ICC Prosecutor to ‘Post’: Probe of Gantz, IDF officers, is premature

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While deciding to investigate Israel for war crimes, International Criminal Court Prosecutor Fatou Bensouda told The Jerusalem Post this week the fate of IDF soldiers, like former chief of staff Benny Gantz, remains undecided, and the troops could end up being let off the hook.

On December 20, Bensouda announced her intent to open a war-crimes investigation of both Israel and the Palestinians, leading to praise from the Palestinian Authority and a wave of condemnation from Jerusalem. Any investigation of the IDF will focus on 2014’s Operation Protective Edge, overseen by Gantz, who at the time was chief of staff. The ICC probe will also focus on settlement construction after 2014, the year the Palestinians chose as the starting date for membership in the ICC.

In a special interview with the Post, Bensouda said it was still possible she would end up closing the case against IDF soldiers. At the same time, Bensouda was careful not to commit, since she may still decide to prosecute soldiers at a later date for their involvement in Operation Protective Edge or the 2018-2019 Gaza border-fence conflict.

After her war-crimes probe decision two weeks ago, Israeli officials warned that senior IDF officers who oversaw the 2014 war could face arrest warrants and criminal charges in countries that are signatories to the Rome Statute, which governs the ICC.

Her clarification that the cutoff date for settlements was June 2014 is of critical importance, since it means that only a fraction of settlements are potentially in jeopardy. The vast majority of settlements where most of the Jews in the West Bank live were built long before, so they are not in the ICC’s crosshairs.

If the case against the IDF is ultimately closed, it would be because, as Bensouda explained to the Post, she has yet to decide on the critical issue of “complementarity,” which provides that a case is inadmissible before the ICC if it has been properly investigated by a state with jurisdiction over it. Regarding Operation Protective Edge, Bensouda would have to decide if the IDF’s investigations of its own soldiers for alleged war crimes are sufficient to bar her from involvement.

She said she would decide this issue at a later date and would publicize a separate report to explain that decision.

“We recognize that national proceedings have been or are being undertaken with respect to these allegations,” Bensouda said. “The office’s admissibility assessment in terms of the scope and genuineness of relevant domestic proceedings concerning the IDF remains ongoing at this stage and will need to be kept under review in the context of an investigation.”

“I cannot conflate jurisdiction [whether Palestine is a state] with admissibility [whether Israel’s legal system complies with international law],” she added. “Rather, I have recognized that I cannot at this stage definitively rule in or out the potential cases arising from IDF conduct in Gaza during 2014.”

Bensouda’s office has said in the past that at most, her review of Operation Protective Edge would involve three large incidents, meaning she will not review the majority of the war.

Bensouda explained why she decided to announce an intent to open a full war-crimes probe before determining the question of complementarity.

One reason, she said, had to do with technical issues relating to how the ICC Pretrial Chamber operates. A second, more crucial reason though was that she “intentionally did not want to distract attention from the focus of these proceedings, which is already complex. This is why I merely provided an overview of my findings sufficient to demonstrate that the issue before the judges is concretely related to the scope of future investigations.”

Essentially, Bensouda explained that the debate over whether a state of Palestine exists was so heated, that she did not want to take on a second mega-issue at the same time that might distract attention from this first crucial threshold issue.

According to the Rome Statute, Bensouda is only allowed to proceed against Israelis if the ICC Pretrial Chamber agrees that Palestine is a state.

It is expected to agree with Bensouda. But in the unexpected scenario that the ICC Pretrial Chamber rules Palestine is not a state, the entire investigation would very likely fall by the wayside.

Next, the Post pressed about why her 120-page legal brief of December 20 did not mention Israel’s vast efforts at warning Palestinian civilians to evacuate war-zone areas during Operation Protective Edge.

Bensouda responded: “Should the judges render a ruling in response to our request to confirm the scope of the territorial jurisdiction in this situation, we will see how we can provide further details of our assessment of the statutory criteria to the public, including on the questions of jurisdiction and admissibility [which could include analyzing Israel’s attempts to warn Palestinian civilians.]”

A major objection of the Israeli side has been that Bensouda appeared to treat Israel and Hamas with a certain relative equivalence.

