The ICC has Become Politicized and is Out to Get Israel

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ICC Prosecutor Continues Examining Palestine Situation and Warns Israel

International Criminal Court (ICC) Prosecutor Fatou Bensouda told reporters at United Nations headquarters in New York, following her May 12th briefing to the UN Security Council on the ICC’s Libya-related activities, that her previously announced “preliminary examination” concerning the situation in Palestine is still open. She has not set any deadline for completing her examination.

Ms. Bensouda is continuing to look into whether crimes subject to the ICC’s jurisdiction were possibly committed in the Palestinian territories since June 2014. She is considering information, if any, submitted to her office by both sides to the conflict and from other sources. Ms. Bensouda decided to undertake the preliminary examination, which she described as “a quiet process,” on her own initiative once the so-called Palestinian state acceded to the ICC’s governing Rome Statute. Israel is not a party to the Rome Statute and has not consented to its jurisdiction.

Ms. Bensouda said that she is currently assessing the gravity of any alleged crimes that she determines would be subject to ICC jurisdiction, such as war crimes and crimes against humanity. She will also examine any national efforts to deal with them in a just manner as factors in deciding whether to proceed to the next stage of conducting a more formal criminal investigation.

The ICC prosecutor claimed she will be completely impartial and will be assessing possible crimes committed by Israelis and the Palestinians. However, Ms. Bensouda chose to warn only Israel, in an interview with the Associated Press, that if it does not cooperate with her initial examination it may face the prospect of a full investigation based on information submitted by its critics. In this connection, Ms. Bensouda is likely to take into account the recent findings of a commission of inquiry set up UN Secretary General Ban Ki-moon, blaming Israel’s armed forces for conducting attacks on several UN sites in Gaza.

Ms. Bensouda appears unmoved that Israel’s military has opened several criminal investigations into its conduct during the Gaza war and that Israel also has an independent judiciary with a demonstrated record of effective, transparent operation. This is despite the fact that the ICC is not supposed to expend resources on matters that can be handled in the first instance by national courts, under the principle of complementarity.

A group of experts invited by the ICC’s Office of Prosecutor to examine complementarity, wrote in 2003:

“The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.”

Libya illustrates the incredibly low bar that a state’s legal system has had to meet in order to convince the ICC that it should defer to the state’s jurisdiction over an alleged crime rather than take over the case itself. Libya is near total collapse, with no rule of law at all in many parts of the country. The International Federation for Human Rights stated in March of this year that “hundreds of cases of alleged grave violations, including extrajudicial killings, widespread use of torture and arbitrary arrest have been submitted to Libya’s General Public Prosecutor, during 2012, 2013, and 2014 against a number of armed groups with no concrete measures taken to date towards achieving accountability. The national courts in Libya are unable to prosecute alleged perpetrators of serious crimes due to continuing threats to judges, lawyers and prosecutors by armed groups.”

Yet the ICC decided that Libyan authorities were capable of handling the trial of a former intelligence chief from Colonel Qaddafi’s regime, Abdullah al-Senussi, rather than assume jurisdiction for the case itself. The former prime minister under Qaddafi, al-Baghdadi al-Mahmudi, and a number of Qaddafi government ministers are also being tried in Libya. True, the ICC is requesting that Libya hand over Qaddafi’s son Saif al-Islam al-Qaddafi to the ICC for prosecution and has asked the Security Council for assistance in this regard. However, Saif al-Islam al-Qaddafi remains in Libya where Libyan authorities insist that they will prosecute him, while the ICC and Security Council are doing nothing effective about it.

If Libya can handle the investigation and prosecution of alleged crimes against the people of Libya, surely Israel itself can be relied upon to handle the investigation and prosecution of any crimes allegedly committed by its military or political leaders without ICC involvement. However, Ms. Bensouda shows no signs of letting go of the Palestinian situation as her preliminary examination drags on.

Preliminary examinations can take a very long time. The Afghanistan examination is in its eighth year. The Georgia examination is in its seventh year. However, with pressure exerted by the Palestinians and their many allies who are member states of the ICC, Ms. Bensouda will likely conclude that she must move forward with a formal investigation and possible prosecution of Israeli political and military leaders in absentia. African countries, whom have already complained that the ICC focuses far too much of its attention on alleged crimes committed on the African continent, may add their voices to the chorus calling for ICC action against Israel, which some perceive to be a Western, neo-colonial state as a result of Palestinian propaganda. Additional pressure will come as a result of the Secretary General’s report and another one due soon from the UN Human Rights Council.

Ms. Bensouda may try to thread the needle and focus a formal investigation and possible prosecution on very specific incidents of alleged war crimes and crimes against humanity, such as the alleged Israeli attacks on UN facilities in Gaza that resulted in civilian casualties, as well as Hamas’s use of some UN facilities to hide weapons and its rocket firings at civilian populations in Israel. This way she would appear to be taking a balanced approach. She may also try to duck the more political issue of Israeli settlements, at least on the first go-around, although she said she would not rule out looking at Israel’s settlements activities during her current examination phase.

Even if Ms. Bensouda does include Hamas as a potential target for prosecution, it would serve only as a cover to try to legitimize her decision to go after Israel. A superficially balanced prosecution would amount in reality to the ICC’s complicity with the Palestinians’ strategy of asymmetrical lawfare against Israel.

Hamas operates completely outside of the rule of law. Hamas has no meaningful institutions of justice to investigate and prosecute the conduct of its own forces, which Hamas considers to be part of its legitimate acts of resistance. The Palestinian Authority does not have an independent judiciary either. Palestinian Authority President Mahmoud Abbas and his aides have repeatedly obstructed the work of the Palestinian Authority judges. It has gotten so bad that some brave Palestinian judges have been complaining and even went on strike. In any event, the Palestinian Authority won’t dare investigate Hamas’s conduct, not wanting to further inflame tensions with Hamas and lose whatever standing it has left with the Palestinian people. At the same time, Abbas will unlikely face any formal investigation and prosecution himself, because he has managed to disassociate himself (publicly at least) from Hamas’s tactics during the Gaza war.

For the ICC to treat Israel, which is a functioning democracy with an independent judiciary, on the same level as Hamas is a travesty of justice.

Moreover, Hamas’s leaders, even if subject to an ICC arrest warrant, will be able to easily elude capture by hiding out either in Gaza itself or in sympathetic countries such as Qatar. All they have to do is to look at the example of Sudan’s President Omar Al Bashir, against whom an ICC arrest warrant has been issued. Bashir is still free and traveling to countries where he knows he will be safe from arrest by local authorities.

Israeli officials, on the other hand, will be subject to arrest throughout the world if the ICC moves forward with prosecution and issues arrest warrants, including in Western Europe where the tide of public opinion has turned against the Jewish state. The ICC’s intervention will provide more momentum to the growing campaign of boycotts, divestment and sanctions (BDS) against Israel. The Palestinians’ propaganda efforts to completely de-legitimize Israel and isolate it from the international community will be provided an enormous boost.

ICC Prosecutor Fatou Bensouda should wrap up her preliminary examination forthwith and conclude that there is an insufficient basis for the ICC to proceed to a criminal investigation or to take any other action with regard to Israel’s conduct at this time.