The contortions and collusions of ICC's Bensouda – opinion

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The Chief Prosecutor of the International Criminal Court, Fatou Bensouda, has contorted the jurisdiction of the court into a dangerous parody in her desperate efforts to drag Israeli soldiers and political leaders into the dock at The Hague. Now, according to a senior Palestinian leader, she has also been colluding with members of the internationally-proscribed terrorist groups Hamas and Popular Front for the Liberation of Palestine (PFLP) to achieve her baleful objective.

The ICC should be an important part of the international rule of law, but Bensouda is betraying the honorable legal tradition established by the court’s predecessor tribunals that brought war criminals to justice at Nuremberg and Tokyo after the Second World War.

The court’s founding Rome Statute allows investigations only within the sovereign territories of state parties to the treaty. But the prosecutor has unlawfully accepted delegated jurisdiction over the West Bank, east Jerusalem and Gaza from what she calls the “State of Palestine.” Palestine is not a state and never has been. Under the 1993 Oslo Accords, from which the Palestinian Authority derives its very existence, the PA was not granted any criminal jurisdiction over Israelis whatsoever nor can it transfer such jurisdiction to international institutions like the ICC.

The ICC accuses Israel of committing crimes against international law (all demonstrably fallacious) within what is an area unlawfully treated as sovereign Palestinian territory. Yet the borders of any future Palestinian state – and of Israel, which is not a state party to the court – remain undefined under international law. Self-evidently, the ICC cannot obtain delegated jurisdiction from a non-sovereign entity in relation to territories that it does not possess.

Realising she’s on shaky ground, the prosecutor referred the question to the ICC’s Pre-Trial Chamber to confirm her spurious claims of jurisdiction. In an unprecedented move, seven member states, including Germany, Brazil, Australia and Uganda, as well as numerous other bodies, have submitted to the panel “friends of the court” briefs – amicus briefs – strenuously objecting to Bensouda’s claims of jurisdiction. The prosecutor gave her response to these challenges to her authority this week, offering nothing new even in light of strong evidence against the ICC’s jurisdiction in this case, instead doubling down on her own position.

According to Jordanian media, a Palestinian Authority representative in contact with the ICC has boasted that the prosecutor’s referral to the Pre-Trial Chamber is merely a charade, only initiated in order to protect “the ICC's public image… in a sensitive investigation such as this.” He claims that the court has already decided there is jurisdiction and has begun preparations to open an investigation.

THIS GIVES Saeb Erekat, Secretary of the PLO Executive Committee and chief negotiator on the Israel-Palestinian peace process, the confidence to say: “The step taken by the prosecutor represents a confirmation of her position that the ICC has territorial jurisdiction to examine the ongoing crimes that are committed by Israel... It is the final step towards opening a criminal investigation.”

Erekat also confirms that a committee he chairs, working with the prosecutor, includes six members of Hamas and a PFLP member with a senior Hamas official acting as spokesman. If Erekat is right, the ICC prosecutor has been dealing with members of designated terrorist organizations, in itself intolerable for an international official of her stature. Compounding her woeful misjudgement, these terrorist groups have carried out violent criminal attacks that the court is also due to investigate should it be granted jurisdiction.

The ICC was not established to replace national judicial systems but to complement them – to act only where states themselves lack the capability or will to conduct their own investigations and prosecutions. Israel has a long-established and internationally-respected legal system, with a record of investigating and bringing charges against those accused of war crimes, which renders the court’s process inadmissible.

As some of us foresaw from the start, the ICC has twisted itself into a political court rather than a serious legal body. Its notorious obsession with Israel is only part of the problem. Following accusations that the court was biased against African states which led South Africa, Burundi and The Gambia to threaten withdrawal, the ICC has tried to deflect criticism by focusing on Western liberal democracies, alleging large-scale war crimes in Afghanistan and Iraq by the US and UK. Like Israel, both nations have well-respected legal systems with track records of dealing effectively with allegations against their forces.

This makes the ICC an instrument of “lawfare”, intended to weaponize legal processes to deter or hamper law-abiding Western liberal democracies from fighting to defend themselves and to undermine their core values.

This travesty must now be permanently ended. The US, never a party to the ICC, is rightly defending itself against the court’s lawfare campaign. Britain should now leave the ICC and follow America’s lead. Other Western countries, including those that filed amicus briefs in favor of Israel, should do the same.

They should deny court officials travel to their countries, as the US has already done with Bensouda. They should defund the ICC and impose sanctions including seizure of funds where possible. This would protect their forces and leaders from the depredations of the ICC and force the court to act as the Rome Statute intended, dealing only with member states without functioning judiciaries that are unable to apply international law themselves.