

Why the ICC's Claim of Jurisdiction Over Israel and Palestinians for War Crimes is Disturbing

by Hugh Fitzgerald



In a 2-1 decision, a three-judge panel (chosen from the 18 members of the ICC) has concluded that the claims of the International Criminal Court to have jurisdiction to open a criminal investigation of possible war crimes that may have been committed by Israel or the Palestinians during Operation Protective Edge, which was fought in Gaza in 2014. What makes this decision particularly disturbing is that Israel is not a member of the ICC, and only members of the ICC are held subject to its jurisdiction. But different rules apply, apparently, when it comes to Israel.

A previous Jihad Watch report on this is [Times of Israel](#),

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In a major decision released Friday, a pretrial chamber of the International Criminal Court determined that The Hague has jurisdiction to open a criminal investigation against Israel and the Palestinians for war crimes alleged to have taken place in the West Bank, Gaza Strip and East Jerusalem.

ICC chief prosecutor Fatouh Bensouda indicated in 2019 that a criminal investigation, if approved, would focus on the 2014 Israel-Hamas conflict (Operation Protective Edge), on Israeli settlement policy and on the Israeli response to protests at the Gaza border...

Bensouda has considerably broadened her remit. Assigned to study the possible prosecution of war crimes during the 2014 Israel-Hamas conflict, she chose as well to study two very different subjects – the “legality” of Israeli settlements created throughout the West Bank over the past 50 years, and Israel’s handling of the Hamas-organized “Great March of Return” that was held by Palestinians marching towards, and attempting to breach, Israel’s security fence with Gaza every Friday between March 30 2018 and December 27, 2019, when at last it was discontinued.

It has always been well understood that the ICC has jurisdiction only over those states that are members of the ICC. Israel is not, but this did not prevent two of three ICC judges from ruling that it did not matter.

In the US, State Department spokesman Ned Price said his office was still reviewing the decision. However, he clarified that the Biden administration has “serious concerns about the ICC’s attempts to exercise its jurisdiction over Israeli personnel.”

The Biden Administration ought to have come out with both guns

blazing, denouncing this absurd decision. What is there that needs “reviewing”? Why is the U.S. merely expressing “serious concerns” instead of dismissing the farce? Israel is not a member of the ICC. Therefore Israel – like all other non-members, including the United States itself – is not subject to its jurisdiction. There is one way that a country that is not a member of the ICC may be referred to it, if the UN Security Council so decides. But Israel was not so referred; the U.S. still has its veto in the Security Council.

“We have always taken a position that the court’s jurisdiction should be reserved for countries that consent to or that are referred to by the UN Security Council,” Price added, hinting at US opposition to the decision, given that Israel is not a member of the ICC. The US is also not a member. The Palestinians joined the court in 2015.

Aside from never consenting to the ICC’s jurisdiction, Israel was also not “referred to” the ICC by the UN Security Council. Such an attempt would have been futile, for the Americans still possess a veto at the UNSC, and even under Biden, would not permit such a travesty.

The ICC is meant to serve as a court of last resort when countries’ own judicial systems are unable or unwilling to investigate and prosecute war crimes. Israel’s military has mechanisms to investigate alleged wrongdoing by its troops, and despite criticism that the system is insufficient, experts say it has a good chance of fending off ICC investigation into its wartime practices. When it comes to settlements, however, some experts say Israel could have a difficult time contesting international law forbidding the transfer of a civilian population into occupied territory.

Both the Israeli military itself, and Israel’s judicial system are known for the thoroughness of their investigations of all claims of war crimes. The ICC’s prosecutor, Fatouh Bensouda,

completely ignored Israel's track record, in her own investigation, treating the Jewish state as if it were a lawless state on the level of North Korea or Iran or – "Palestine."

Israel was originally accused of "war crimes" in the earlier, 2008-2009 Gaza operation, by Justice Richard Goldstone, who later admitted that he had been quite wrong to accuse Israel, for after submitting his report, he had learned much more about the IDF's methods of warning civilians, and the great care it takes to minimize such casualties. A report by the Anti-Defamation League contains this summary of how Israel holds its soldiers to the highest standards and how it investigates itself:

IDF guidelines strictly call for the prevention of harm to uninvolved civilians. Allegations that individual Israeli soldiers acted unethically or illegally during Israel's military operations in Gaza were carefully investigated and legal action was taken against soldiers found to have committed violations, including criminal indictments.

In an April 2011 op-ed in the Washington Post, Justice Richard Goldstone, the lead author of the infamous 2009 Goldstone Report which charged Israel with war crimes through a deliberate policy to target civilians during the 2008/09 Gaza operation, wrote "If I had known then what I know now, the Goldstone Report would have been a different document." Justice Goldstone withdrew the report's most serious claim that the Israeli Defense Forces intentionally targeted civilians during their operations in Gaza. The op-ed, entitled "Reconsidering the Goldstone Report on Israel and War Crimes," further commended Israel's investigations into charges of abuse. As Justice Goldstone concluded, "the investigations published by the Israeli military and recognized in the U.N. committee's report...indicate that civilians were not intentionally targeted as a matter of policy." He further wrote of Hamas: "rockets were

purposefully and indiscriminately aimed at civilian targets...That comparatively few Israelis have been killed by the unlawful rocket and mortar attacks from Gaza in no way minimizes the criminality[of Hamas]."

Allegations regarding incidents during the 2014 Operation Protective Edge are still under investigation. Despite Israel's best efforts to avoid harming non-combatants, there were many civilian injuries and deaths were reported in Gaza. As in prior Israel-Hamas conflicts, Hamas had deliberately placed its operational centers, storage facilities and rocket launching sites, infiltration tunnels, in densely populated areas, including private homes, mosques, schools and medical facilities, a violation of the Law of Armed Conflict (which prohibits a party to hostilities from deliberately making civilians the object of attack). Hamas' own military manuals urged their fighters, many of whom posed as civilians and non-combatants, to use populated civilian areas so that it "increases the hatred of the citizens towards the attackers [the IDF] and increases their gathering [support] around the city defender [Hamas]." Israel enacted procedures to warn civilians through leafleting, phone calls and other methods, that their neighborhoods and buildings were located in the vicinity of military operations and urged them to leave the area. In response to these warnings, Hamas advised Gaza residents to ignore "Israeli propaganda" and stay in their homes.

In keeping with its commitment to observing international law, Israel created a permanent Fact Finding Assessment Mechanism (FFA Mechanism) to compile alleged violations of international law during Operation Protective Edge, approximately 100 incidents in total. The incidents are being investigated by Israel's Military Advocate General (MAG) which has launched criminal investigations into a number of the alleged violations.

It should also be noted that many of those who accuse the IDF

or individual Israeli soldiers of war crimes believe that military action can never be justified, and do not provide guidelines for what they would consider the justified use of force in the context of a state battling a terrorist organization entrenched in a densely populated area.

Israel has done everything possible to minimize civilian casualties. A close observer of Operation Protective Edge, British Colonel Richard Kemp, has testified to the many ways that Israel warned civilians to flee impending attacks: through leafletting, telephoning, emailing, radio broadcasts, and Israel's inventive "knock-on-the-roof" technique.

And, Colonel Kemp noted in his report, no army has been so quick to investigate its own soldiers for putative war crimes like the IDF. And tomorrow we'll get to Colonel Kemp's observations on how admirably Israel fights its wars.

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