The ICC and the Orwellian denial of Jewish presence in Israel

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On December 5, 2019, the Office of the Prosecutor of the International Criminal Court (ICC) issued its yearly report on Preliminary Examination Activities. In that report, the Prosecutor confirmed its position that it was “particularly focusing on reported settlement-related activities engaged in by Israeli authorities” in the “West Bank and East Jerusalem.” It follows that for Fatou Bensouda, the Chief Prosecutor of the ICC, what she calls “settlement-related activities” are considered international crimes under the Rome Statute.

On December 20, 2019, Bensouda filed a motion with a pre-trial chamber requesting a ruling on the scope of the exercise of the Court’s territorial jurisdiction. In that motion, the Prosecutor indicated that she considered that all conditions were met for the opening of a formal investigation into the “Situation of Palestine,” pending the pre-trial chamber’s determination on territorial jurisdiction.

Interestingly, in her motion, the Prosecutor relies heavily on the idea that settlement activities are per se illegal in order to advocate that Israel would be principally responsible for Palestine’s incapacity to exercise its right to self-determination, and that – despite the fact that all relevant criteria of statehood would not be fulfilled at this point in time – Palestine should still be considered a state under international law.

These statements coming from the ICC Prosecutor follow by a few weeks the announcement by US Secretary of State Pompeo that: “The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law,” thus reversing the Obama administration position adopted in 2016, especially when it supported UNSC 2334 of December 23, 2016, (apparently drafted by the UK with the help of the Palestinians) which considered all settlements illegal under international law.

This announcement has sparked considerable reactions and commentaries on whether it was legally grounded or not, regarding the legality of Israeli activities in the Judea and Samaria and east Jerusalem. Here is not the place to enter into these discussions. What is interesting here is exploring one specific aspect of them and uncovering what is behind the position that Israeli presence in Judea and Samaria and east Jerusalem is per se illegal.

If one analyzes the arguments put forward in that respect, it becomes apparent that those who support them – willingly or unwillingly – serve the cause of a certain narrative. What is this narrative? That narrative is based on the existance of an Arab autochthonous (indigenous) population and that logically, this population owns the land, by virtue of a right of first occupant. This forms the basis of the Palestinian narrative advocated since the creation of the PLO in the 1960s. In this context, Jewish Israelis are portrayed exclusively as settlers coming from Europe. As a consequence of this narrative, is put forward the idea that the State of Israel is the result of the colonization of the territory by a foreign population. Why? Because colonization – especially in the context of the decolonization process of the 1960s – is viewed as such an illegitimate process, that the State of Israel could be denounced as illegitimate.

This leads to the question of determining who was the first occupant, and implying that historical Jewish presence must be denied and further that, as a corollary, Palestinians need to prove that they were the first occupants. The consequence of this narrative is that anything “Jewish” is erased from the history of the country. For example, recently, Palestinian academics denied archeological evidence of Jews in Israel, part of a narrative to portray Jews as recent “invaders.” More generally, this creates an impossible historical conundrum, since the presence of an Arab population emerged as a notable community in the territory of Israel after the Muslim conquests of the 7th century and that, thereafter, this population always cohabited with the remaining Jewish and Christian communities after those conquests.

More specifically, the aspect of this broad narrative relating to the inherent illegality of Jewish presence in Judea and Samaria, implies a certain view of the history of the past century. One could even say that this narrative requires a sort of Orwellian rewriting of the past, to erase key moments that fit uneasily with such a narrative. Indeed, it requires a writing out the recognition of a Jewish right to self-determination that followed the 1917 Balfour Declaration. It ignores the conditions under which Judea and Samaria – as well as Gaza – were occupied respectively by Jordan and Egypt from 1947 to 1967. It ignores the circumstances of the 1967 Six Day War when Israel took control of this territory in a defensive war. It ignores the negotiated terms of the Oslo Agreements in relation to the distribution of authority in Judea and Samaria and the lack of final status of both borders and territories. The wide-sweeping argument of illegality per se also ignores the diverse nature of each individual presence in these territories, in terms of where it is, how it came into existence, what legal authority applies to it, etc.

As in a courtroom, the issue comes down to the identification of competing narratives before the international community acting as a Judge. Each side is therefore faced with the choice of which narrative from which to choose. Some narratives can be reconciled; others cannot. The fact remains that taking the position that settlements are illegal as such, serves a war-like narrative that denies any legitimacy to Jewish presence in the entire territory of Israel, as exemplified by numerous declarations, including a recent declaration by a Fatah official that “Palestinian people will not relinquish a grain of soil from the land of historical Palestine from the [Mediterranean] Sea to the [Jordan] River.”

The December 20, 2019, announcement by the ICC Prosecutor that she is ready to open a formal investigation regarding “settlement-related activities” at its core, will undoubtedly be seen as a first narrative victory for those challenging Jewish presence in Israel. This can only be countered if another narrative is presented – not just in public discourse – but at the ICC itself, which provides genuine procedural opportunities for participation in the judicial debate, as we noted in an editorial last September.