



## **The US-Israeli Campaign Against the ICC**

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**EXECUTIVE SUMMARY:** US Secretary of State Mike Pompeo recently issued a stern warning to the International Criminal Court (ICC) at The Hague to stop the chief prosecutor from proceeding with an intended investigation into war crimes allegedly committed by Israel. Pompeo's warning concerned Israel, but as the US is itself in danger of an ICC investigation into supposed war crimes in Afghanistan, it was meant to send a broader message. Any ICC investigation of Israel and the US would be dangerous, and the allies must use all diplomatic and legal tools at their disposal to fight and delegitimize the prosecutor and the Court.

On May 15, 2020, US Secretary of State Mike Pompeo issued a stern warning to the International Criminal Court (ICC) at The Hague. He said the ICC is a political body, not a judicial institution, and slammed chief prosecutor Fatou Bensouda for her desire to investigate what she called "Israeli war crimes in Gaza, the West Bank and East Jerusalem." He noted that the ICC has no authority to conduct this investigation because Israel, like the US, never joined the Rome Statute that created the Court. He further pointed out that the Palestinians, who filed the original complaint, do not have a sovereign state, "and therefore are not qualified to obtain full membership or participate as a state in international organizations, entities, or conferences, including the ICC."

"A court that attempts to exercise its power outside its jurisdiction is a political tool that makes a mockery of the law and due process," Pompeo said. He then warned, "If the ICC continues down its current course, we will exact consequences."

Bensouda's decision to investigate alleged Israeli war crimes is highly suspect on all the grounds cited by Pompeo. Both Israel and the US refrained from joining the ICC precisely because they suspected, clearly with good reason,

that it would be another highly politicized and profoundly biased UN body. Moreover, the ICC was founded in 2002 for the purpose of investigating crimes against humanity and war crimes, such as genocide, committed by countries that are not investigating war crimes of their own citizens. The Israeli case does not meet any of these fundamental conditions. Bensouda has thus violated the ICC's own rules and procedures for the express purpose of going after Israel, and she is doing so at the behest of the Palestinians.

Because of these criticisms, the chief prosecutor was compelled to ask a pre-trial panel of three judges to authorize her investigation. Those judges, [Péter Kovács](#) of Hungary, [Reine Alapini-Gansou](#) of Benin, and Marc Perrin of France, are now deliberating her request.

On a recent visit by Pompeo to Israel, PM Benjamin Netanyahu asked him to act forcefully against Bensouda and the Court. In issuing the warning to the Court, Pompeo not only responded to Netanyahu's request but also followed up on a letter sent to him by 69 Senators and 262 Representatives from both sides of the aisle asking him to vigorously defend Israel against the ICC's pending investigation.

It is not only for Israel's sake that the US is stepping into this fray. In November 2017, Bensouda announced that she had enough evidence to investigate alleged US war crimes in Afghanistan. As she was later to do in the Israel case, she asked a pre-trial panel of three judges to authorize the investigation.

The US administration criticized her strongly, canceled her visa to the US, and threatened to prosecute her in a US court as well as anyone else who might be involved in the case, including her staff and even ICC judges. If the Court ever dares to detain an American citizen, senior officials added, the US will use force to release him or her. President Trump, Pompeo, and John Bolton, the then National Security Adviser, accused the ICC of being political, corrupt, irresponsible, unaccountable, and lacking transparency, and therefore illegitimate.

Apparently, the severe threats influenced the pre-trial judges, who did not allow Bensouda to continue her investigation of the US. However, she appealed the decision and won. The original pre-trial panel's decision has been reversed and she is now authorized to proceed with her investigation. Pompeo's warning on the Israeli case is thus also a message about the Court's pending investigation of the US.

Eight countries from all continents but Asia—Germany, Austria, Hungary, Brazil, Uganda, the Czech Republic, Australia, and Canada—delivered a

formal objection to Bensouda's plan to prosecute Israel (the Canadian protest was disqualified for technical reasons). Germany's objection is especially important because it is considered one of the strongest supporters of the ICC. Dozens of non-governmental bodies and experts have also filed objections.

In the meantime, testimony about Bensouda's unsavory past has surfaced. Victims have come forward who claim that when she served as justice minister of Gambia, she was an integral part of a cruel and authoritarian regime guilty of oppression and serious human rights violations. Furthermore, news reports recently revealed that Bensouda advised Palestinian officials on how to obtain a decision from the Court to investigate and indict Israel, and that she collaborated with Palestinian organizations while preparing her brief for the pre-trial judges. All of this conduct violates ICC rules.

If the pre-trial panel of judges authorizes the prosecutor to open an investigation of Israel, it could have serious legal implications for Israeli high-level politicians, officials, and military officers. The prosecutor is likely to summon many of them for questioning. In the event that they ignore these summons, which they are likely to do, the prosecutor could then issue international orders for their arrest.

On paper, they could then be arrested and extradited to the Court if they were to visit any of the 123 countries that are party to the Rome Statute. Obviously, this would not happen in the US or any of the other states that never joined the Rome Statute or that joined and later withdrew. Nor is it likely to happen in states that are party to the Rome Statute but that have officially rejected Bensouda's claims. Nevertheless, in view of widespread bias and the excessive politicization of international law, an ICC investigation of alleged Israeli war crimes could severely damage Israel's standing and reputation in the world.

On May 17, 2020, while introducing his new government, Netanyahu made reference to the part of Bensouda's criminal charges that define the construction of Jewish settlements in the West Bank as war crimes. He said: "We will fight the International Criminal Court's attempt to accuse IDF soldiers of war crimes and the State of Israel for the horrendous crime of kindergarten construction. What hypocrisy, what twisting of the truth. These areas of the country are the birthplaces of the Jewish nation. It's time to apply Israeli law over them." The talks about unilateral application of Israeli sovereignty over the Jordan Valley and West Bank Jewish "settlements", as prescribed in Trump's Israeli-Palestinian peace plan, could hinder the international effort to prevent the ICC investigation.

Israel cannot cope on its own with the dangers of an investigation and possible indictment by a biased and corrupt prosecutor and a highly politicized tribunal. The assistance of the US and other countries is crucial. It is by no means a certainty that Trump will win reelection in November, and we have no idea what the balance in Congress between Republicans and Democrats will be. If the Court decides to abandon its plan to investigate the US, Democrats who in the past decade have moved left and clashed with the Israeli government may not feel any need to adopt a tough policy toward the ICC and vigorously defend Israel.

Pompeo's warning to the ICC is crucial to defeat Bensouda and the Palestinians who have been trying to undermine Israel's standing in the world and right to self-defense. But it isn't enough. Israel should conduct a forceful and relentless campaign against the ICC with all the diplomatic and legal tools at its disposal. Former chief of staff and new Israeli FM Gabi Ashkenazi may be among the first to be summoned by Bensouda for questioning. He should place the campaign against her and the ICC high on his list of priorities.

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