The Hague vs. Israel: Everything you need to know about the ICC Palestine probe

December 29, 2019

The Times of Israel

<https://www.timesofisrael.com/the-hague-vs-israel-everything-you-need-to-know-about-the-icc-palestine-probe>

Late last Friday afternoon, minutes before Shabbat started in Israel, the chief prosecutor of the International Criminal Court dropped a legal bombshell when she announced her intention to launch an investigation into alleged war crimes committed in the Palestinian territories.

How exactly the process she set in motion will end is entirely open: A worst-case scenario, from an Israeli perspective, would see Prime Minister Benjamin Netanyahu, former and current defense ministers and army chiefs finding themselves in the dock in The Hague, accused of war crimes, a few years from now.

Alternatively, the ICC brouhaha could end in a few months with the court deciding that it doesn’t have the jurisdiction to deal with the Israeli-Palestinian conflict, and simply closing the case.

Unsurprisingly, the Palestinians hailed Prosecutor Fatou Bensouda’s decision as the beginning of the end of Israeli impunity, while the government in Jerusalem denounced it as outrageous, absurd and illegal under international law. Netanyahu went as far as [calling it “pure anti-Semitism](https://www.timesofisrael.com/international-criminal-court-probe-of-israel-is-pure-anti-semitism-says-pm/).”

One can debate whether such rhetoric helps or hurts Israel’s case, and one should not forget that it’s election season here. Either way, Bensouda’s decision, five years in the making, is based on complex legal arguments, which is why even veteran reporters writing for some of the country’s most-read newspapers have erred on central points.

The headline of Sunday’s Yedioth Ahronoth, for instance, decried, in huge letters, “The Hague’s hypocrisy,” arguing that the ICC was after Israel but does not bother to investigate other ostensible perpetrators of war crimes.

In fact, Bensouda explicitly also said that there is “is a reasonable basis to believe that members of Hamas and Palestinian armed groups” committed various war crimes.

Indeed, Bensouda indicated that Israel’s legal system, which probes alleged wrongdoing by Israeli soldiers, may be good enough to render the ICC’s involvement redundant and thus inadmissible. The total lack of accountability for actions carried out by Hamas, however, does not raise that question for the other side, she determined.

What follows are seven questions and answers that aim to explain the significance of Bensouda’s decision.

**1. What exactly did the prosecutor announce on Friday?**

Bensouda stated that “following a thorough, independent and objective assessment of all reliable information available to my Office,” she has concluded a preliminary examination “into the situation in Palestine” which started in early 2015. Her office found that there is a “reasonable basis to proceed with an investigation.”

At the same time, she acknowledged that The Hague may not have the jurisdiction to deal with Israel/Palestine. Hence she asked for a ruling by three ICC judges to determine the scope of the court’s territorial jurisdiction.

The prosecutor herself believes “Palestine,” which acceded to the[Rome Statute](https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf), the court’s foundational document, in early 2015, is enough of a state for the purposes of transferring criminal jurisdiction over its territory to the court.

The ICC hence can investigate alleged crimes that were carried out anywhere in the West Bank, including East Jerusalem, and the Gaza Strip, according to her view.

However, acknowledging the “unique and highly contested legal and factual issues” regarding the question of Palestinian statehood, she requested that the ICC’s so-called pretrial chamber “rule expeditiously” on where, if anywhere at all, the court has jurisdiction.

“The resolution of this foundational issue is necessary now for several reasons,” she wrote.

“First, it will allow judicial consideration of an essential question before embarking on a course of action which might be contentious… Second, an early ruling will facilitate the practical conduct of the Prosecutor’s investigation by both demarcating the proper scope of her duties and powers with respect to the situation and preempting a potential dispute regarding the legality of her requests for cooperation.”

### ****2. What exactly did she accuse Israel and the Palestinians of?****

In her 112-page [report](https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF) issued Friday, the prosecutor said there is “a reasonable basis to believe that war crimes were committed” by both the Israel Defense Forces and Hamas and other “Palestinian armed groups.”

First, in the framework of 2014’s Operation Protective Edge, the 50-day war waged against Gaza terrorists, Israel is accused of:

* intentionally launching at least three disproportionate attacks
* willful killing and willfully causing serious injuries
* intentionally attacking Red Cross personnel or institutions.

