How the ICC is encouraging greater civilian casualties

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By Evelyn Gordon

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March 16 was the deadline for filing briefs on whether the International Criminal Court should recognize Palestine as a state. But important though that question is, the ICC prosecutor’s decision to open a criminal investigation against Israel poses a much bigger problem: Contrary to the court’s stated mission of trying to reduce the harm caused by war, it may well result in even higher casualties and more extensive property damage.

Like all Western countries, Israel makes great efforts to uphold customary laws of war, including by trying to minimize civilian casualties. As a group of high-ranking Western military experts wrote in a [report](http://www.jpost.com/International/Security-and-defense-IDF-exceeding-expectations-of-war-rules-436997) on the Hamas-Israel war of 2014, Israel “met and in some respects exceeded the highest standards we set for our own nations’ militaries.” In fact, Israel has historically caused [fewer civilian casualties](http://evelyncgordon.com/israels-record-on-civilian-casualties-compares-well-to-americas/) and [less property damage](http://evelyncgordon.com/ramadi-gaza-and-western-hypocrisy/) than other Western armies.

Many Israelis actually resent this, arguing that the restrictions imposed on the army’s use of force put Israel’s own soldiers and civilians at greater risk. And the Israel Defense Forces’ vehement denials can’t necessarily be taken at face value since it would hardly admit to putting Israelis at risk. Yet even assuming these denials are truthful, the fact that many Israelis believe otherwise means that the army is under constant pressure to be less stringent about using force.

Until now, however, it has had a strong counter-argument: These restrictions aren’t so onerous as to make effective military action impossible, and obeying them keeps our soldiers and politicians out of international legal trouble. Consequently, it’s worth the effort.

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But now, ICC prosecutor Fatou Bensouda has declared that all the IDF’s efforts were worthless: In her view, it committed prima facie war crimes both during the 2014 war and in subsequent military operations in the Gaza Strip. In other words, meeting or even exceeding the West’s “highest standards” is no longer enough to keep you out of legal trouble.

The court’s supporters have a facile response to this: Israel must simply meet even higher standards, and then it will be fine. But in reality, as previous ICC decisions have made clear, the court considers virtually *any* civilian casualties unacceptable.

That’s precisely why its pretrial chamber of judges has [twice demanded](http://evelyncgordon.com/icc-takes-anti-israel-bias-to-new-heights/) that Bensouda reconsider her decision not to prosecute Israel over its 2010 raid on a flotilla to Gaza. The soldiers were enforcing a blockade that even the United Nations deemed legal, and as Bensouda noted in her decision to dismiss the case, they opened fire solely in self-defense after nine of them were seriously wounded when passengers aboard one ship attacked them with knives, chains, wooden clubs, iron rods and slingshots. But the pretrial chamber dismissed this context as [completely irrelevant](http://evelyncgordon.com/the-icc-channels-the-queen-of-hearts-on-israel/), insisting that the resultant 10 deaths were a criminal massacre.

Nor is the ICC alone. Zero civilian casualties is also the standard increasingly promulgated by other self-appointed custodians of the laws of war. The International Committee of the Red Cross, for instance, has [declared](http://evelyncgordon.com/the-red-cross-destroys-the-laws-of-war/) that attacking a “populated village” is forbidden under any circumstances, even if the enemy is hiding there.

Bensouda fought the pretrial chamber over the flotilla case for years because do otherwise would be to abdicate her own prosecutorial independence and grant the chamber the right to dictate her decisions. But it’s hardly surprising that she preferred to avoid another exhausting battle with the chamber over Israel. It was much easier to simply adopt its “no civilian casualties ever” standard and prosecute Israel for its Gaza operations.

Yet zero or near-zero civilian casualties are an impossible standard when, for instance, Palestinians routinely launch rockets from populated areas at Israeli civilians, or bring [babies and grandmothers](http://evelyncgordon.com/baby-layla-shows-whats-wrong-with-israels-pr/) to violent protests where other “demonstrators” are throwing bombs and Molotov cocktails at soldiers in an effort to breach the border. The only way any country could avoid civilian casualties in such situations would be to refrain from military action at all—or in other words, to let the enemy breach its border and attack its own soldiers and civilians while doing nothing to try to stop it. Indeed, near-zero civilian casualties isn’t a standard any military in any conflict has ever been able to meet.

Thus by saying that even compliance with the highest Western standards isn’t enough to protect Israel from prosecution, the ICC has essentially said there’s no point in even trying to uphold the laws of war, because as the ICC interprets them, they are incompatible with the most basic requirements of self-defense. Unless Israel is willing to sit with folded hands while Palestinian terrorists attack it—which it will never do—it has no hope of escaping the ICC’s clutches. And if so, why bother adhering to stringent restrictions that expose its own soldiers and civilians to greater risk?

Moreover, as I’ve [explained before](http://evelyncgordon.com/us-britain-and-france-will-be-next-if-icc-indicts-israel/), activist courts always seek to obtain widely applicable precedents by going after “easy” targets first, and for the ICC, Israel is obviously an easier target than, say, America or France. Thus assuming the court upholds Bensouda’s position on Gaza—which, given its [proven anti-Israel bias](http://evelyncgordon.com/iccs-anti-israel-bias-shows-america-is-right-to-shun-it/), it’s certain to do—this precedent could and would be used against every other Western country that engages in military operations since other Western armies use the same tactics and the same precautions that Israel does. This could lead other Western militaries to conclude that efforts to abide by the laws of war have become pointless.

In short, by going after Israel despite its adherence to the West’s “highest standards,” the ICC could end up reversing more than a century of efforts to reduce the collateral damage of military action. That would lead to even higher civilian casualties, the antithesis of its purpose.

All law is based on two fundamental principles: that compliance is possible without leaving yourself or your country vulnerable to destruction; and that compliance protects you from legal trouble. If those two criteria aren’t met, nobody would have any reason to obey the law.

The ICC’s decision to prosecute Israel eviscerates both those principles. And as such, it’s liable to destroy the very international law it was created to uphold.