



## Initial Palestinians reactions to the International Criminal Court (ICC) decision and Palestinian preparations for legal steps

December 25, 2019

### Overview

**The Palestinian Authority (PA) expressed great satisfaction** with the decision of Fatou Bensouda, the ICC Prosecutor, that there is a basis for opening an investigation of the "war crimes" Israel allegedly commits in "Palestine." The PA regards the decision as a political achievement, **the fruit of its vigorous, years-long activities towards the ICC and other international institutions** (see Appendix A). Over the years the PA has presented the ICC with "case files" relating to Operation Protective Edge, the Israeli settlements, Jerusalem, the Palestinian prisoners, alleged "Israeli terrorism" and "crimes" Israel allegedly commits against the Palestinian people. **Hamas participated in PA's cries of joy, completely ignoring the fact that the Prosecutor said war crimes committed by Hamas and other "armed groups" in the Gaza Strip would also be investigated.**

► **In practical terms the PA has begun making preparations for the legal, political and media campaigns expected to be waged in The Hague.** They include **appointing teams of experts, initiating cooperation with civilian social organizations, getting support from international lawyers and appointing a monitoring committee with representatives from every strata of Palestinian society.**

► Saeb Erekat, secretary of the PLO's Executive Committee, thanked Qatar for financing the teams of lawyers who have worked for the Palestinians with the ICC so far. He called on representatives of the monitoring committee to participate in **assembling a list of the names of Palestinians who have been killed by Israel, and called on human rights organizations to present complaints to the ICC.** In the assessment of Nabil Sha'ath, advisor to Mahmoud Abbas for foreign affairs and international relations, the PA will provide the Court with issues such as **the "settlement project," the prisoners [i.e., Palestinian terrorist organizations jailed in Israel] and Israel's [alleged] "aggression" against the Gaza Strip.**

## Overview of the ICC Prosecutor's Announcement

On December 20, 2019, Fatou Bensouda, the Prosecutor of the International Criminal Court (ICC) in The Hague, announced that having completed her preliminary investigation (which began in 2015), she is of the opinion that there is a basis for opening an investigation of the situation in "Palestine" and Israel's [alleged] "war crimes" in the West Bank, east Jerusalem and the Gaza Strip. She said she considers that the Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967. However, she requested a ruling from a pre-trial chamber on the scope of the Court's territorial jurisdiction in the situation of Palestine, to be presented within 120 days. She said the investigation would include war crimes committed by Hamas and "Palestinian armed groups" which used the civilian population as human shields and carried out acts of torture (ICC website, December 20, 2019).



**Fatou Bensouda, the ICC's Prosecutor  
(ICC YouTube channel, December 20, 2019).**

► Bensouda's announcement came after a number of years during which, urged by the Palestinians, **she carried out a preliminary investigation into the justification for opening an investigation against Israel** (the preliminary investigation began in January 2015).

Bensouda will investigate four issues:

- ◆ "War crimes" allegedly committed by the IDF during Operation Protective Edge in the Gaza Strip ("the 2014 hostilities").
- ◆ "War crimes" committed by "Hamas and Palestinian armed groups" against residents of the Gaza Strip during Operation Protective Edge.
- ◆ The expansion of the settlements in the West Bank since 2014.

◆ IDF fire at Palestinians in the Gaza Strip.

▶ The Prosecutor determined that although she has the authority to judge the issue, since in her opinion a "Palestinian state" exists in the 1967 territories, **she asked an additional panel of judges to deliberate and give their opinion as to the Court's jurisdiction in the matter within 120 days.** During their deliberations "referring entities and victims may make submissions." In addition, she said she was still examining the measures taken in Israel regarding circumstances that may obviate the need to open an investigation. She said she had made her decision after assessment and preliminary investigations had been carried out regarding the situation in the territories. She said an investigation would also be conducted against " Hamas and Palestinian armed groups" who had used the population as shields and carried out acts of torture (ICC website, December 20, 2019).

As far as the Prosecutor is concerned, **she is clearly of the opinion that Israel's policy in the territories is illegal and unjust for the Palestinians.** She obviously gives great weight to UN resolutions and decisions, including those of the UN General Assembly, the Security Council and the Human Rights Council, which are **well-known for their strong anti-Israeli bias.** She mentions the opinion positions of other organizations, such as the EU, regarding the illegality of the settlements. However, **she gives little weight to the fact that the issues of the settlements and borders are supposed to be settled through bilateral negotiations,** and does not relate at all to the complex nature of security. She completely ignored the wave of Palestinian terrorism at the beginning of the century [i.e., the second intifada] while giving a detailed description of the historical background of the conflict (article by Pnina Sharbit Baruch, Institute for National Security Studies (INSS), Overview, December 22, 2019).

