Exclusive: JPost Speaks to ICC Prosecutor Bensouda About Israel's Fate on War Crimes

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<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Exclusive-JPost-speaks-to-ICC-Prosecutor-Bensouda-about-Israels-fate-on-war-crimes-445806>

With the fate of the Israeli army and the country’s legitimacy at stake in the ongoing war crimes debate, *The Jerusalem Post* on Monday became the first Israeli outlet to sit down for an in-person exclusive interview with International Criminal Court Chief Prosecutor Fatou Bensouda in her office on the court’s premises in the Hague in the Netherlands.

Since she controls Israel’s fate about whether the IDF’s conduct during the 2014 Gaza War and the settlement enterprise are investigated as war crimes or not, Ms. Bensouda may be the most important global figure in Israel’s future, having an even greater concrete impact than UN Secretary-General Ban Ki-Moon.

In the 2014 Gaza war, around 2,100 Palestinians were killed, between 50-80% civilians, depending on whether one accepts the IDF or UN calculations.

The 54-year-old Gambian Bensouda came out of the gates in her relationship with Israel mostly under attack by Prime Minister Benjamin Netanyahu for recognizing Palestine as a state for the purposes of her office deciding to open a preliminary examination into whether Israel and the Palestinians have committed war crimes.

Since her recognition on January 16, 2015 and her explanation that she felt compelled, in her own decision, to follow the UN General Assembly’s vote recognizing Palestine, Jerusalem has worried that she would follow the UNGA and what is viewed as a general anti-Israel atmosphere in future decisions as well.

On Monday, Ms. Bensouda, who spent almost a decade as deputy chief prosecutor before taking the top job, put those concerns to rest.

In one of the most intense exchanges of the interview that will be music to Israel’s ears, Ms. Bensouda said that “the UN General Assembly do not tell me what to do, that the prosecutor should act in this way or that way, unless of course it is in accordance with the statute.”

Asked if this meant that the UNGA is now out of the picture of her legal conclusions, Bensouda, in one of her rare emotional moments of the interview where she let down her guard, said forcefully, “Completely! I’m not even thinking of why they would tell me why I should take this case and not this case. That is interfering with my independence.”

The ICC chief prosecutor was clear that the Palestine recognition issue was the only issue in which she needed to heed the UNGA and that it was for technical reasons, but that she will not take future directives from them when deciding the central question of the war crimes debate: whether the IDF’s investigative apparatus for the 2014 Gaza war complies with international standards.

But Palestinians can take comfort in some of her other positions or non-positions (with Bensouda, like many legal officials, observers are sometimes left grasping at non-answers to shed light on issues which the official does not wish to discuss.)

Israel tends to lose most battles in the international arena, with the exception being cases in which specific international figures are, from the start, ready to go against the grain and recognize the complex challenges it encounters in fighting its neighbors.

Bensouda is not ready to declare her acceptance of Israeli exceptionalism.

Asked about whether the Israeli case is unique, because, Israel would argue, it has performed far more serious investigations of its own soldiers' conduct during the Gaza war than any prior country that the ICC examined, Ms. Bensouda demurred from answering the question.

Pressed about what, if anything, her view is on Israel and the Palestinians' situation after 18 months of preliminarily examining of the conflict, she said, “I would not go to the extent of saying what is unique at this time.”

Elaborating, she said, “We are not looking, judging the whole judicial system of any state or any system that is supposed to have jurisdiction or that could exercise jurisdiction. We are not looking at the judicial system and how it is functioning. We are looking particularly at specific crimes and we are looking at specific conduct, we’re looking at specific persons, with their responsibility…and as I always say [we are doing this] in an independent and very dispassionate way and this is very critical whether it is in Afghanistan or whether it is any other situation.”

Over and over again, she repeated the mantra of her commitment to the Rome Statute, to her mandate and to being guided by a set criteria of the law applied by the ICC, with no accounting for exceptionalism or a broader approach being a prism through which to view the conflict.

