



PERSPECTIVES

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Fighting the Demonization of Israel at the International Criminal Court

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EXECUTIVE SUMMARY: Fatou Bensouda, the chief prosecutor of the International Criminal Court (ICC) at the Hague, has decided to indict senior Israeli policymakers and military officers for committing war crimes in the West Bank and Gaza. Her decision is baseless, preposterous, and discriminatory, and it violates the ICC's own mission and rules. Bensouda's action should be placed within the wider context of the Palestinian disinformation, delegitimization, and demonization campaign against Israel at international organizations. Israel should discredit and delegitimize the ICC in turn via aggressive political measures and collaboration with concerned liberal democracies, primarily the US.

On December 20, 2019, Fatou Bensouda, the chief prosecutor of the International Criminal Court (ICC) at the Hague, announced: "I am satisfied that war crimes have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip." She referred to 2014's Operation Protective Edge in Gaza, the 2018-19 Hamas's violent "protests" along the Israeli border with Gaza, and the Israeli neighborhoods in East Jerusalem and the West Bank. She mentioned war crimes committed by Hamas and other Palestinian "armed groups," but that mention was no more than a fig leaf to create an impression of neutrality. The object of her case—to target Israel for demonization—is reflected in the enthusiastic praise she received for her decision from the Palestinian Authority and Hamas.

Bensouda's opinion is baseless, preposterous, and discriminatory, and most importantly it violates the ICC's own mission and rules. The Court was established in 2002 to prosecute individuals for international crimes of genocide, crimes against humanity, and serious war crimes. The US and Israel did not ratify the Rome Treaty that established the Court out of concern that it

would be used to deliver politicized and biased judgments. That concern has been proven valid.

Bensouda's action is a major threat to Israel. The ICC prosecutes individuals, not states. Therefore, if its pre-trial chamber of three judges accepts Bensouda's request and rules that the ICC has jurisdiction over the case, she will be able to subpoena senior Israeli politicians and military officers for interrogation. If they refuse to submit to interrogation, as they are likely to do, she could issue warrants for their arrest.

The ICC is not a genuine court in that it does not follow basic rules of judicial evidence and procedure. It is yet another highly politicized UN body driven by a prejudiced political agenda.

No jurisdiction

The main arguments against Bensouda's decision are straightforward.

- Only sovereign states can file complaints. In 2015, the Palestinian Authority joined the Rome Treaty and several countries recognized Palestinian independence. Palestine is not, however, a sovereign state.
- Israel, like the US and about one-third of the countries in the world, did not join the ICC. The Court therefore has no jurisdiction over it.
- The ICC was established to deal with war crimes that leaders and countries ignore. Israel is a democracy and has one of the most respected legal systems in the world. Israel investigates cases of war crimes and prosecutes those responsible. In contrast, the Palestinian Authority and Hamas never investigate their own war crimes and never prosecute those responsible.
- The ICC was established to investigate and prosecute serious war crimes such as genocide. Crimes of this nature have occurred recently in the Middle East, such as those committed by the Syrian government, Russia, and Iran during the Syrian civil war. They murdered hundreds of thousands of civilians, turned half the population of Syria into refugees, and destroyed cities, towns, and villages. The ICC (and for that matter no other UN body) did nothing to stop these war crimes and does not appear to have any interest in prosecuting anyone for them.
- Contrary to Bensouda's claims, the ICC is not an independent body, and her preliminary investigation was neither objective or neutral. The ICC depends entirely on the UN General Assembly for its funding and operations. In keeping with the strong anti-Israeli attitude of the UN and its agencies, the Court uses and follows the highly distorted, biased, and one-sided resolutions and reports produced on Israel by UN agencies.

Several liberal democracies have severely criticized Bensouda's decision. US Secretary of State Mike Pompeo stated:

We firmly oppose this (decision) and any other action that seeks to target Israel unfairly. We do not believe the Palestinians qualify as a sovereign state, and they therefore are not qualified to obtain full membership, or participate as a state in international organizations, entities, or conferences, including the ICC. The US also reiterates its longstanding objection to any assertion of ICC's jurisdiction over nationals of States that are not parties to the Rome Statute, including the US and Israel, absent a referral from the UN Security Council or the consent of such a State.

Australian PM Scott Morrison said his country does not recognize the "State of Palestine" or its status as a member state of ICC and therefore believes the ICC has no authority on the matter.

Germany, a strong supporter of the ICC, issued a more delicate warning. Its foreign ministry stated that it is "confident that the court will resolve the issues raised. This will also address issues of admissibility that may be doubtful." The subtext is clear: Germany does not believe the ICC has jurisdiction over the Palestinian-Israeli conflict.

Context

Bensouda's action should be placed within the wider context of the Palestinian disinformation, delegitimization, and demonization campaign against Israel. They employ three major instruments: the UN and its agencies; NGOs, particularly those claiming to advocate for human rights; and the Boycott, Divest, and Sanction (BDS) movement. These instruments are interrelated and they reinforce each other.

At the UN, the Palestinians enjoy automatic support from Muslim countries, Russia, China, the EU, and developing countries. As they have failed to defeat Israel through violence and terrorism, they have opted to delegitimize and demonize Israel at the UN and its agencies, portraying it as an evil, racist, and apartheid state, the worst violator of human rights in the world—so vile that it is devoid of the right to defend itself and even to exist.