▶ **Given the anti-Israel nature of the Prosecutor's announcement, Israel and the United States, which are not ICC members, rejected it outright:**

◆ **Israeli Attorney General Avichai Mandelblit** said Israel is a democratic country of law and committed to and acting with respect for international law and humanitarian principles. That commitment is ensured by a strong, independent legal system and there is no place in it for international legal interference (Israeli media, December 20, 2019). At the beginning of the weekly government meeting, Israeli Prime Minister Benjamin Netanyahu said the decision of the ICC's Prosecutor was in complete contradiction of the fundamental principles of the Court (Israeli government website, December 22, 2019).

◆ **American Secretary of State Mike Pompeo stressed the United States' opposition to this measure and others unfair to Israel.** He said the United States did not believe the Palestinians qualified as a sovereign state and therefore **were not qualified to become full members of international organizations, including the ICC** (State Dept website, December 20, 2019).

## Palestinian Responses and Preparations for Future Action

▶ The Palestinians expressed great satisfaction with Bensouda's announcement, considering it **a political achievement gained through their vigorous activity towards the ICC and other international organizations.** The PA and other Palestinian organizations immediately began making preparations for the legal activity about to begin in the Court. According to Riyadh al-Maliki, Palestinian foreign minister, **he received the authorization from Mahmoud Abbas to carry out the preparations. They include forming teams of experts and creating cooperation with civilian social Palestinian organizations as well as with the Palestinian Bar Association and international legal groups.** Nabil Sha'ath, advisor to Mahmoud Abbas for foreign affairs and international relations, said the comprehensive investigation would include issues presented to the ICC by the Palestinians, among them the "settlement project," the prisoners and Israel's [alleged] aggression towards the Gaza Strip. He said the Court was about to begin its investigation, starting with the West Bank and then proceeding to the Gaza Strip (al-Najah al-Akhbari, December 21, 2019).

▶ Saeb Erekat, secretary of the PLO's Executive Committee, elaborated on the PA's activity with the ICC. He said a "high national committee" had been appointed to monitor the Court's activity. The committee is headed by Riyadh al-Maliki and is composed of 45 representatives from all strata of Palestinian society. **Erekat also thanked Qatar for financing the team of international lawyers which worked for the Palestinians towards the ICC.** He said he hoped the committee would have a significant role in making a complete list of the names of Palestinian fatalities. **He also called for complaints to be presented through human rights organizations** (Palestinian TV, December 21, 2019).



**Saeb Erekat talks about the Palestinians' preparations (Palestinian TV Facebook page, December 21, 2019).**

▶ Reactions from other senior Palestinian figures to the Prosecutor' announcement were the following:

- ◆ **PA Chairman Mahmoud Abbas** called it a "great day" for the Palestinian people. He said joining the ICC had been very significant for the Palestinian people because **it gave every Palestinian who had been harmed by Israel the right to appeal to the Court** (Wafa, December 20, 2019).



**Mahmoud Abbas at Fatah's Revolutionary Council conference announces Fatou Bensouda's decision, and is met with applause (Mahmoud Abbas' Facebook page, December 20, 2019).**

- ◆ **PA Prime Minister Muhammad Shtayyeh** said the Prosecutor's decision was a victory for "justice and truth." He said the PA was working as hard as it could to have Israel tried for its [alleged] "war crimes" against the Palestinian people. He added that the [so-called] panic in Israel following the decision reflected its fear that the "truth" would be exposed and Israel would be shown as a state that violated human rights and international law (Wafa, December 20, 2019).
- ◆ **Saeb Erekat, secretary of the PLO's Executive Committee**, said Bensouda's decision would put an end to the [alleged] "criminals' " evasion of punishment and

support justice. He added that the decision had sent a message of hope to the Palestinian people. He stressed that the PA would continue to support the Court and collaborate with it. He said a campaign was currently underway to have all civilian social organizations collect the names of the victims harmed by Israel and **put them in files to be given to the ICC** (Wafa, December 20, 2019).

◆ The PA's foreign ministry welcomed Bensouda's announcement, saying the Palestinian people had the right to demand justice through the ICC. The ministry said the PA would participate in all the legal steps to stress **that the question of regional jurisdiction had already been finally decided according to international law**. It also stressed that the ICC had the right and the legal jurisdiction necessary for the Palestinian territories because the PA had signed the Rome Statute and had authorized the Court to investigate the [alleged] crimes carried out in its territories (Wafa, December 20, 2019).

▶  **Hamas also regards the decision as a victory and achievement for the Palestinians, completely ignoring that the Prosecutor suggested investigating the war crimes committed by Hamas and other "armed Palestinian organizations" during Operation Protective Edge**. Hamas spokesman Fawzi Barhoum praised the decision, saying that now it had to be implemented in practice and Israel had to be tried for its "crimes" and "aggression" against the Palestinian people and its holy places. He said **Hamas was making preparations to make work easy for every relevant committee and to cooperate by giving them all the documents and "proof" of Israel's crimes** (Sawa, December 20, 2019).



