New ICC Report Takes Palestinians’ Side Despite Israeli Optimism

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The recent International Criminal Court Prosecutor’s Office visit to Israel and the West Bank was viewed as a success by the Israeli side, but the optimism may be premature.

On Monday, the ICC Prosecutor’s Office released its annual report, including its second preliminary report on the Israeli-Palestinian conflict regarding alleged war crimes committed by Israelis and Palestinians since June 2014, focused again on Operation Protective Edge in July-August 2014.

Though the document had many similarities with the 2015 report, it notably went out of its way to confirm that ICC Prosecutor Fatou Bensouda views Gaza as legally still “occupied” by Israel for the purposes of her review of the 2014 Gaza war.

That determination could have a massive impact on whether Bensouda takes Israel’s or the Palestinians’ side on borderline laws of war issues as it frames the Palestinians more as the victims. It also makes it more likely that she will view even war-related issues more from the perspective of human rights law than from that of the law of armed conflict. Human rights law perspectives tend to demand more of militaries in avoiding collateral civilian casualties even as all legal paradigms show concern for civilians.

While Bensouda had alluded to the possibility of viewing Gaza as occupied in a previous unrelated case, her previous comments on the issue were not in the context of the 2014 Gaza war and were not a binding policy statement as much as they appeared to be her initial leaning.

Monday’s report sounded far more decisive on the issue.

The report does explain the Israeli position on Gaza no longer being occupied, stating, “In September 2005, Israel completed its unilateral withdrawal from Gaza, including dismantling its settlements and withdrawing its forces. Israel has maintained that following the 2005 disengagement, it is no longer an occupying power in Gaza.”

However, it continues on to say that “it may be argued that Israel nonetheless remains an occupying power as a result of the scope and degree of control that Israel has retained over the territory of Gaza – a position that the [Prosecutor’s] Office has previously taken” in a case involving the island of Comoros and the 2010 Mavi Marmara flotilla incident.

Another issue where Bensouda took the Palestinians’ side is regarding Jerusalem’s status.

She mentioned Israel’s annexation of Jerusalem, as she had in her 2015 report, but for the first time added, “The UN Security Council and International Court of Justice, among others, have regarded the annexation of east Jerusalem as a violation of the jus cogens norm prohibiting the acquisition of territory by military force.”

While it is unclear what impact her statement about Jerusalem’s status will have on the war crimes examinations, it may show her leaning toward viewing Israel’s settlement enterprise as illegal as much of the world does, and perhaps even as war crimes.

Whether settlements built since June 2014, the start of the period Bensouda is examining, constitute war crimes is a central issue of the ICC probe. The Palestinians say they are war crimes while Israel argues that they are disputed areas whose status can only be resolved by negotiations between the parties.

The report also mentioned receiving communications from the Israeli and Palestinian sides, but did not analyze recent IDF published reports on the status of its war crimes investigations of its soldiers. It also did not take Hamas to task for still declining to initiate any investigations against its fighters.