Israel and the ICC: Is the battle over int’l law lost?

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Since around 9/11 and the Second Intifada, Israel has been fighting, along with some western allies like the US, for the soul of international law.

Was International Criminal Court Prosecutor Fatou Bensouda’s decision to investigate Israelis for war crimes a sign that Jerusalem has lost the battle once and for all, and if so, how did it come to this?

On: a) whether Palestine is a state; b) whether settlements are illegal and whether they are a war crime and c) how the Oslo Accords and UN Resolutions about resolving borders issues between the parties, Bensouda went against the Israeli and current US opinion every time.

As many Israelis see the question: What led a democratic state like Israel who is up against terrorists like Hamas to facing a full war crimes investigation from the ICC?

The answer starts with the principle of self-determination and the rising up of the Third World nations in the 1970s against many of the major powers that created the United Nations and the post-World War II order.

Over and over again in her legal brief explaining her readiness to view Palestine as a state and to view the settlements enterprise as a war crime, Bensouda refers back to self-determination and to the number of states supporting the Palestinians’ view of the settlements.

Bensouda’s brief is honest enough to recognize that according to many international law principles of statehood, such as the Montevideo principles, it is difficult to call Palestine a state.

If there is not Palestine then there is no case and there certainly is no war crimes regarding the settlements.

The ICC Prosecution overrides all of the counter-views which would say Palestine does not have the characteristics of a state, by citing Palestinian self-determination as “jus cogens,” a universal principle of international law which trumps all others.

This, despite the fact, that until the 1970s, self-determination was only one of many competing principles for deciding such issues.

She cites over and over again that close to 140 states agree there is a state of Palestine and view the settlements as illegal.

For Bensouda, it makes no difference that Palestine is not a full member state of the UN and the supreme body of international law, the UN Security Council, has not recognized it.

Rather, the fact the less-authoritative UN General Assembly gave Palestine a status as a non-member is viewed as a sufficient “formula” for Palestine to have joined a wide range of international bodies, including the Rome Statute.

The same applies to Bensouda moving in the direction that the settlements are unequivocally a war crime.

It is one thing to say that the settlements may violate international law or suffer from legitimacy issues regarding not changing facts on the ground until Israel and the Palestinians reach an agreement on borders.

But not every violation of international law is a war crime. If another country has an aircraft briefly fly through your air space, it’s a minor violation of sovereignty and not a war crime.

Never in the history of international law have there been war crimes trials for building homes. Rather, war crimes have referred to genocide and mass killing.

Bensouda seems to disregard this record entirely without much notice she is making a radical move.

In a similar vein, while she quotes extensively in the main body of her brief from a 2016 speech by then-US secretary of state John Kerry criticizing Israel’s settlements as problematic, the ICC Prosecution brief practically pretends the current US government does not exist.

The only mention of the current US government view the settlements are legal is footnote 547, which notes only, “the current administration has a different view,” but without exploring the basis of that view at all.

Critics of Israel like to point to the Article 49 of the 1949 Fourth Geneva Convention to contradict this.

But in historical context, this article referred to the Nazis forcibly transferring their own population-sectors, such as the Jews, into other countries as part of the concentration camp process and Final Solution.

Nothing in the Geneva Conventions explicitly prohibits as a war crime Israelis from voluntarily moving to areas of the West Bank, where Jews lived in the past and where Palestinians are not currently living – even if the land might be disputed.

Israeli critics essentially admitted this when they added the new words “indirect population transfer” to the Rome Statute’s 1998 updated version of the Geneva Conventions in order to try to nail the Israeli settlements.

Critics of Israel can respond it no longer matters what the 1949 Geneva Conventions meant since the 1998 Rome Statute supersedes it and the new changes were expressly made to go after Israel’s settlements. This post-1998 trend is another departure from what international law had been.

But UN Resolution 242 setting down that borders be resolved by a deal between the parties still applies.

This point is where Bensouda could define herself as allowing the politics of anti-Israel countries adding words to the Rome Statute right before it was finalized to dictate her actions and to interfere in a land disappoint between two peoples. Or she could have looked at the many unique aspects of the Israeli-Palestinian conflict to argue why those words in the Rome Statute do not apply to Israel.

Put differently, she could stake out a role as a completely-objective actor or take a side about the historical context with which to view the question of if settlements are a war crime.

Bensouda acknowledges that Palestine has no borders, the Oslo Accords dictate certain aspects of the borders between the sides and the Palestinian Authority does not even control Gaza – having nothing to do with Israel.

Effectively, at this point she adapts the current majority global critical opinion of blaming all of these issues on the “Israeli occupation.”

Even the Oslo Accords she treats essentially as an unfair contract between a large company (Israel) and a weak party/consumer (Palestine) and says that anywhere that Palestine signed away any self-determination rights, it cannot be held to the deal.

Except that Yasser Arafat represented the Palestinian nation and, even if weaker was Israel, was given control of substantial territory as part of the Oslo Accords.

It is also possible that Bensouda gives little thought to the Oslo Accords because the peace process has been stalled for so long and because she is clearly worried about Prime Minister Benjamin Netanyahu’s call for partial West Bank annexations.

But Bensouda had started to signal her direction on the settlements issue more than a year ago, so the latest pronouncements by Netanyahu cannot be more than a small part of the picture.

Finally, the ICC has issued a range of rulings regarding other countries which could be helpful to Israel. In every case, Bensouda said these did not apply and instead supported her arguments with rulings from other countries which went against the Israeli stance.

There is little good news for Israel in terms of where the ICC Prosecution is taking international law.

But even if many European countries view the settlements as illegal, they and the US may still help build Israel a firewall against Bensouda going after Israel for the settlements as a war crime down-the-road.