**Appeal to the ICC as a means of Palestinian "resistance" [i.e., violence and terrorism] (Facebook page of Isma'il al-Bazam, December 20, 2019).**

## Appendix A

### Palestinian activity towards the ICC

Ever since they signed the Rome Statute, **the Palestinians have been working strenuously towards the ICC**. They presented the Prosecutor with periodic reports and ad hoc reports about various events, and kept urging her to authorize prosecuting Israel in the Court.



**Mahmoud Abbas in The Hague shaking hands with Fatou Bensouda, the ICC's attorney general (Wafa, October 30, 2015).**

▶ The following are examples of Palestinian activity:

◆ **In May 2019 Riyadh al-Maliki, Palestinian foreign minister, met with Fatou Bensouda in The Hague. He gave her the annual report about the "crimes" Israel allegedly committed in 2018**, stressing the importance of opening an investigation as quickly as possible into the situation in the territories, in view of Israel's intention to annex parts of the West Bank. **He also claimed an Israeli Court had silenced the affair of the burning of the house of the al-Dawabshe family and asked Bensouda to examine the matter** (Wafa, May 2019).



**Riyad al-Maliki shaking hands with the ICC attorney general  
(Facebook page of the PA foreign ministry, December 2, 2019).**

- ◆ **In May 2019 Wasel Abu Yusuf, a member of the PLO's Executive Committee,** said an appeal had been presented to the ICC regarding a number of files, among them the "settlements' file" (Dunia al-Watan, May 19, 2019). On May 22, 2019, Riyad al-Maliki met with Fatou Bensouda in The Hague. He asked the Court to investigate the issue of the settlements and Israel's activities in the territories, and asked the Court to perform its function as an authorized body to investigate [alleged] "crimes" related to the settlements (Wafa, May 21, 2019)
- ◆ **In June 2018 Riyad Mansour, the Palestinian representative to the UN, held a press conference during which he criticized ICC Prosecutor Bensouda.** He claimed she repeatedly delayed dealing with the Palestinian issue. He said that for three years the ICC had not held an investigation into the situation in the "land of Palestine" after its initial investigations. He said an committee of the International Council on Human Rights would shortly begin investigating Israel's actions against the demonstrators at the return marches (Dunia al-Watan, June 23, 2019).
- ◆ **In January 2018 Riyad al-Maliki** sent a communiqué to Fatou Bensouda demanding that the Court use its authority to investigate Israel's [alleged] "crimes" against the Palestinian people. **He claimed Israel "harms" the rights of children, mentioning the detention of Ahd Tamimi** (Wafa, January 18, 2019). Regarding Ahd Tamimi, Saeb Erekat said that if the Court did not open an investigation the PLO would present a formal complaint with a demand for an investigation. He said the PLO was being aided **by six international lawyers** to choose the best way to open an investigation against senior Israel figures accused of [alleged] "war crimes" (Palestinian TV, January 20, 2019).
- ◆ **In September 2017 the Palestinian al-Haqq organization said that four Palestinian civilian social organizations had presented the ICC with an extensive report,** their fourth, describing Israel's [alleged] crimes in Judea, Samaria and east Jerusalem. The four organizations presenting the report were the Palestinian Center for Human Rights, the al-Mezan Center, al-Dameer and al-Haqq (al-Haqq website,

September 20, 2019). The report was presented **by Shawan Jabarin,<sup>1</sup> formerly a Popular Front for the Liberation of Palestine (PFLP) operative**, along with Nada Kiswanson, a human rights lawyer based in The Hague who represents al-Haqq in Europe and to the ICC (Nada Kiswanson and other investigators affiliated with al-Haqq helped prepare the report). According to Shawan Jabarin, as opposed to previous reports presented to the ICC, which dealt with Israeli activity in the Gaza Strip, al-Haqq's report dealt with Israeli activity in the West Bank and east Jerusalem. He also said the report provided the Prosecutor with a convincing and reasonable foundation for opening an investigation (al-Haqq website, September 20, 2017).

