ICC Prosecutor doubles down that Palestine is a state

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International Criminal Court Prosecutor Fatou Bensouda on Thursday doubled down on her position that "[Palestine](https://www.jpost.com/israel-news/icc-prosecutor-to-give-final-position-on-if-palestine-is-a-state-preview-626322)" is a state in a climax bringing closer a grand all-out alleged war crimes legal battle with Israel.

A major argument Bensouda made was that the State of Palestine was already accepted into the ICC's Assembly of State Parties in 2015 without significant objection by the members of the ICC.

While there were public statements by Israel and some others against this, Bensouda said that no members legally challenged Palestine before the ICC's judges at the time, which is a form of legal acceptance.

She added that it was unclear the ICC Pretrial Chamber even has the power to retroactively kick Palestine out of the Assembly of State Parties five years after it has been participating and where Palestinians have even held offices.

How the three ICC Pretrial Chamber judges rule now that Bensouda has filed her highly influential position will have fateful consequences for Israel on a legal, diplomatic and public relations level.

The case would very likely not proceed if the ICC does not accept ‘Palestine’ as a state since most cases start only if referred by a state.

On December 20, Bensouda had already ruled that Palestine is a state and that there was sufficient evidence that both Israel and Hamas committed war crimes, warranting her opening a full criminal investigation.

However, she also asked the ICC’s Pretrial Chamber to endorse her view and since then around 50 countries, NGOs and renown world experts filed positions with the ICC Pretrial Chamber for and against Israel.

The Israeli government itself did not respond to Bensouda’s December 20 decision, resting instead on two legal briefs it filed on December 20, hours before Bensouda’s announcement, and on the support of dozens of allied countries and NGOs.

Israel does not want to appear to have accepted ICC jurisdiction since it is not a member of the Rome Statute.

In contrast, the Palestinian Authority has published statements calling on the ICC to disregard any countries objecting to the idea of Palestinian statehood.

Countries filing legal briefs to support Israel have included: The Czech Republic, Austria, Germany, Australia, Hungary, Brazil and Uganda.

Germany is most relevant because it is one of the largest funders of the ICC, second only to England, and the British are already in a direct fight with the ICC over a potential case against them.

The Trump administration has rescinded Bensouda’s visa for traveling to the US and is threatening other measures, potentially including sanctions, against ICC personnel due to its position on both the Israel case and an unrelated case against the US for alleged torture of detainees in Afghanistan.

Some of the other supporters of Israel who filed briefs include: The Israel Bar Association, the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, the Jerusalem Center for Public Affairs, Shurat Hadin and leading jurists, like former Canadian Justice Minister Irwin Cotler.

The Arab League and the Organization of the Islamic Conference, which represent around 60 countries have supported the Palestinian position.

A number of other leading jurists, many who were once UN officials who criticized Israel such as William Schabas and Richard Falk, also support the Palestinian side.

After all of these approximately 50 briefs, the core of Bensouda's position was unwavering and puts Israel back on the hot seat.

A major problem Israel may face hear is that Bensouda is not acting alone even within the ICC system.

The ICC itself is regulated by the Assembly of State Parties which has not only accepted Palestine, but which has multiple times accepted the appointment of Palestine’s diplomats to key positions.

It may be hard for the ICC judges to force the Assembly that regulates it to roll back the clock five years to 2015 when it started to treat Palestine like a full-fledged state.

There are come compromise solutions that have been floated, such as the ICC judges only ruling on what Palestine’s borders are, but not taking a position on statehood per se, leaving that decision to the ICC Prosecutor.

Another floated idea has been to delay ruling on the statehood issues until a later point in the trial, as suggested by the ICC Public Defender’s Office.

Culturally, Palestine is overwhelmingly accepted in the environments in which international judges tend to operate (over 130 of around 190 states recognize “Palestine.”)

Some judges may simply find it unthinkable to toss the case out disregarding the real argument underlying Bensouda’s move: that Palestinian’s right to self-determination trumps everything else (Israel says negotiations between the parties trumps everything else.)

Israel is hopeful that it may have some luck with the three judges it drew: Péter Kovács of Hungary, Marc Perrin de Brichambaut of France and Reine Alapini-Gansou from Benin.

Kovacs ruled for Israel in a different case.

The other two ruled against Israel in that case, but some Israeli officials hope that since France has supported a Palestinian state through negotiations with Israel, that Brichambaut may rule in its favor this time.

Those supporting Israel have said that there is no State of Palestine which could refer a case to the ICC, negating the court’s jurisdiction over allegations against Israel because it failed the 1933 Montevideo test for statehood.

Under that test, an entity can only become a full-fledged “state” if it has a permanent population, a defined territory, government and capacity to enter into relations with other States.

The argument goes that the Palestinians fail most of these parameters.

In contrast, those supporting the Palestinian side say that the principle of Palestinian self-determination and prosecuting war crimes overrides the Montevideo principles, especially in light of UN General Assembly and Assembly of State Parties decisions accepting Palestine.

The Assembly of State Parties is effectively the legislative branch of the ICC.

Israeli supporters turn this around and quote the UN General Assembly Resolution of November 2012 which elevated Palestine from observer status to non-member state, but prevented it from being a full-member state.

The Czech Republic brief stated that, “The controversy over the question of statehood of Palestine has also appeared in relation to the unsuccessful application of Palestine for admission to membership in the United Nations.”

Moreover, the brief attacks the idea that the acceptance of the UN secretary-general of certain instruments in which “Palestine” acceded to various international treaties, a technical issue, is sufficient to allow Palestine to grant criminal war crimes jurisdiction to the ICC, a far more substantive issue.

ICC Prosecutor Bensouda has said that once the UN secretary-general accepted Palestine as a state and permitted it to join dozens of treaties, conventions and UN-related bodies, that there is no basis to block it from joining the Rome Statute.

Those supporting Palestine, including B’Tselem have said, “the Prosecutor actually calls for a broad reading of the ICC’s jurisdiction that sees past the rigid, traditional concept of a sovereign state” to “more accurately reflect the object and purpose…combating immunity for perpetrators of serious crimes.”

B’Tselem has said that using the Vienna Convention definition “would actually constrict the powers of the ICC,” from probing the “gravest of crimes, which ‘shock the conscience of humanity’ and ‘threaten the peace, security and well-being of the world’.”

In a special interview with the Post in January, Bensouda said it was still possible she would end up closing the case against IDF soldiers. At the same time, Bensouda said she may still decide to prosecute soldiers at a later date for their involvement in the 2014 war or the 2018-2019 Gaza border-fence conflict.

Any ICC probe will also focus on settlement construction after 2014, the year the Palestinians chose as the starting date for membership in the ICC.

While this could put some top Israeli ministers and housing planning officials in the ICC’s crosshairs, it would not apply to the vast majority of the settlements, which were built before 2014.

Originally, Bensouda was due to file her final position on March 30, but this was delayed by a month due to the coronavirus crisis.

The slow pace of the proceedings draws into question how deeply Bensouda will be able to personally delve into any criminal probe given that her nine-year term ends in June 2021 and that the ICC Pretrial Chamber will likely roll into an extended appeal process.