Hamas and other armed groups are accused of:

* intentionally attacking Israeli civilians
* using Palestinian civilians as human shields
* willfully depriving civilians of the rights to a fair trial
* willful killing
* torture or inhuman treatment
* “outrages upon personal dignity,” which refers to humiliating and degrading treatment.

In the context of discussing Protective Edge, the prosecutor notes that the IDF has launched investigations into alleged wrongdoing by its soldiers and “the existence of pending proceedings in relation to other allegations.”

Given that the ICC can only open proceedings if a country’s government fails to properly investigate such allegations, Bensouda wrote that she will have to keep reviewing the “scope and genuineness of relevant domestic proceedings” that remain ongoing.

However, she noted, there is no question that the crimes allegedly committed by Palestinian groups in Gaza are not being investigated and are thus fair game for the ICC.

Second, Israel may have committed war crimes by promoting the settlement movement. According to paragraph 8(2)(b)(viii) of the Rome Statute, the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” is considered a war crime.

Third, Bensouda says her investigation may also probe alleged crimes committed by IDF troops using “non-lethal and lethal means” to fend off Gazans who, often at the behest of Hamas, rioted weekly at the border fence with Israel during the so-called “March of Return,” which began in March 2018.

**3. How will the pretrial chamber rule, and when will we know?**

The pretrial chamber was given 120 days to issue its judgment on the scope of the court’s jurisdiction. So it seems very likely that its decision will only be publicized after the next Israeli elections, and possibly only after a new government is formed in Jerusalem.

What the chamber’s three judges — Péter Kovács, of Hungary, Marc Perrin de Brichambaut, of France, and Reine Adélaïde Sophie Alapini-Gansou, of Benin — are going to rule is anyone’s guess.

They could adopt Israel’s position, that the ICC has no jurisdiction over Israel/Palestine whatsoever.

Attorney General Avichai Mandelblit on Friday afternoon published[a 34-page legal opinion](https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%e2%80%9csituation%20in%20Palestine%e2%80%9d%20-%20AG.pdf) explaining in great detail why he is convinced that the the ICC “manifestly lacks jurisdiction” over the case because “no sovereign Palestinian State is in existence” that could delegate to the court criminal jurisdiction over its territory and nationals.

But if the judges are unmoved by his thesis, they are likely to endorse Bensouda’s position, which posits that the “resolution of broader questions regarding Palestinian Statehood is unnecessary” as long as “Palestine” acceded to the Rome Statute and formally became a “State Party” to the court.

Alternatively, the three judges could rule that the court has jurisdiction only over East Jerusalem and the West Bank, but not Gaza — since the Palestinian Authority does not control the coastal enclave.

Or they could decide that jurisdiction only extends to Areas A and B of the West Bank, which according to the Oslo Accords is the area where Palestinians have administrative control, as opposed to Area C, where Israel retained complete territorial jurisdiction.

### ****4. What happens during the 120 days?****

Bensouda on Friday urged the pretrial chamber to allow various relevant parties to make their case regarding jurisdiction. While she is not saying so explicitly, she appeared to be encouraging the judges to invite Israeli officials to participate in the process.

During the last five years, the prosecution learned that both Israelis and Palestinians, as well as their respective supporters, have detailed views on the question of jurisdiction, she wrote. Hence an “open, participatory process” to settle the question is desirable, “so that the spectrum of relevant perspectives may be properly assessed.”

The Palestinians will happily join any hearing in The Hague. The Israeli side hasn’t announced yet whether it will participate in such a process. On the one hand, Israel may want to take advantage of the opportunity to directly influence the judges of the pretrial chamber. Legal experts in Jerusalem believe their case is much stronger than Ramallah’s.

“We will struggle for our rights and for our historical truth with all the tools at our disposal,” Netanyahu vowed Sunday during the weekly cabinet meeting.

“We will continue to struggle against this always,” he said.

On the other hand, participating in the process would lend legitimacy to the proceedings, some officials argue.

In the past, Jerusalem has often opted not to cooperate, for instance, with UN Human Rights Council probes into Israel’s behavior lest it be seen as legitimizing an organization it deems hopelessly biased.

