ICC arrests 101: Which Israelis will be arrested and when? - Analysis

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The sky is falling! International Criminal Court prosecutors in The Hague will be arresting gazillions of IDF officers and West Bank settlers anywhere they travel outside Israel as of March 21!

Watch out. Or calm down.

Yes, the threat of the ICC arresting Israelis exists, and even that theoretical possibility is serious business requiring a full diplomatic and legal campaign. But in moving on that campaign, facts matter, and quantifying the challenge correctly is important.

In reality, the probability is high that zero Israelis will be arrested on March 21 (the day after the ICC Pretrial Chamber is expected to approve a full war crimes investigation against Israelis) or even for some months beyond.

It’s important not to blow the threat out of proportion: No IDF officers are likely to be arrested for at least 6-12 months after the March 20 hearing. Even the hearing date is not in stone, and could be postponed by months.

These delays are because ICC Prosecutor Fatou Bensouda exclusively told The Jerusalem Post on January 2 that the March 20 hearing has nothing to do with the IDF.

It is unclear whether she can investigate the IDF yet as she has not decided whether the IDF’s internal investigations of alleged war crimes by its soldiers comply with international law.

If she later decides to investigate the IDF for war crimes, she told the Post that this would only occur after she has issued a later public report on the issue.

While Bensouda did not give the Post a timeline, the impression was that it could take her office another 6-12 months to issue a large report on such a complex issue.

A spokesman for the ICC reaffirmed on Tuesday, “The notion that ICC will be issuing arrest warrants in connection with the situation in Palestine in March of this year is thus false.”

Even in the fall of 2020 or March 2021, there may only be a small number of IDF officials, such as Brig.-Gen. Ofer Winter (whose name has been widely reported), who were involved in three major incidents during Operation Protective Edge in 2014, and therefore may have a problem.

Apart from a few IDF top brass involved in the battles at Rafah on Black Friday, Shejaia and Khuza’a, few arrests are expected stemming from misconduct during Operation Protective Edge.

This means that Benny Gantz is in no danger anytime in the next six to 12 months, and may never face arrest.

Theoretically however, the ICC Prosecutor could go after him as the IDF overall commander, but the Israeli comptroller report on the Operation Protective Edge has made it clear that the Palestinians killed during Black Friday came by order of frontline commanders.

More specifically, the comptroller report said that local commander Brig.-Gen. Ofer Winter had an outdated Hannibal Protocol order, permitting more aggressive use of force, than what Gantz had. Thus an administrative error led to failing to update the order at the front.

The IDF also issued an extensive report debunking a variety of myths about the Black Friday incident. This report framed the incident as an unexpected multi-front chaotic battle with Hamas during which some Palestinian civilians were caught in the crossfire.

There is one other piece to the ICC and the IDF.

In March 2018, the IDF-Hamas-Gaza border crisis started. It is unclear what the ICC will do in relation to this. But IDF probes are ongoing and likely will be until the end of Bensouda’s term in June 2021, or close to that point.

This means Bensouda will not likely issue arrests in relation to these issues, or not until a much later date. Rather, most of the handling of the 2018-2019 conflict will likely be passed on to her successor.

It is also possible that the issue may be dropped entirely since Hamas has announced it is significantly cutting back the weekly Great March of Return protest, and the conflict does not fit easily into a standard law of war analysis.

Israel’s bigger short-term ICC problem is not the IDF, but the settlements.

Theoretically, arrests relating to the settlement enterprise could begin much sooner because Bensouda has already found that Israel is not prosecuting the settlements as a crime.

However, Bensouda told the Post on January 2 that she will not immediately issue arrests as she will need to conduct a fact-finding process after March 20 to determine which individuals to investigate.

This will likely take a minimum of three months, and could take half a year or longer.

As an ICC spokesman told the Post on Tuesday, “should an investigation be opened, investigations take time before a suspect is identified on the basis of the evidence gathered and an application for a warrant of arrest made.”

Also, Bensouda may not rush to issue such arrests as she may need to issue arrests against Hamas and other Gaza militant groups before or at the same time.

Finally, there are allegations of torture and “pay for slay” against the Palestinian Authority.

She may wait to issue arrests until deciding these allegations to avoid criticism that she is being biased in favor of the PA.

So pushing the March 2020 date back to the summer or end of 2020, who might the ICC try to arrest in connection with the settlement enterprise?

While theoretically possible, it is unlikely an arrest will be issued for Prime Minister Benjamin Netanyahu. While he is responsible for overall policy and makes many pronouncements about the settlements, it is only one of many responsibilities he has. Other officials are far more central to the enterprise.

Also, when Bensouda went after a head of state in the Kenya case, the entire prosecution collapsed due to a lack of state cooperation.

Bensouda has said that her office has learned from this experience.

Experts say that arrests might be issued for the housing ministers from June 2014 onward, and for local regional council chiefs in charge of West Bank settlement expansion from June 2014 onward. Anyone before June 2014 – which means most officials who have been involved with the settlements – is beyond Bensouda’s jurisdiction based on time limitations set in the PA’s own referral.

A minority of experts think some defense ministers from June 2014 onward could be on the hook for actions taken to advance settlements, especially for house demolitions. But a majority say that since defense ministers are a side point to the settlement enterprise, they will not be investigated. Individual settlers will generally not be investigated as the ICC prioritizes higher profile persons.

The tricky part is that the ICC will not announce when it issues these arrest warrants. So, just to play it safe, some of these officials may choose to cease traveling in certain areas already after March 20 absent pre-guarantees from those states that they will not be arrested. Around 125 countries are members of the ICC, including most European states.

However, the US cut bilateral deals with countries during the post 9/11 era to forestall the arrest of American troops.

The truth is no one can really know who the ICC will seek to arrest and no human being has ever been prosecuted in history for the “war crime” of building structures. However, the arrest list will be much shorter and is likely much farther off than many outlets are currently reporting.