These three judges could send Israel to the dock in The Hague

July 9, 2020

By Raphael Ahren

The Times of Israel

<https://www.timesofisrael.com/these-three-judges-could-send-israel-to-the-dock-in-the-hague/>

One of them has dealt with Israel in various capacities throughout his distinguished career, including chairing a major international conference in Tel Aviv. One has written a 20-page analysis of an international court’s views on the legality of Israel’s security barrier. And one seems to have no prior record of involvement with the Israeli-Palestinian conflict.

Together, these three judges will soon decide whether Israel is headed for the dock in The Hague.

Marc Perrin de Brichambaut of France, Péter Kovács of Hungary, and Reine Adélaïde Sophie Alapini-Gansou of Benin make up the pre-trial chamber that has been charged with ruling on the tricky question of the International Criminal Court’s jurisdiction over the Palestinian territories.

It’s up to them to determine whether the The Hague will launch an [investigation into alleged war crimes](https://www.timesofisrael.com/the-hague-vs-israel-everything-you-need-to-know-about-the-icc-palestine-probe/) committed in the West Bank, Gaza Strip and East Jerusalem — which could possibly see Israeli political and military leaders in the dock — or to close the case. They are expected to hand down their ruling [in the coming days or weeks](https://www.timesofisrael.com/israel-said-to-expect-icc-ruling-on-jurisdiction-in-war-crimes-probe-within-days/).

The ICC is controversial in general, with the United States [slapping sanctions on it](https://www.timesofisrael.com/icc-shuns-unprecedented-us-sanctions-against-tribunal-employees/) and Israel accusing it of [bias and anti-Semitism](https://www.timesofisrael.com/icc-prosecutor-netanyahus-anti-semitism-charge-is-particularly-regrettable/). The three judges of the pre-trial chamber in whose hands Israel’s fate now lies have also been subjects of some scrutiny.

Last year, [lawyers for a Malian defendant sought to disqualify](https://www.ijmonitor.org/2019/10/why-icc-judges-rejected-a-request-to-disband-pre-trial-chamber-i/) the same chamber from ruling on a Mali war crimes probe because its impartiality had allegedly been undermined, since Alapini-Gansou had previously participated in two fact-finding missions to the African country. But a plenary of judges dismissed the case.

So far, there have been no formal efforts to disqualify the pre-trial chamber ahead of its expected decision on the “situation in Palestine,” even though two of the three judges — Brichambaut and Kovács — have a long history of involvement with the intricacies of the Middle East conflict.

As a trio judging cases for the ICC, their scorecard does not necessarily bode well for the State of Israel, which hopes they will rule that the court does not have jurisdiction over the West Bank, Gaza and East Jerusalem.

The three judges have repeatedly ordered the court’s prosecutor, Fatou Bensouda, to reexamine the case of the Gaza flotilla, which she wants to close as not meeting the court’s requirement of “gravity.”

On May 31, 2010, Israeli commandos boarded the Mavi Marmara, a naval vessel aiming to break the naval blockade on Gaza, and were violently attacked by activists aboard armed with clubs and metal bars. In the ensuing melee, nine Turkish citizens were killed and one died later of his wounds; 10 soldiers were wounded, one seriously.

Three years later, the Comoros, a small Muslim-majority nation in the Indian Ocean, asked the ICC to investigate the Israeli raid on the vessel, which had sailed under its flag.

But Bensouda decided there was “no reasonable basis” to probe the matter because even though Israeli forces may have committed war crimes aboard the Marmara, the possible offenses were not grave enough to merit prosecution at the ICC.

The Comoros appealed her decision, and the case was brought to the pre-trial chamber. Brichambaut, Kovács and Alapini-Gansou ordered her to reconsider, ruling that she had “committed material errors” in her assessment of the case’s gravity.

A Kafkaesque back-and-forth ensued, with the prosecutor, the pretrial chamber and an appeals chamber arguing, over thousands of pages, not about the alleged crimes themselves but rather about who has jurisdiction to close and reopen probes. In November 2018, Brichambaut, Kovács and Alapini-Gansou ordered her for revisit the issue [for a third time time](https://www.timesofisrael.com/for-third-time-icc-prosecutor-refuses-to-open-probe-into-gaza-flotilla-incident/) (which she refused to do, bringing the case again to an appeals chamber, where it is currently under consideration).

“When this is the quality of the court’s decisions, and when its exploitation for political ends is so easily and repeatedly allowed, it is no wonder that so many are deeply concerned that the court has lost its way,” a senior Israeli official told The Times of Israel at the time.

