Analysis: Walking a tightrope with the International Criminal Court

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The members of the International Criminal Court Prosecution team that has come to Israel and the West Bank for a first-ever five-day visit has been walking on egg shells not to offend anyone since the second they landed.

Possibly out of fear of being publicly attacked for something related to the visit, they did not even publicize it until the day they were flying in.

And those concerns may have been justified.

On one hand, it seems that the ICC Prosecution team has threaded the needle of somehow pleasing both the Israeli government and the Palestinian Authority. Visiting Ramallah gave additional recognition to “Palestine” as a state, even as the news-killing emphasis on the visit being routine and only related to outreach pleased Israel, which does not recognize the ICC’s jurisdiction to get involved.

On the other hand, in this three-dimensional conflict, the team incurred the wrath of Hamas for visiting Israel and the West Bank, but not Gaza (Israel is not exactly upset about this).

However, Hamas’s criticism, even if one is neutral, could be said to be overstated since it has refused contact with the ICC and provided no information about alleged war crimes it was involved in – say shooting thousands of rockets at Israeli civilians.

But this is the sideshow in the final analysis.

The grand game is: Which side will the ICC Prosecution take? Despite the prosecution’s teams mostly successful best efforts to give zero hints on this front, there are some tea leaves to read some of their leanings.

The two indications have to do with approaches to international law which could favor Israel or the PA.

In an exclusive February interview and series of meetings with The Jerusalem Post in The Hague, some ICC officials casually brushed off Israel’s concerns that their team lacked sufficient military expertise to make tough borderline calls about alleged war crimes involving civilian casualties and proportionality.

On Friday, it appeared that the ICC officials were far more sensitive to that concern, citing that they already have hired one military expert known for neutrality and that they are in the process of hiring additional military experts.

This could be huge for Israel, if the ICC officials listen to the experts.

One of the great fault lines in judging international law and war crimes today when it comes to Israel and other Western-style militaries is the gulf between academic experts and military experts.

Academic experts tend to be skeptical that what the IDF or the US military call “mistaken” killing of civilians are anything other than the result of reckless indifference and essentially intentional killings of civilians.

Military experts do not always give a pass, but they are more likely to see gray in the fog of war that characterizes real-time operations and errors that do not seem to “make sense” afterward.

The ICC Prosecution team was presented with new major relevant books by former judge advocate-general of the Canadian Forces Brig.- Gen. (ret.) Kenneth Watkin and Lt.-Col. (ret.) Geoffrey Corn, the US Army’s former chief of international law, which they did not seem to be familiar with. Military experts would likely recognize them (though one nonmilitary Israeli expert also did not recognize them), but “failing” a two-book test does not reduce the positive of hiring military experts.

Also significant, it would appear that the ICC Prosecution team would not rush to apply to Israel the “strict proportionality and mistakes standard,” in a 2014 decision it made relating to North Korea, as an acrossthe- board standard. That standard would declare that repeated “mistakes” in which civilians die under similar circumstances are disproportionate or essentially intentional killings.

The issue was raised only a few weeks ago in a similar context by scholars Ryan Goodman and Alex Whiting on the Just Security legal blog.

Their emphasis would seem to be on treating every case individually and not jumping to conclusions based on general rules, which the IDF would likely appreciate as it views its situation as unique.

Of course there are military experts who have slammed IDF targeting policy and the prosecution could ultimately decide to apply the strict standard from the North Korea case to Israel due to the large volume of killed civilian Palestinians.

But compared to the signals the ICC Prosecution sent in February, the signals it sent during this visit could only be seen favorably by Israel, even as the prosecution’s final decision lies a long way off.