Did Palestinians push ICC Prosecutor into complimenting IDF?

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By Yonah Jeremy Bob

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Something bizarre happened early Tuesday morning when the International Criminal Court Prosecution closed the 2010 Mavi Marmara flotilla case for a third time.

The ICC Prosecution made some of the most complimentary statements regarding the IDF and Israeli positions on some war crimes issues to date.

It may be that the ICC Prosecution will make a bigger headline against Israel later this week, but in the meantime, it seems that the Palestinians and their allies may have overplayed their hand.

From a technical perspective, ICC Prosecutor Fatou Bensouda’s third consecutive decision to close her preliminary probe of alleged war crimes by IDF soldiers who killed 10 people who attacked them on the Mavi Marmara during a clash to seize the ship was nothing new.

She and the ICC Pretrial Chamber have been at legal loggerheads over this case for multiple rounds now since 2014.

The ICC has pushed her to move to a full criminal investigation three times, and each time she has said that there was no basis to move forward.

But this time was different.

Because the latest ICC ruling directed Bensouda to accept certain factual conclusions, she needed to more deeply analyze the IDF’s behavior.

In her past two decisions to close the case, she merely said that 10 dead activists who clashed with the IDF was not a high enough volume of casualties to warrant her office’s attention, which deals mostly with genocide or mass killings.

However, the Island of Comoros – which was essentially acting on behalf of the Palestinians – kept pushing Bensouda to analyze the case more seriously.

In hindsight, they probably wish they had not pushed so hard.

The compliments to the IDF were all indirect, but they were unmistakable for someone who closely follows this arena, especially since international human rights forums usually only condemn Israel.

Bensouda said that one reason that she would not open a criminal probe was that the case had been probed by the IDF legal division.

Even if this was not a full sign-off on all investigations by the IDF legal division, and was only said in the context of an issue called “command responsibility,” Bensouda could have come to the same result without mentioning the IDF legal division.

Furthermore, Bensouda’s explanation noted that if a country’s legal division’s probe were viewed as a sham, that they would not have provided any protection from the ICC. Turning that statement around, and since Bensouda wants to close the case, it means she is saying that the IDF probe here was not a sham.

Along the same lines, Bensouda pointed out that Spain, England, Sweden and Germany had all dismissed any war crimes allegations against the IDF for the incident. Some of these countries dismissed their allegations on the basis of recognizing Israel’s justice system as legitimate and as having properly probed the issue.

Next, the ICC ordered Bensouda to act as if the IDF had started shooting before it entered the Mavi Marmara, even though this claim is highly disputed.

Bensouda said that even assuming this disputed claim to be true, the IDF had tried to take the Marmara by surprise without any altercation as well as other non-lethal efforts to avoid injuring the passengers.

Moreover, the ICC Prosecution wrote that only one of the 10 people who died might have been killed in this initial shooting.

Even after the altercation, the ICC Prosecution said that the IDF tried to provide quick medical attention to injured passengers.

All of this narrative made it sound like Bensouda viewed many, even if not all the IDF actions in a positive light of an army that cared about the rule of law.

There were other positive points the ICC Prosecution made about Israel and the IDF that one never hears from bodies like the UN Human Rights Council.

Bensouda distinguished between wide allegations of passengers being uncomfortable and slightly roughed up versus very limited allegations of actual potential inhuman treatment.

This was notable, as critics of Israel often simply lump any uncomfortable treatment by Israel of arrested persons as full-fledged “torture.”

Even more surprising were the ICC Prosecution’s comments directly against the Palestinian-Comoros Island’s position.

Whereas Israel’s critics portrayed the Marmara passengers as practically having the status of UN peacekeepers, Bensouda declared their purposes to be political.

In addition, she dismissed any attempt by the ICC Pretrial Chamber to view Israel’s blockade of Gaza as part of the war crimes’ picture, saying that analyzing this issue was inherently subjective.

Israeli government sources viewed the decision as hopefully being the end of the ICC wasting its own resources in an internal dispute with its own prosecutor regarding a case that should never have been probed in the first place.

The big question is what the ICC Prosecution will decide about the war crimes debate regarding the 2014 Gaza War and the settlement enterprise.

Tuesday’s decision may have hinted at the possibility of Bensouda accepting the IDF legal division as a credible legal body. Then again, none of this helps Israel with the settlements issue, and all of this may turn out to be a small positive decision for Israel, before a much bigger negative decision comes.