### Rare outreach to Palestinian victims

The three judges also caused some dismay in Israel when they [launched a campaign to reach out](https://www.timesofisrael.com/in-rare-step-international-criminal-court-reaches-out-to-palestinian-victims/) to “victims of the situation in Palestine” — the case that could land Israeli leaders in the dock — two years ago. They ordered the court’s registry “to establish, as soon as practicable, a system of public information and outreach activities for the benefit of the victims and affected communities of the situation in Palestine.”

Furthermore, the judges required the registry — a neutral organ of the court providing administrative support — to open an “informative page on the Court’s website” geared exclusively to Palestinians, and to report on the progress of its activities every three months. Victims “play an important role” in the court’s work, the judges noted.

Their move was deemed “unusual” and “strange” by some officials in Jerusalem, who noted that is almost unprecedented for a pre-trial chamber to engage in active outreach to victims in a case that has not yet advanced to the stage of an investigation.

Responding to the outreach program, Alan Baker, a former legal adviser to Israel’s Foreign Ministry who was involved in negotiating the ICC’s founding statute, said the court has allowed itself to become a tool of pro-Palestinian propaganda.

“This seems to me to be quite crazy, and the court is openly turning itself into a Palestinian propaganda engine, similar to the [United Nations] Human Rights Council, with a regular reporting regime on Palestine only and a distinct section of its website devoted to Palestine,” he told The Times of Israel at the time.

The three judges were going out of their way to cater to Palestinian victims in preparation of a trial, even though the court has yet to determine whether it has jurisdiction over the territory in question, Baker noted.

“All this seems to indicate that the ICC is venturing far beyond its role and is being politically manipulated, or is manipulating itself, against its own better interests,” he fumed.

Despite the previous disagreements between the pre-trial chamber and the prosecution on Israel-related matters, many international law experts predict that Brichambaut, Kovács and Alapini-Gansou will ultimately agree with Bensouda that “Palestine” is a state that can transfer criminal jurisdiction over its territory to The Hague, and green-light her investigation. Israel and [nearly a dozen other countries](https://www.timesofisrael.com/why-the-palestinian-case-at-the-hague-took-a-big-hit-this-week/) — including the US, Australia, Brazil and Germany — have publicly argued the opposite.

### No evidence of anti-Israel bias

At the same time, a cursory search does not reveal any anti-Israel bias on the part of the judges.

Brichambaut, who was born in Morocco and has been involved with the ICC since its founding, has actually defended Israel on at least one occasion.

In 2004, he participated in a [debate in the French Senate](https://www.senat.fr/rap/r03-388/r03-3888.html) about nuclear proliferation in his position as senior Defense Ministry official. It would be ideal if all states in the Middle East, including Israel, would join treaties calling for the abolition of atomic weapons, he said.

“Regarding Israel, I certainly did not explain myself well,” he clarified a few minutes later, stressing that the Jewish state was neither proliferating nuclear weapons nor threatening to use them. “The country that has proliferated, by giving nuclear power to Israel, is France. No one has ever accused Israel of then sharing its [nuclear] capabilities.”

Israel’s motivation for maintaining nuclear capabilities are evident and do not require further elaboration, he added.

One year later, Brichambaut was appointed secretary-general of the Organization for Security and Co-operation in Europe (OSCE). In this position, he presided over the 13th OSCE Mediterranean Seminar [that took place in Tel Aviv](https://mfa.gov.il/MFA/PressRoom/2007/Pages/Deputy%20FM%20Whbee%20addresses%20OSCE%20Mediterranean%20Seminar%2018-Dec-2007.aspx) in December 2007. No Arab states participated in the event, which Brichambaut[told the Jerusalem Post at the time](https://www.jpost.com/israel/arab-reps-a-no-show-at-ta-dialogue-parley%22%20%5Ct%20%22_blank) showed that the region requires “a transformation of institutions, of practices, of society and culture.”

Brichambaut became a judge at the ICC in 2015, and discussed the challenges of the Israel-Palestine file a year later [in an interview](https://www.icm2016.org/the-icc-s-fight-for-justice-q-a-with-marc-perrin-de-brichambaut).

“The Palestinian case is going to be very difficult for many reasons. First, it addresses a number of provisions within the statute which once again have never been covered — issues like occupation,” he said.

Another “huge problem” for the court would be to find evidence and witnesses, and the prosecutor’s dilemma as to who would be determined as “potential culprits” to be hauled in to The Hague, he added.

