Four main take-aways from ICC report on Israel-Palestinians

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The International Criminal Court Prosecutor’s Office published its annual report on Monday on preliminary examinations of war crimes allegations, including regarding the Israeli-Palestinian conflict. Here are the four main take-aways:
 **1. December 2016 UN Security Council resolution starts to hurt**
Israel is starting to pay a concrete price for the December 2016 UN Security Council resolution, which was the first in decades to declare, without a US veto, the settlements illegal. Many viewed the Obama administration’s refusal to veto the resolution as a parting shot at the Netanyahu government for failing to progress in peace negotiations at a pace it considered acceptable.

For the first time in several reports on the Israeli-Palestinian conflict, the ICC prosecutor cited this resolution as reaffirming “the occupied status of the West Bank” as well as explicitly condemning “the ‘construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law.’” This means that the ICC prosecutor may feel freer than ever before to treat Israeli settlements in the West Bank as war crimes, even though no court in history has done so until now. The report in general also spends more time on the settlement issue than in past reports. This has been the nightmare scenario which led Israel to refuse to ratify the ICC’s Rome Statute at the last second, after having been involved in drafting it for years.

**2. “Occupied Gaza” dropped – could be good from Israeli perspective**

The idea that Gaza is still occupied despite Israel’s 2005 withdrawal was conspicuously discussed in the 2016 ICC Prosecutor’s Report and – a possible big positive for Israel – is conspicuously absent from Monday’s report.

A determination that Gaza is still occupied could have had a massive impact on whether the ICC took Israel’s or the Palestinians’ side on borderline laws of war issues, as it framed the Palestinians more as the victims.

That section seems to have been replaced with a discussion about whether the conflict between Israel and Hamas in Gaza is an international or non-international armed conflict.

This could just be using different terms for the same questions relating to “occupation,” but it also may be much more where Israel wants the debate to be. Whether the conflict is an international or non-international armed conflict or a mix, all of these paradigms are much more focused on the laws of war than on human rights law. The laws of war could favor Israel, whereas human rights law more likely favors the Palestinians. The bottom line is: Last year the ICC prosecutor seemed unequivocally in favor of the Palestinian overall view of the situation in Gaza, and now the overall view of the situation seems back in play.

**3. Neither Israel’s own probes nor Hamas’s lack of probes are mentioned**

The decisive issue for Israel on whether the ICC prosecutor moves from the current preliminary examination of alleged war crimes to a full criminal investigation will likely be whether it views Israel as having properly probed its own alleged war crimes. If Israel is viewed as having probed its own, the ICC stays out. If it is viewed as having insufficiently probed, the ICC dives in.

In the past, the ICC prosecutor has referenced updated information received from Israel, while being silent about Hamas undertaking investigations.

This time the report is strangely silent on both Hamas and Israel. The most glaring omission is that there is no mention of the “Hebron shooter,” Elor Azaria, getting sentenced to 18 months in prison (reduced eventually to 14 months) for killing a neutralized Palestinian terrorist. The Israeli side considers this case exhibit A for how seriously it prosecutes its own – and therefore a basis to keep the ICC out of its affairs. It is unclear what this means, but in the ICC prosecutor’s decision last month to go after the US for war crimes in Afghanistan, it was surprisingly dismissive of the US’s own probes of itself.

**4. Israel has time**

Maybe the central words are “phase two.” Israel is still viewed as only in phase two of the analysis of whether to move to a full criminal investigation. It will need to be in phase three for some time before the ICC prosecutor makes a final decision.

Also, all of the rhetorical signs of momentum in moving toward a near future decision, not to mention the absence of any visits to the region in over a year, are missing.

This means that the ICC Prosecutor’s Office has probably had its hands too full with deciding whether to go after the US and has been distracted from fully focusing on the Israeli-Palestinian conflict. Any final decision is almost certainly a year, if not multiple years, away.