ICC Prosecutor Recommends Israel Be Investigated for War Crimes — Why the US Should Care

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On April 30, amid a global pandemic, the Chief Prosecutor of the Hague-based International Criminal Court (ICC), Fatou Bensouda, reaffirmed her recommendation that Israel be investigated on charges of war crimes and crimes against humanity toward the Palestinians.

The complaint submitted by the Palestinians refers first and foremost to alleged crimes committed by Israel in 2014 during Operation Protective Edge, as well as Israeli settlement construction and its handling of the violent riots at the Gaza security fence since March 2018. An investigation into Israel’s conduct is now contingent upon authorization from a pre-trial chamber of three ICC judges.

Firstly, it is important to note that Bensouda is wrong on every count. Israel, a thriving democracy in a hostile region, has already carried out an extensive investigation into hundreds of accusations of alleged crimes committed during the 2014 operation, and has indicted multiple soldiers in the Israel Defense Forces for their conduct. We must also remember that Israeli settlements are indeed legal under international law, and that the “peaceful protests” along the Gaza security fence are in fact anything but peaceful.

More relevant, however, is that many renowned legal experts and key European states have already expressed opposition to Bensouda’s clearly politically-motivated and legally inept recommendation. Essentially, she is conferring the ICC’s jurisdiction over Israel at the behest of “Palestine,” a state that does not exist under international law, no matter how hard the ICC argues otherwise.

Unfortunately, there has been scant attention paid to how an investigation into Israel could impact the US on the international stage. Since the ICC entered into force in 2002, both Israel and the US have had a difficult relationship with the court. While they were signatories during the ICC’s formative stages, both countries conveyed their disapproval of the Hague’s potential susceptibility to politicization by certain actors, and promptly abandoned their intentions to ratify the Rome Statue (which thus nullified any legal obligation they had toward the ICC).

Contrary to the United Nations, which many perceive to be a toothless supra-national body devoid of tangible enforcement mechanisms, the ICC sees itself as capable of prosecuting individuals, even if they are citizens of states not legally bound to the Rome Statute. The jury is still out on whether this is indeed true in all cases, but the thought is frightening for anyone who holds the classic nation-state model of society near and dear.

So, why should the US care about Israel’s latest woes at the Hague? Well for starters, since March 2020 the US itself is already under investigation for alleged crimes committed by US forces in Afghanistan in the early 2000s. These include allegations of torture, rape, and cruel treatment of individuals.

The investigation into the US was green-lit in 2020 after Bensouda requested authorization from the ICC in 2017 for crimes allegedly committed since 2003, meaning a 14-year gap between the alleged crime and the request for authorization. Conversely, Bensouda originally requested authorization for an investigation into Israel in December 2019 for crimes allegedly committed in 2014 — a mere five-year gap. Evidently, the crime-to-investigation process vis-à-vis Israel far outpaces that of the US.

It is therefore entirely within the realm of possibility that an investigation into Israel will both begin and conclude before the US investigation is completed, especially since the time-frame being investigated in the Israeli case is far shorter than the American case. In other words, although the investigation into US conduct has already been authorized by the court while the investigation into Israel has not, the Israeli case could still be an indicator of what lies ahead for the US at the Hague.

Furthermore, President Donald Trump has been characteristically outspoken about his contempt for the ICC. In his 2018 speech at the UN General Assembly, the President stated that “as far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority.” The president’s dislike of supra-national and intergovernmental institutions extends far beyond the walls of the Hague. For example, the Trump administration cut the US contribution to the UN budget, defunded UNRWA for perpetuating the Palestinian refugee crisis, withdrew from the anti-Israel and anti-US Human Rights Council, and most recently halted funding to the World Health Organization over its handling of the coronavirus pandemic. And let’s not forget his rocky relationship with NATO and his criticisms of the WTO.

Decision-makers in the US as well as President Trump himself would be wise to carefully scrutinize the developments in the Israeli case as a harbinger of what might await them should the ICC’s investigations yield results. Israel and the US appear to be in close contact on matters pertaining to the Hague. On the same day the investigation into the US was authorized, an Israeli delegation traveled to the United States to coordinate a possible US-Israeli campaign against the ICC’s judicial overreach. Realistically, this campaign has likely been sidelined as both states deal with the COVID-19 crisis. Once the pandemic and its immediate fallout are behind us, the US and Israel should resume organizing their joint campaign immediately.

If the president’s apparent reluctance to accept the vision of global governance holds true, he and his administration must exhibit the same steadfastness against the ICC as it has and stand firmly with Israel in the face of Bensouda’s gross miscarriage of justice.