IDF, Israeli government lawyers shift from détente to brawl with ICC

December 30, 2019

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The Jerusalem Post

<https://www.jpost.com/Israel-News/IDF-Israeli-govt-lawyers-shift-from-d%C3%A9tente-to-brinkmanship-with-ICC-612574>

Although anything is possible, International Criminal Court prosecutor Fatou Bensouda’s decision on December 20 to go after Israelis for alleged war crimes perpetrated in the Gaza Strip has likely ended an experiment.

Until that decision, top IDF and government lawyers hoped they could dialogue with the Hague-based court to avoid an all-out confrontation. Based on that hope, Israel treated Bensouda and the ICC differently than other UN-system bodies.

For example, though the UNHRC commissioned multiple reports relating to alleged Israeli war crimes following three wars with Gaza between 2009-2014, Israel never allowed any UNHRC investigators to set foot in Israel or the West Bank.

This hampered the UNHRC’s ability to investigate and symbolized Israel’s belief that the UNHRC and its investigators were so biased that the best policy was simply to boycott and isolate them diplomatically.

Israel also had no direct communications with UNHRC investigators, though Israel found ways to issue public documents or for former officials and others to present its critique of UNHRC criticism.

In contrast, in July 2015, government and IDF officials started to correspond directly with the ICC prosecution, including Israeli officials visiting The Hague.

Further, when the ICC Prosecution wanted to visit Israel and the Palestinian Authority in Ramallah in 2016, Jerusalem rolled out the red carpet and provided high-level government access (though the sides appeared to have mutually decided to avoid a public press conference).

Part of the bet Israel made was also that the UNHRC, unlike the ICC, has no enforcement powers.

In contrast, some 125 countries, including most of Europe, that are signatories to the ICC’s Rome Statute, are obligated to arrest and extradite anyone who the ICC issues an arrest warrant for.

That the ICC has enforcement powers was not the only reason that Israel treated it differently from the UNHRC.

Israel also hoped the ICC prosecution would be more neutral than the UNHRC.

And compared to the UNHRC, the ICC prosecution has broken some new positive ground regarding Israel with: not rushing to judgment (its preliminary probe took about five years, and it waited until all IDF probes were completed); announcing it would prosecute Hamas; and hinting that it might recognize IDF probes as valid.

However, that “progress” gets buried when the headline is that the ICC prosecution has recognized “Palestine,” is going to prosecute the IDF for some unspecified war crimes and is going to prosecute the settlement enterprise as a war crime.

In light of the overwhelmingly negative bottom line from the ICC, all signs from the IDF and government lawyers are that there will be a paradigm shift toward treating the ICC as more of a hostile actor, in a similar vein to the UNHRC.

If Israel were looking to still “play nice” with the ICC, there might be an attempt now to put out additional public information about results of the IDF probes into nine incidents from the 2018-2019 Gaza border crisis in which soldiers allegedly broke the rules of engagement.

A first decision, a conviction of one soldier in a plea bargain for violating those rules, was published in November.

But no new decisions have been released since December 20, and there are no signs that additional decisions will be published anytime soon, though some probes date back about 18 months.

Moreover, if the IDF were looking to please the ICC, it might reengage in a dialogue about the cases where the IDF has already investigated its own soldiers’ conduct during the 2014 Gaza war, which the ICC prosecution has concerns about.

All signs are that the IDF completed nearly all if not all of its some 500 probes and 30 criminal investigations related to the 2014 Gaza War, and that there is no movement at this time to reopen those cases.

In fact, IDF and Israeli government sources are returning to a more traditional line of defense: Israel investigated war crimes allegations against IDF soldiers long before the ICC existed, and it will continue to do so because it is an ethical society committed to the rule of law.

In other words, the Israeli message may now be that it no longer cares what the ICC decides, and it will go about its legal investigations as if the ICC did not exist.

Diplomatically speaking, Israel can certainly play this game until around April 2020, when the ICC Pretrial Chamber will issue a ruling on whether the ICC prosecution may proceed.

It may be able to push this approach through November 2020 or January 2021 even if a new US president is elected. If Donald Trump, who has a heavy distaste for the ICC, is reelected, Israel may even be able to maintain this position indefinitely.

All that is known for certain at this point is that there was always a school of thought in the Israeli government that viewed attempts to mollify the ICC as a waste of resources and time, and this school is now ascendant.