In fact, while she mentions alleged war crimes by the Palestinian side, the word “Hamas” does not even appear in the main press release summary that many journalists and officials used as their platform for understanding her decision.

A careful reading of her 120-page brief shows that Bensouda has concluded that Hamas has done zero investigations of its rocket attacks on civilians, whereas the IDF has performed substantial probes of alleged war-crimes incidents involving its own soldiers.

Bensouda was pressed why she did not state clearly in her summary that she would move forward more quickly in her investigation against Hamas than against Israel. This would seem to follow logically from her own legal conclusions that only Israel has investigated itself.

She responded: “Should the judges render a ruling in response to our request to confirm the scope of the territorial jurisdiction in this situation, we will see how we can provide further details of our assessment of the statutory criteria to the public, including on the questions of jurisdiction and admissibility [whether her investigation against Hamas will move faster].”

Pressed to give a “yes” or “no” answer about whether she would move faster in probing Hamas than against Israel, she declined. However, an official added that while it would be improper to give advance notice of the ICC prosecution’s strategy for later stages, the Post could draw its own conclusions from the fact that Bensouda specifically noted the absence of any Hamas self-investigation.

Many Israelis were put off by the seemingly unlimited nature of Israeli officials who the ICC might probe and prosecute. For example, if Bensouda finds war crimes were committed by the IDF during Operation Protective Edge, the decision in theory could implicate not only current Prime Minister Benjamin Netanyahu, but a potential future prime minister, Benny Gantz.

She was questioned about whether she might consider avoiding prosecuting Gantz if he became prime minister and was involved in a peace deal to resolve the Israeli-Palestinian conflict.

The ICC Rome Statute provides that cases should not go forward if they run counter to the “interests of justice.” There is a split between experts on the ICC about whether this could lead the ICC to forego a case where it might undermine broader peace efforts between warring nations.

Bensouda responded: “The premise of this question is entirely speculative and premature. An investigation has not been opened at this stage. The Office of the Prosecutor will of course conduct independent and impartial investigations.”

Similarly, when asked about the timing of any potential arrests of Israeli officials, her office declined to analyze the issue, since she said it was nowhere near determinations regarding key preliminary legal issues, such as jurisdiction, admissibility and assessments of individual involvement.

A glaring imbalance in even Bensouda’s 120-page brief was extensive citation of former US Secretary of state John Kerry’s speech blasting the Israeli settlements as problematic in late 2016, whereas the current US administration’s view was relegated to a single footnote with no explanation.

Asked if her conduct showed blatant bias in analyzing the key legal views of the settlements, Bensouda responded: “As you will be aware, as litigants, we are not required to give equal parity to different positions when arguing a particular position. But we certainly believe that Chamber should be aware of the existence of contrary views.”

Separate from the legal issues, Bensouda has been accused of ignoring the Israeli public and its supporters and favoring interactions with the Palestinian side.

More specifically, her ICC team only visited Israel once in October 2016, and while it interviewed with the Post and met with select Israeli government and academic officials, it held no press conferences or had any direct outreach to the public.

Bensouda responded to this issue, stating: “My office also had repeated, highly substantive and robust interactions at the seat of the court with representatives of both the Palestinian and Israeli authorities, as well as representatives of civil society, on the full range of issues relevant to the preliminary examination.”

“Such exchanges contributed greatly to the ability of the office to arrive at an informed view of the various statutory criteria, including in particular issues of jurisdiction and admissibility, and to fully ventilate the complex issues related to the court’s jurisdictional preconditions,” she said.

“Many will attempt to misrepresent my office’s work concerning the situation in Palestine, and/or attempt to tarnish our credibility through ad hominem attacks,” Bensouda said. “Regrettably, the initial reactions to my independent and responsible decision taken in accordance with my mandate under the statute has already witnessed an emerging trend in this regard.”

“We recognize this situation is complex, which is why we have taken the responsible route of voluntarily requesting a ruling on the matter before even initiating an investigation. Our investigations will examine allegations against all actors, not just one side,” she said.

“We have been sober in our approach and hope for an open and participatory judicial process moving forward that will enable the court’s judges to benefit from all views when discharging their own independent mandates to arrive at an informed and legally sound decision,” Bensouda said.