Unfortunately, several international human rights NGOs, including Human Rights Watch and Amnesty International, are staffed by anti-Israeli directors and investigators, and they demonize Israel via highly biased, distorted, and misleading reports. Israeli and Palestinian human rights NGOs, too, disseminate distorted and sometime fabricated reports, especially on the confrontations in Gaza. Those organizations include B'Tselem, Breaking the Silence, Al Haq, Al-Dameer, and Al Mezan. They are heavily funded by Western European countries on condition that they frequently challenge the Israeli legal system and provide the ICC and the UN Human Rights Council (UNHRC) with incriminating information against Israel.

Refuting the Israeli war crimes thesis

While all Bensouda's accusations against Israel should be rejected on the basis of the legal and political arguments discussed above, there is additional overwhelming evidence to dismiss her allegations about Israel's purported "war crimes" during military confrontations with Hamas in Gaza. Bensouda claims her decision relies on reports on these confrontations submitted to the UN, particularly those initiated and approved by the UNHRC. That dysfunctional and corrupt organization is dominated by authoritarian countries, some of which are among the greatest abusers of human rights on earth. The UNHRC is notorious for its bias against Israel. It has one agenda item just for Israel and another for the entire rest of the world.

The UNHRC appointed several "independent" commissions to investigate Israeli "war crimes" in Gaza. One investigated 2014's Operation Protective Edge and another the 2018-19 Gaza "protests." Both relied on questionable and fabricated information provided by local and international "human rights" organizations. The first chair of the 2014 commission, William Shabas, resigned after Israel found that he had previously worked for the PLO and was biased against Israel. Among other things, he said before his appointment that Israeli PM Benjamin Netanyahu should be indicted for "war crimes" committed during the 2006 Second Lebanese War. (Besides his bias, Shabas revealed just how much he really knows about Israel and the Middle East with this charge. The prime minister of Israel during the 2006 war was Ehud Olmert, not Netanyahu.)

The ICC's investigators did not include anyone with any military background or experience. However, several high-level officers and officials with substantial military experience from several countries investigated the cases cited in Bensouda's opinion and reached definitive conclusions that are completely at odds with her claims.

In November 2014, following a fact-finding mission to Israel, the Chairman of the US Joint Chiefs of Staff, General Martin Dempsey, said that "in the 2014 Gaza conflict, Israel went to extraordinary lengths to limit collateral damage and civilian casualties." In June 2015, the independent High-Level Military Group led by General Klaus Naumann, former Chief of Staff of the Bundeswehr and Chairman of the NATO Military Committee, and 10 other former chiefs of staff, generals, senior officers, and officials from seven countries investigated the 2014 Gaza operation. They unanimously stated:

Each of our own armies is of course committed to protecting civilian life during combat. But none of us is aware of any army that takes such extensive measures as did the IDF last summer to protect the lives of the

civilian population in such circumstances... During Operation Protective Edge, in the air, on the ground and at sea, Israel not only met a reasonable international standard of observance of the laws of armed conflict, but in many cases significantly exceeded that standard.

Similarly, Col. Richard Kemp, former commander of the British forces in Afghanistan, blasted and systematically refuted the war crimes allegations and reports submitted to the UNHRC on the 2014 Gaza operation and the 2018-19 violent Gaza “protests.” He submitted detailed reports based on research and observations on the ground. He blamed Hamas for the violence and for war crimes and argued that Israel exercised great restraint—and unlike Hamas, took exceptional measures to adhere to the laws of armed conflict and to minimize civilian casualties. He accused the UNHRC of endemic bias against Israel and rejected the reports it had approved as totally wrong and baseless.

Both the UNHCR and Bensouda ignored all this diverse military expert evidence as it did not fit their agenda.

The US approach

In November 2017, Bensouda asked the ICC’s pre-trial judges for an authorization to open an investigation into war crimes allegedly committed by the US in Afghanistan. In September 2018, NSA John Bolton called the ICC “unaccountable” and “outright dangerous” to the US, Israel, and other allies. He threatened the ICC with sanctions: “We will ban its judges and prosecutors from entering the US. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system.”

In March 2019, Pompeo warned that the US would revoke the visas of ICC officials who pursued allegations against US forces in Afghanistan or against Israel. On April 5, 2019, the US revoked Bensouda’s visa.

A few days later, the ICC’s pre-trial judges rejected Bensouda’s request to open an investigation against the US by arguing that it is likely to fail due to lack of cooperation from the parties involved and budgetary constraints.

The judges were more concerned about losing their entry visas to the US and about other American sanctions than about the case itself. President Trump called the judges’ decision “a major international victory” and denounced the ICC for its “broad, unaccountable, prosecutorial powers,” as well as for what he considered its threat to American sovereignty. He said, “Any attempt to target American, Israeli or allied personnel for prosecution will be met with a swift and vigorous response.”

What should Israel do?

Israel must fight the ICC through aggressive political means. Bensouda joined those who delegitimize and demonize Israel. The best response would be to delegitimize and penalize her and the ICC via an alliance of countries under US leadership along the lines adopted by the Trump administration. If the pre-trial judges approve Bensouda's request, Israel should ask the US to fulfill its commitment, cancel the visas of Bensouda, the ICC judges, and its investigators, and apply other severe sanctions against them.

Like the US and other countries, Israel should ban entry by ICC investigators into Israel, the West Bank, and Gaza; pass laws that protect Israeli officials and officers from ICC directives and potential indictments; and sign bilateral agreements with states refusing to comply with ICC orders and arrest warrants. Israel should also consider sanctions against the Palestinian Authority, which, with Bensouda's help, started the ICC preliminary investigation. These steps can help to expose the ICC's complete lack of credibility or legitimacy.

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