The ICC cannot start a war crimes trial without the defendant physically in the dock, which “might prove an absolutely insurmountable obstacle,” he offered.

“The rest, it’s your judgement as good as mine. Neither Palestine nor Israel are usual entities. There’s a lot of power, there’s a lot of culture, and there’s a lot of human potential that goes around those, so it’s likely to be extremely demanding approaches if ever those cases come to the court.”

### Will the Hungarian judge defy Budapest?

Kovács, a professor of public international law at the University of Budapest and the first Hungarian judge at the ICC, finds himself in a somewhat awkward position: His native country is one of the states that [publicly argued that the court does not have jurisdiction](https://www.timesofisrael.com/why-the-palestinian-case-at-the-hague-took-a-big-hit-this-week/) over “Palestine” and should close the case.

He is, of course, not bound by Budapest’s opinion, and before getting the job asserted that as a judge in Hungary he repeatedly opposed the government’s will. Still, it can be assumed that he is carefully weighing whether he wants to defy the very country that nominated him for his current job.

A former diplomat, Kovács is familiar with the intricacies of the Middle East peace process. A [20-page paper](https://core.ac.uk/download/pdf/83571749.pdf) he authored about the International Court of Justice’s 2004 advisory opinion on Israel’s security barrier does not offer many insights into his ostensible political leanings.

However, he did argue that the assertion that Israeli policies vis-a-vis the West Bank violate international law “can hardly be challenged.” At the same time, he observed that in the Middle East, “no interstate questions can be answered solely on the basis of international law.”

In another paragraph, Kovács objected to the court’s call for the United Nations to redouble its efforts to bring about a “negotiated solution … and the establishment of a Palestinian State.” Such wishes are “very close to what one could qualify as judicial activism,” he charged.

**An unknown quantity on Israel-Palestine**

Alapini-Gansou’s career has so far focused mostly on the human rights situation in several Africa states. There are no indications that she has dealt in any depth with the Israeli-Palestinian conflict before becoming a judge at the ICC in March 2018. On matters related to Israel, she has not offered any dissenting opinions.

In The Hague, pre-trial chambers rule by majority; judges who disagree with their colleagues are invited to explain their minority view.

In 2018, for instance, Brichambaut disagreed with Alapini-Gansou and Kovács regarding the prosecutor’s request to probe the alleged deportation of more than 725,000 Rohingya Muslims from Myanmar to neighboring Bangladesh (the former is not a member of the court, while the latter is).

Alapini-Gansou and Kovács [argued](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF)that the court has territorial jurisdiction over crimes that partially took place on the territory of an ICC member state. Brichambaut disagreed and posited that it was premature to determine the question of territorial jurisdiction before a preliminary examination of the case had been initiated.

In 2015, it was Kovács who had “various” disagreements with his fellow judges regarding the Marmara case. The Israeli troops’ actions on the Gaza-bound vessel would likely “not qualify as war crimes,” he wrote in his [dissenting opinion](https://www.icc-cpi.int/RelatedRecords/CR2015_13140.PDF). “It follows that the lack of prospect for any successful prosecution, together with the relatively low gravity of the alleged crimes makes it clear that the initiation of an investigation in the present situation is unwarranted.”

He was overruled, and the case is still pending.

What Brichambaut, Kovács and Alapini-Gansou will decide on the “situation in Palestine” is anyone’s guess at this point. They could adopt Israel’s position and argue that the ICC has no jurisdiction over Israel/Palestine whatsoever.

Israel’s Attorney General Avichai Mandelblit in December argued that the ICC “manifestly lacks jurisdiction” over the case because “no sovereign Palestinian State is in existence” that could delegate to the court criminal jurisdiction over its territory and nationals. (If the pre-trial chamber decides to close the case, the prosecutor could either decide to let it go or appeal the decision.)

If the judges are unconvinced by Mandelblit’s arguments, they are likely to rule that the broader question of Palestinian statehood is irrelevant as long as “Palestine” formally became a “State Party” to the court, [which it did in April 2015](https://www.icc-cpi.int/Pages/item.aspx?name=pr1103). (Some member states may choose to appeal that decision).

There are various other possibilities. The judges could, for instance, ask for more time or for more information. Or they could refuse to issue a ruling at all and ask the prosecutor to make a decision herself.

Either way, Israel will soon find out. While the judges don’t have a set deadline, they are expected to announce their ruling before the ICC goes on summer break in mid-July.