Even pressed on whether she would judge Israel or Hamas as more credible and truthful when the sides disagree about the specifics of an incident in which both could be on the hot seat, she insisted she would not choose.

In the measured and remarkably consistent dispassionate tone that characterized most of the interview, even if others viewed her not choosing as a judgment, she stated “it’s a judgment in the sense that I am going by my legal boundary. If you are calling that a judgment, yes, that is a judgment, because that is in the statute.”

There were answers which Bensouda gave which may give Israel at least a temporary sigh of relief. There was no sense of being pressured to make a decision anytime soon about alleged war crimes against the IDF. She would not even make an advance commitment to making a decision about whether to move from a preliminary examination to a full criminal investigation before the end of her term in 2021, even under pressure from Israel critics who claim that she is moving to slowly in jumping on alleged Israeli war crimes.

The chief prosecutor said, “The message that I have consistently wanted to send…I am not going to deviate from what the statute tells me to do. I will not deviate from that, not for any reason. It is very critical for the credibility of this office… I can assure you, whether it is here, whether it is Palestine, whether it is any other situation,” Bensouda said, emphasizing she would not be rushed.
“I cannot sit here and say that it will take seven years, or it will take ten years or it will take any number of years…all of this depends on the facts and the circumstances. The preliminary examination cannot be given a timeline,” she added.

Not that this should be confused with Bensouda giving the IDF extra slack. Her refusal to commit to a deadline for deciding whether to move to a full criminal investigation was due to an opposition in principle to making even theoretical commitments.

In fact, she qualified that statement, noting “I will not hesitate to take the next step…I will not hesitate once the legal requirements have been met to do what I have to do…but it is not my situation that I’m sitting here…to give it to the next prosecutor whose coming, because I don’t have the courage.”

Other good news from the Israeli perspective was Bensouda’s refusal to endorse UNHRC Report lead author Judge Mary McGowan-Davis’ comment that, “It becomes clear very early on [in the war] that huge numbers of families are dying in these houses that are targeted by large bombs. It must become apparent to someone [in the IDF] that the rules of engagement that are supposed to protect civilian lives are not effective, so those who were in the position to make the kind of decision to change the course of the operation should have done so.”

In response, Bensouda said, “We are not judging what the report said or what it didn’t say, we are collecting information, we take note of this report…but I don’t feel…our work is based on what other people are saying, but it is more based on the information that we collected, the assessment that we will make based on that information, as of now we do not collect from one source, we collect from different, divergent sources, we do cross-checking.”

Probably, the least good news from the Israeli perspective was her response to being confronted with her former boss and former chief ICC prosecutor Luis Moreno-Ocampo’s [statements to the *Post* about settlements](http://www.jpost.com/Arab-Israeli-Conflict/Former-ICC-prosecutor-High-Court-approval-could-save-settlements-from-war-crime-label-436967).

On December 10, Moreno-Ocampo told the *Post* that anyone prosecuting Israelis regarding settlement activity would be incapable of proving criminal intent if those Israelis explained that they honestly believed their actions were legal once ratified by the country’s top court.

While calling Moreno-Ocampo a good prosecutor who did his best, she refused to prejudge any issues related to the settlements. This was significant since the *Post* did not ask her to decide legal issues regarding a specific settlement, only to comment on whether there could be any theoretical situation in which an Israeli High Court ruling could be a defense to the alleged crime of illegally building settlements (direct or indirect forcible removal under the ICC Rome Statute.)

Bensouda refused to name any situation, regarding settlements or otherwise, in which an Israeli High Court ruling could be a defense, standing true to her overall theme of staying away from theoretical situations.

There was one area in which Bensouda was proud to take a clearer stand – regarding sexual crimes often related to gender, like mass rape.

Bensouda, who has made gender issues a hallmark of her term, implied she was gratified, “realizing that I have the opportunity in this position to bring more focus to these very serious crimes which will not go away…For me, it has been ignored long enough… people want to overlook these crimes, I like to underline the importance of these crimes."