Gaza violence puts Israel back on ICC radar

April 9, 2018

By Yonah Jeremy Bob

The Jerusalem Post

<http://www.jpost.com/Israel-News/Gaza-violence-puts-Israel-back-on-ICC-radar-549315>

After quite a while being off, Israel is back on the International Criminal Court prosecutor’s radar.

The ICC prosecutor’s statement on Sunday was a clear and direct warning to both Israel and Hamas about taking any actions that the ICC might view as war crimes.

This is a big and swift shift.

Until Sunday, the ICC prosecution had not said a word about Israel since its October 2016 visit, had never commented on incidents in real time and has had its hands full elsewhere.

To many, the 2014 Gaza war, which brought the ICC into the picture, now looks a bit old to prosecute. And since three-and-a-half years have already passed, there is certainly no rush.

The state comptroller’s recent report validated the 2014 war-making decisions as taking into account international law at a global level, and other than citing large numbers of casualties, critics have been hard pressed to present evidence that specific soldiers had intent to commit war crimes.

The ICC’s annual report did not even have Israel at its Phase III level. You need to have gotten from Phase II to Phase III for the court to even get close to a decision about whether to dive deeper into a conflict.

The trend had seemed to be that Israel would quietly cooperate with the ICC and provide information, and the court would stay away or at least keep a low profile.

All of that was flipped in just two weeks.

The current situation on the [Gaza border](http://www.jpost.com/Arab-Israeli-Conflict/Israel-fires-at-suspects-who-briefly-breached-Gaza-border-549162) – with a combination of violent and nonviolent protests challenging Israel’s border controls and the IDF’s reaction, sometimes patient and sometimes lethal – has moved the Israeli-Palestinian situation back to the top of the ICC’s “to do” pile.

The good news from the Israeli perspective is the ICC did not fall for the idea that everything that has gone on at the border has been peaceful protests. It warned Hamas against using human shields to hide military activity.

The bad news is that the ICC continues to seem to maintain a position of moral equivalence between Israel and Hamas.

And of course, the worst news for Israel was that there was any statement at all.

The new international attention may lead the ICC to expedite its prior investigatory activities as well as come down harder on Israel due to the volume of casualties, without looking fully into the complexity of the circumstances.

And now there is an additional angle.

The ICC’s statement may have also sent a message that it has become less of a prosecuting institution and more of one trying to deter and extinguish violent flare-ups.

If it was once accused of being too Africa-focused, it now has opened full criminal investigations against both Russia and the US and is seriously considering criminally investigating the Israeli-Palestinian conflict.

All indications are that both Russia and the US will waive off the ICC.

Even before that, many nations have ignored the ICC’s arrest warrant to extradite Sudanese President Omar al-Bashir; some countries have even withdrawn from ICC membership to protest when the court criticized them.

There have been a plethora of legal analyses discussing ways that the US could talk to the ICC while quietly freezing any ICC cases of receiving evidence and witnesses until the cases slowly die. This happened to years of ICC legal work on alleged war crimes in Kenya.

Alternatively, prior to becoming the Trump administration’s national security adviser, [John Bolton](http://www.jpost.com/American-Politics/8-reasons-why-Trumps-John-Bolton-appointment-is-causing-a-frenzy-among-Jews-546961) had written an op-ed that the US should loudly and simply tell the ICC that ‘you are dead to us’ and ignore its existence completely. Might this view now become policy? Direct confrontation of the court with Russia, the US and possibly Israel was not inevitable, and the diplomatic consequences of each confrontation were written on the wall.

In that light, ICC Prosecutor Fatou Bensouda may be more interested in sending messages of deterrence than arranging actual trials.

The ICC’s statement on Sunday may actually somewhat deter Israel and Hamas from further altercations.

But the moral-equivalence message it sent to Israel may also undermine the ICC’s credibility in the eyes of those Israeli legal experts who are still on the fence as to whether they believe the court will give Israel a fair hearing.

All that is certain is that even though some Israelis had hoped that the ICC’s relative silence during the last couple of years meant that it had exited stage right, the ICC is back – or never really left.