Former Top FM Official Blasts Media, Government for Exaggerating ICC Danger

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Former Foreign Ministry top legal adviser Alan Baker is not happy with how the media and many Israeli government lawyers are framing the threat of the International Criminal Court regarding Israel.

In his narrative, which he recently explained in an interview with The Jerusalem Post, the media – including the Post – and many government lawyers are exaggerating the threat posed to Israel by the ICC, a threat he thinks is very unlikely to turn into anything concrete.

Essentially, Baker says that even though ICC Prosecutor Fatou Bensouda recognized a “State of Palestine” in January 2015 – which allowed her office to start reviewing Israeli-Palestinian war crimes allegations – he predicts that eventually she will reverse herself or the ICC itself will reverse her on the issue. If there is no State of Palestine, there is no ICC war crimes investigation.

Even in the event that they continue to accept Palestine as a state, he believes there is no chance the ICC will go after the settlement enterprise as war crimes because they do not meet the “gravity” requirement – meaning that the ICC was founded to go after genocide, not housing.

“Whether Alan Baker lives on a settlement or was involved in organizing people to live on settlements is not of the gravity... of [Khmer Rouge leader] Pol Pot, not the gravity of genocide. If [the ICC] wants to maintain its status of probing the most serious crimes as a whole, which threaten peace and security and threatened millions, can anyone genuinely say Israeli settlement activity meets those criteria?” Baker says.

Bring up the dark warnings to the Knesset by the Israeli government legal establishment against passing the “settlement regulation bill” and on other issues, and Baker boils over in frustration.

“I’m naïve maybe, but I generally think that if and when the issue of Palestinian standing and the jurisdiction of the court with respect to territory, spatial territory without yet having statehood or borders [comes before the court], that any judge doing his job in an impartial manner would have to say ‘Come back when you’re a state!’” exclaims the generally lowkey Baker.

Baker continues, “And that’s why I feel that all these various senior lawyers in the IDF international law division, Hebrew University and the Justice Ministry, and I am not talking about those who have a political agenda and some do, and they admit it, but those who have studied and understand the state of the ICC, I don’t understand how they can talk of the likelihood of senior Israelis maybe getting held before the court.”

So when Israeli officials ask Baker if they should worry about being thrown in prison because of the ICC, he tells them, “‘no.’ And I try to put things in the correct proportions, and it’s been taken out of proportion.”

Moving from criticizing some government lawyers to the media, and specifically the Post, he comments, “This brings me to the Jerusalem Post, which is frightening people. Every now and then I get calls from pilots of planes of El Al or former officers – ‘Can I land in Spain? Will I be arrested?’” also recounting concerns by former Shin Bet directors Carmi Gillon and Ami Ayalon, former prime minister Ariel Sharon and former foreign minister Tzipi Livni about being arrested during overseas visits.

He states that “the Jerusalem Post is in a very unique position. You can’t compare it to The New York Times or The Washington Post,” since the Post, Haaretz and other Israeli media are “taken by international readers as representing the views of Israelis.”

Yet after advising downplaying the ICC threat, he admits that the situation is uncertain.

“If Bensouda is concerned genuinely about whether the ICC will fail or succeed, I think she can’t ignore the Palestinians’ hijacking of the ICC,” says Baker. He advises Bensouda to “tell the Palestinian Authority foreign minister ‘Do me a favor – stop being such nudniks.”

He says that Bensouda’s focus on the Israeli-Palestinian conflict is “realizing the prophecies of doom the US, Russia and Israel were having in 1998. If the court will be hijacked and the Palestinians will turn it into their personal tribunal against Israel, it will create huge damage for the court.

“But since the Africans are leaving [the jurisdiction of the ICC] and the focus is on Africa, she’s trying to prove: ‘Look, I am dealing with the Israelis’ – but this is very artificial. The countries who worked hard to establish the court, the Americans, the Canadians, feel it’s being hijacked.... They feared the court would be hijacked for political reasons and its happening.”

Burundi, South Africa and Gambia have given formal notice that they will withdraw from the Rome Statute that governs the ICC, saying it disproportionately targets Africans.

He added, “those who argued against me when I said we should become a party [to the ICC] in principle because of the suffering of the Jewish people, are saying to me now: ‘Look, we were right.’” Baker admitted that this whole thing is “very frustrating and very upsetting,” explaining he “tends to downplay the dangers of this court,” banking on Bensouda or the ICC eventually rejecting Palestinian statehood.

But returning to doubts, he says about Bensouda, “She’s a political animal, she was appointed by her country [Gambia], by the Assembly of State Parties [the court’s management oversight and legislative body] and is fulfilling instructions.”

His opinion is not one that is easily ignored.

Baker has been working on Israeli foreign policy legal issues since 1975, with involvement in nearly every peace negotiation.

He served in the IDF international law division, in the UN’s internal legal division and for decades in the Foreign Ministry.

Baker was also an ambassador to Canada and currently heads the international law department at the Jerusalem Center for Public Affairs.

In the negotiations leading to the founding of the ICC, Baker was part of a four-person team leading negotiations for Israel. He was also on the ground to witness the last-minute deals, including an anti-settlement deal, which led to Israel and the US deciding not to become members of the ICC.

Baker is also known for being one of the three authors of the 2012 Levy Report (officially called the Report on the Legal Status of Building in Judea and Samaria) that the Israeli Right sees as providing a way to retroactively legalize certain settlements and outposts, and whose recommendations included establishing a special land court to more efficiently resolve West Bank ownership disputes.

Despite his status as an author of Levy Report, Baker says “I am not among the fans” of the settlement [regulation] bill which would retroactively legalize outposts on private Palestinian land.

Baker explains that the bill would change the law dealing with private Palestinian property in a problematic way and that the fight over that bill and over the Amona outpost “would not have arisen if the government had implemented the Levy Report.”

Ultimately, Baker believes that the settlements issue and the ICC will all go away “once negotiations are restored. Then this whole international festival will probably end or be suspended.”

Then again, Baker has no prediction about when negotiations will be restarted.