### ****5. What happens after the 120 days are up?****

If the pretrial chamber rules that the court does not have jurisdiction to deal with the matter, the Palestinians can turn to the court’s appeals chamber, which consists of five judges. Their decision could be expected to follow within a few months.

Israel, however, could not appeal a decision saying the ICC does have jurisdiction over the “situation in Palestine,” as it is not a member of the court. It is unclear whether a third state, which is a member of the court and well-disposed toward the Jewish state (for example the UK, Hungary, Canada or Brazil), could legally challenge the pretrial chamber’s ruling.

### ****6. If the court is deemed to have jurisdiction over “Palestine,” what happens next?****

If the prosecutor is given the green light by the pretrial chamber, and once the appeals process is exhausted, “Palestine” would join Uganda, Kenya, Libya, Mali, Georgia and half a dozen other conflict zones currently under ICC investigation.

While during the preliminary examination the prosecutor relied on publicly available information, the investigation is a criminal process, which could have quite dramatic consequences for Israeli officials.

During her investigation, she will have to gather witness testimony to establish guilt beyond a reasonable doubt.

To do that, Bensouda has the right to issue arrest warrants for individuals she wants to interview.

All 123 member states of the court are theoretically obligated to cooperate with such arrest warrants, which could severely impair Israeli officials’ ability to travel to Europe, South America and Africa.

In practice, however, states have often not cooperated with the prosecutor’s requests. Canada, for instance, told the court years ago that it doesn’t recognize Palestine and therefore [won’t cooperate with her requests on the matter](https://www.theglobeandmail.com/opinion/canadas-bluster-over-palestines-icc-bid-betrays-its-principles/article22672289/).

It is entirely unclear how long the investigation would last. It took Bensouda half a decade to conclude her preliminary examination, and the actual investigation, during which she must re-investigate everything from scratch, could be expected to take many long years as well.

Bensouda’s term as chief prosecutor ends in June 2021. But even if her successor decided to conclude the investigation with indictments for Israeli (and Palestinian) officials, the path from this to a trial and eventual convictions would also be very, very long.

The ICC has very limited resources, and only tries defendants it can get its hands on. An Israeli official who doesn’t want to be put in the dock could simply stay at home or limit his or her travel to the many countries that do not cooperate with the court.

### ****7. Does the ICC unfairly single out Israel for censure?****

It is certainly possible to argue that getting dragged into the Israeli-Palestinian conflict is not a good look for the court. A bloody civil war has been raging for years in Syria with hundreds of thousands dead and millions displaced; there are massive human rights violations in China, Myanmar, Iran, North Korea and elsewhere; and The Hague does nothing.

Instead, the ICC, which seeks to prosecute only the “most serious crimes of international concern,” is gearing up to investigate a Western democracy that insists it is fighting defensive conflicts against brutal terrorist organizations, and building homes on disputed territory captured in a defensive war.

“Who are they accusing here? Iran? Turkey? Syria? No — Israel, the only democracy in the Middle East. This is terrible hypocrisy,” Netanyahu said Sunday.

On the other hand, this “whataboutism” argument isn’t entirely straightforward, either. The aforementioned states, like Israel, are not members of the ICC and the court thus does not have jurisdiction over crimes committed on their respective territories.

The ICC did not choose to get involved in the Israeli-Palestinian conflict. It did not initiate the process. Indeed, it is reasonable to assume that the court, with its limited resources and already poor reputation, was hoping to stay far away from it. However, it was dragged into it by the Palestinians. Frustrated with the lack of progress in the peace process, Ramallah viewed The Hague as a convenient arena to score potent points against Israel.

However, it can be counter-argued, the prosecutor could have easily rejected the case by determining that the ICC does not have jurisdiction because Palestine is not a state. Whether she chose the opposite path out of purely legalistic or political-ideological reasons we may never know definitively. But we will find out soon enough whether the pretrial chamber agrees with or reject her arguments.

In the meantime, it is worth noting that the prosecutor’s announcement last week did not come as a surprise to Israel. For the last five years, senior politicians, including those on the right, were keenly aware that Bensouda was watching Israel’s every step. Netanyahu’s vocal support for expanding the settlement enterprise, including his recent repeated vows to annex significant portions of the West Bank, self-evidently did not help convince her to close the case and let it be.