◆ **In October 2015, Mahmoud Abbas headed a delegation that met with Fatou Bensouda at ICC headquarters in The Hague** (Wafa, October 30, 2015). Also present was **Riyad al-Maliki, Palestinian foreign minister, who gave her legal documents dealing with the escalation [i.e. popular terrorism] which had begun at the time, and detailing what the documents mainly called Israel's [alleged] "killing of Palestinians without a trial"** (Wafa, October 30, 2019). **Riyad al-Maliki** transmitted Mahmoud Abbas's request that the Prosecutor send an ICC delegation to examine events in the territory to document the [alleged] "Israeli crimes" in order to hasten an official investigation against the Israeli government (Wafa, October 31, 2019). **Saeb Erekat** said **five files** had been given to the Court relating to the **following issues**: Operation Protective Edge; the settlements, including settlements in Jerusalem; the prisoners [i.e., Palestinian terrorists]; [alleged] Israeli terrorism and the burning of the al-Dawabshe house and Muhammad Abu Khader, the [so-called] "acts of killing" carried out by Israel in the West Bank and the [alleged] crimes against the Palestinian people (Dunia al-Watan, November 2, 2015). Fatou Bensouda warned them against worsening the situation in the territories, saying her office would decide whether or not to bring Israel's [alleged] crimes to ICC prosecution.

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<sup>1</sup> For further information, see the October 22, 2017 bulletin, "Shawan Jabarin, former PFLP operative and current head of a Palestinian human rights NGO, recently submitted a report to the Prosecutor of the ICC accusing Israel of 'war crimes,' expecting the Prosecutor to launch an investigation against Israel."

## Appendix B

### The scope of the ICC's jurisdiction: an overview (according to its website and other sources)

▶ The Rome Statute of 1998, which established the ICC, was adopted by the majority of countries around the globe as an international agreement for trying crimes in four main areas: genocide, crimes against humanity, war crimes and crimes of aggression. After two tribunals established by the UN Security Council, one for former Yugoslavia and the other for Rwanda<sup>2</sup> were successful, **it was decided to establish a permanent Court with greater jurisdiction than the two tribunals.** Thus the International Criminal Court was established (ICC website, December 23, 2019).

▶ The ICC can discuss crimes **on three conditions:** they are under the Court's jurisdiction, they were committed after July 1, 2002, and they fulfill at least one of the following conditions:

- ◆ The crime was committed in the territory of a state which is a member of the Court;
- ◆ The crime was committed by a citizen or citizens of a member state.
- ◆ A state which is not a member state agrees to an ad hoc trial.
- ◆ The UN Security Council referred the issue to the Court.

▶ **The Rome Statute is an addendum which enabled the establishment of the ICC. The Statute has been signed by 124 states. Thirty-one states, one of them Israel, signed the Statute but did not ratify it.** Under the Rome Statute, the ICC can only investigate and prosecute in situations where states are "unable" or "unwilling" to do so themselves. **Four states: the United States, Russia, the Sudan and Israel, informed the UN Secretary General that they did not intend to be part of the Statute and therefore are not subject to the ICC's rules.** States that did not sign the Rome Statute are also not subject to its rules (notably India and China).

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<sup>2</sup> Rwanda appears in the document only as a footnote.

**The Rome Statute's principle of *complementarity* governs the relationship between the ICC and national legal orders, and allows the ICC to step in and exercise jurisdiction where states are unable or unwilling to investigate or prosecute.**

▶ **On January 21, 2009, the PA requested membership in the ICC for the first time.**

It was rejected on the grounds that only a state internationally recognized as such could accept the Court's jurisdiction. However, said the Prosecutor at the time, since only when the Palestinian Authority became recognized as a state by the committee of the Rome Statute's member states or by the UN, the Court would reconsider the request.

▶ **On November 29, 2012, Resolution 67/19 recognized the Palestinian Authority as a "non-member observer state," which enabled the PA to ratify the Rome Statute. On January 2, 2015 the PA ratified the Statute and on January 6, 2016, the UN General Assembly, with power of attorney from the ICC, confirmed it.**

▶ In January 2015 the ICC received a document from the Palestinian government stating **it had accepted the jurisdiction of the ICC on June 13, 2014. The UN Secretary General announced he had received the Palestinian documents about ratifying the Statute** (AP, January 7, 2019).

▶ Immediately thereafter **the Palestinians began intensive activity for an ICC investigation of Israel.** They presented the Prosecutor with detailed documents about what they called Israel's "crimes" in Judea, Samaria and the Gaza Strip. Senior Palestinian figures repeatedly demanded that the Prosecutor initiate an investigation against the Israeli leadership regarding the "crimes" Israel allegedly carries out against the Palestinian people. **The threat of an appeal to the ICC turned into a permanent Palestinian threat against Israel, reiterated on every possible occasion.**

▶ Following the Palestinian appeals, **on January 16, 2015, ICC Prosecutor Fatou Bensouda announced she had opened a preliminary investigation of the situation in "Palestine"** to examine whether there was cause to open a Court investigation. The preliminary examination is not an investigation, but rather a process of examining existing information to determine whether there is cause to continue the investigation according to the Rome Statute conditions. Moreover, the Court said that it would decide, based on the facts and circumstances of every incident, whether to continue collecting information to have enough for a legal foundation to decide about opening or not opening an investigation.

According to the Rome Statute, the preliminary investigation has no time limit (ICC website, January 16, 2019).