Israel’s 2 top int’l law officials take on ICC: Is Gaza ‘occupied’?

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By Yonah Jeremy Bob

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Two of Israel’s top international law officials have published a rare public article to challenge the International Criminal Court prosecution and others who say that Israel still illegally occupies Gaza.

The article, published in the journal Iyunei Mishpat (Legal Studies) recently but being reported now for the first time in English, is important both regarding addressing cases of alleged Israeli war crimes in ongoing fighting with Hamas, as well as regarding what humanitarian obligations Jerusalem has to Gaza, during coronavirus and other periods.

These issues ultimately have major long-term implications at the national security and diplomatic levels, including whether Israel’s naval blockade and other periodic closures of Gaza are legal.

Just as important are the authors: Deputy Attorney-General (International Law) Roy Schondorf and IDF International Law Division chief Col. Eran Shamir-Borer, two officials who have led much of Israel’s handling of ICC issues and humanitarian dilemmas with Gaza.

Schondorf rarely writes publicly or appears in public with the exception of specific conferences or at the Knesset, and Shamir-Borer appears even less often.

It seems that the impetus for their article was to address prior statements by ICC Prosecutor Fatou Bensouda as well as a current article by prominent Israeli prof. Eyal Gross in the same journal, declaring that Israel still legally occupies Gaza, despite having withdrawn in 2005.

If Bensouda, Gross and a number of Israeli critics in UN and international bodies are correct that Israel occupies Gaza, it could mean that the Jewish state might be restricted in what categories of force it could use to combat Hamas attacks, let alone protests or riots on the border.

Further, it could mean that any humanitarian crisis in Gaza puts Israel at fault.

When there are debates about Israeli blockades to prevent rockets and other weapons smuggling, these legal questions could have a decisive impact.

Essentially, Bensouda, Gross and much of the international community say that it is irrelevant that the IDF withdrew and that Israel withdrew its settlements from within the Gaza Strip.

Rather, they argue that UN General Assembly decisions, International Committee of the Red Cross (ICRC) guidance, a decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and other points prove that Israel can “occupy” Gaza as long as it exerts functional control.

To support their argument, they note that Israel controls Gaza’s airspace, maritime borders, wherever there is a blockade, and most of its land borders. Gaza does have one border crossing with Egypt.

They broaden these arguments by saying that Israel’s ability to control Gaza’s interactions with the outside world means it can also control the economic and humanitarian situation there.

In this light, they say that Israel is also obligated to maintain Gaza from a humanitarian perspective, whether with special needs during coronavirus times or with sufficient medical, food, utilities and other items during more normal periods.

IN CONTRAST, Schondorf and Shamir-Bohrer say that there is no basis to rely on the decisions of the UN General Assembly or other political bodies to decide international law.

Regarding the ICTY decision, they say that critics’ understanding of the decisions is misplaced.

In the ICTY case in question, the court was dealing with a situation where a foreign state controlled an internal group within another state in order to impose its will on the other state.

In any event, the Israeli officials’ article says that the ICTY decision was an outlier creating a new doctrine which no one else has adopted.

Moreover, the article says that the ideas Israeli critics are bringing to the Gaza question are “wishful thinking” or “aspirations” to create a new law which does not exist.

Instead, they say that to be considered an “occupier,” a country cannot merely have aspects of functional power over a territory.

Rather, it must have at a minimum “effective control.”

This traditionally has required boots on the ground and, at the very least, involvement in running the day-to-day affairs of the foreign territory and population.

As the article says, Israel has zero involvement in running Gaza’s day-to-day affairs, which are run by Hamas.

Further, the article cites a legal brief filed by Germany in the Israel-Palestinian proceedings before the ICC to support its views.

All of this means that Israel has not occupied Gaza since 2005.

Rather, when Israel facilitates food, economic and medical aid to Gaza, it is on a voluntary humanitarian basis and balanced along with valid security considerations, says the article.

In December 2019, Bensouda requested that the ICC Pretrial Chamber endorse by March her desire to conduct a full criminal probe of Israel and Hamas regarding the 2014 Gaza War, the 2018 Gaza border crisis and the settlement enterprise.

The chamber has still not decided the issue, with the question remaining whether it will decide after US President-elect Joe Biden takes office or wait for Bensouda’s successor to take over in June 2021.