

Israel and the US Step Up Efforts to Intimidate the Hague War Crimes Court

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In the near-two decades since the International Criminal Court was set up to try the worst violations of international human rights law, it has faced harsh criticism for its highly selective approach to the question of who should be put on trial.

Created in 2002, the court, it was imagined, would act as a deterrent against the erosion of an international order designed to prevent a repetition of the atrocities of the Second World War.

Such hopes did not survive long.

The court, which sits in The Hague in the Netherlands, almost immediately faced a difficult test: whether it dared to confront the world's leading superpower, the United States, as it launched a "war on terror".

The ICC's prosecutors refused to grasp the nettle posed by the US invasions of Afghanistan and Iraq. Instead, they chose the easiest targets: for too long, it looked as though war crimes were only ever committed by Africans.

Now, the ICC's chief prosecutor, Fatou Bensouda, looks poised finally to give the court some teeth. She is threatening to investigate two states – the US and Israel – whose actions have been particularly damaging to international law in the modern era.

The court is considering examining widespread human rights abuses perpetrated by US soldiers in Afghanistan, and crimes committed by Israeli soldiers in the occupied Palestinian territories, especially Gaza, as well as the officials responsible for Israel's illegal settlement programme.

An investigation of both is critically important: the US has crafted for itself a role as global policeman, while Israel's flagrant violations of international law have been ongoing for more than half a century.

The US is the most powerful offender, and Israel the most persistent.

Both states have long dreaded this moment – the reason they refused to ratify the Rome Statute that established the ICC.

Last week Mike Pompeo, the US Secretary of State, stepped up US attacks on the court, saying its administration was "determined to prevent having Americans and our friends and allies in Israel and elsewhere hauled in by this corrupt ICC".

A large, bipartisan majority of US Senators sent a letter to Pompeo last month urging him to ensure “vigorous support” for Israel against the Hague court.

Israel and the US have each tried to claim an exemption from international law on the grounds that they did not sign up to the court.

But this only underscores the problem. International law is there to protect the weak from abuses committed by the strong. The victim from the bully.

A criminal suspect does not get to decide whether their victim can make a complaint, or whether the legal system should investigate. The same must apply in international law if it is to have any meaningful application.

Even under Bensouda, the process has dragged out interminably. It has taken years for her office to conduct a preliminary investigation and to determine, as she did in late April, that Palestine falls under the ICC’s jurisdiction because it qualifies as a state.

The delay made little sense, given that the State of Palestine is recognised by the United Nations, and it was able to ratify the Rome Statute five years ago.

The Israeli argument is that Palestine lacks the normal features of a sovereign state. However, as the Israeli human rights group B’Tselem recently noted, this is precisely because Israel has occupied the Palestinians’ territory and illegally transferred settlers onto their land.

Israel is claiming an exemption by citing the very crimes that need investigating.

Bensouda has asked the court’s judges to rule on her view that the ICC’s jurisdiction extends to Palestine. It is not clear how soon they will issue a verdict.

Pompeo’s threats last week – he said the US will soon make clear how it will retaliate – are intended to intimidate the court.

Bensouda has warned that her office is being subjected to “misinformation and smear campaigns”. In January, Israeli Prime Minister Benjamin Netanyahu accused the court of being “antisemitic”.

In the past, Washington has denied Bensouda a travel visa, and threatened to confiscate her and the ICC judges’ assets and put them on trial. The US has also vowed to use force to liberate any Americans put in the dock.

There are indications the judges may now be searching for a bolt hole. They have asked Israel and the Palestinian Authority to respond urgently to questions about whether the temporary Oslo accords, signed more than 25 years ago, are still legally binding.

Israel has argued that the lack of resolution to the Oslo process precludes the Palestinians from claiming statehood. That would leave Israel, not the ICC, with jurisdiction over the territories.

On Monday Bensouda was reported to have given her view that the Oslo accords should have no bearing on whether an investigation proceeds.

Mahmoud Abbas, the Palestinian president, told the ICC last week that the PA considers itself exempt from its Oslo obligations, given that Israel has announced imminent plans to annex swaths of Palestinian territory in the West Bank.

Annexation was given a green light under President Trump's "peace plan" unveiled earlier in the year.

Bensouda's term as prosecutor finishes next year. Israel may hope to continue stonewalling until she is gone. Elyakim Rubinstein, a former Israeli Supreme Court judge, called last month for a campaign to ensure that her successor is more sympathetic to Israel.

But if Bensouda does get the go-ahead, Netanyahu and an array of former generals, including his Defence Minister Benny Gantz, would likely be summoned for questioning. If they refuse, an international arrest warrant could be issued, theoretically enforceable in the 123 countries that ratified the court.

Neither Israel nor the US is willing to let things reach that point.

They have recruited major allies to the fight, including Australia, Canada, Brazil and several European states. Germany, the court's second largest donor, has threatened to revoke its contributions if the ICC proceeds.

Maurice Hirsch, a former legal adviser to the Israeli army, wrote a column last month in Israel Hayom, a newspaper widely seen as Netanyahu's mouthpiece, accusing Bensouda of being a "hapless pawn of Palestinian terrorists".

He suggested that other states threaten to pull their contributions, deny ICC staff the travel visas necessary for their investigations and even quit the court.

That would destroy any possibility of enforcing international law – an outcome that would delight both Israel and the US.

It would render ICC little more than a dead letter, just as Israel, backed by the US, prepares to press ahead with the West Bank's annexation.

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