzan said. “I have dealt with this a lot before.”

The Post pressed Nitzan, pointing out that Bensouda had not only gone after Israel for alleged war crimes, but was also going after the Palestinians.

“It is cynical that Palestinians who are shooting civilians without distinction with rockets intentionally fired on Israeli civilians,” are being compared to Israel, adding, “the world has gone crazy.”

Next, the Post noted to Nitzan that Bensouda had actually given Israel a slightly better status than Hamas since she was still studying Israel’s legal system whereas she had concluded that Hamas had no system at all for probing its own alleged war crimes.

Nitzan dismissed this distinction. “You cannot compare a fly and an elephant and say, ok, let’s question both of them… Hamas, Islamic Jihad and terror groups have carried out huge war crimes for years and she is dealing much more with Israel… This is unjust and outrageous.”

Further explaining his elephant-and-fly analogy, he said that the ICC is accusing the Palestinians of massive and constant war crimes by firing rockets on civilians – enormous war crimes the size of an elephant. In contrast, he said that at worst, if you accept the allegations (which he does not), Israel might be undertaking some problematic military operations in a small and limited number of cases – allegations the size of a fly.

Asked how and why he and his team succeeded at blocking the ICC’s involvement in the 2009-2012 round, but that Israel had not succeeded this time, he said that, “the world has moved more to globalization, also in the legal arena.”

He continued: “2009 is not 2019. The pressure is stronger today. I hope we can still stop it. But it is harder today. I don’t know if we will succeed,” noting that at least “the US condemned” the ICC prosecutor’s decision.

Next, Nitzan expressed sadness about where the ICC has gone since “the original idea of the ICC was a very good idea. But the implementation” has been problematic.

Even “the UN Human Rights Councils is a great idea, but if you put problematic countries on the committees” then it pollutes the process and “feels completely politicized.”

He said that when countries with awful human rights records are “judging” Israel at the HRC that “it feels like you are talking to a wall. They are judging us when we should be judging them.”

Nitzan remarked that out of decorum, he held back some of the rebukes he thought of when appearing before these committees. He said he would have liked to have asked: “Aren’t you ashamed? Where you torture people with electrocution and throw people into rivers… and you are giving us a lecture?”