ICC Prosecutor soon to say whether to probe Israel, Hamas for war crimes

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Four years after launching a preliminary review, International Criminal Court prosecutor Fatou Bensouda said late Wednesday that she is close to a decision on whether to open a full-fledged criminal probe against Israel and Hamas for alleged war crimes.

Bensouda made the revelation as part of her annual report on preliminary examinations on a range of countries. Her report moved the Israel-Palestine review into “Phase III” of the review process; until now it was considered as being in Phase I or Phase II, with no clear timeline in sight.

The statement likely nixes a scenario where Bensouda might wait to decide until November 2020, when it is theoretically possible that a new US president might be taking the reins.

In light of forceful attacks on the ICC by US President Donald Trump and National Security Adviser John Bolton, Bensouda’s decision, which could be made very soon, may put her office on a collision course with a united US-Israel front.

In addition, while the prosecutor has taken flak from the Palestinians for waiting so long to move forward, there are major IDF probes from the 2014 Gaza War which still have not concluded.

Wednesday’s report indicates that Bensouda may not wait for IDF decisions about incidents in Gaza’s Shejaiya and Khan Yunis’s Khuza’a before she makes her own decision.

Besides the timing, the report reveals several important indicators about where Bensouda is leaning on a range of alleged war crime issues.

Regarding the 2014 Gaza War, the report said: “With respect to crimes allegedly committed by members of the IDF, the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system.”

This does not mean that the IDF is off the hook for alleged war crimes relating to 2,100 Palestinians killed – between 50-80% of whom were civilians – since the ICC could decide that the IDF probes were insufficient or that they only probed junior officers and not senior commanders.

But the statement could also be a first sign that the ICC may give Israel a broad pass on the 2014 war, by deciding to recognize the IDF probes as precluding an ICC one.

If so, it would be a stunning turnaround from a 2015 UN Human Rights Council report, which condemned the IDF as having perpetrated war crimes.

This may be positive news for Israel – also regarding Hamas’s behavior in the 2014 operation.

Regarding Hamas, the report said: “With respect to crimes allegedly committed by Palestinian armed groups, the information available at this stage does not suggest any conflict of jurisdiction between the Court and any relevant States with jurisdiction.”

Behind the complex wording, the ICC prosecutor is very likely saying that Hamas has not undertaken any probes of its own actions, leaving no obstacle in the way of the ICC to criminally investigate the terrorist group for war crimes.

Such a criminal investigation against Hamas would be a first.

Moreover, the report discussed the operation in terms of nuanced questions and examined whether the Israel-Hamas conflict is an international or a non-international armed conflict.

This is the debate Israel has wanted, as opposed to earlier reports from 2016, which called Gaza “occupied.”

However, the report appeared to have much worse news for Israel about the settlements.

The 2017 report already appeared to side with critics of Israel, stating that the settlements are illegal under international law.

Wednesday’s report said that Israel has undertaken no probes of settlements as it views them as legal – something the ICC does not accept.

Furthermore, the report appeared to push Israel’s High Court of Justice out of the game by saying that it has declined to rule on whether the settlement policy is a judicial issue.

While recognizing that the High Court has already ruled on some settlements, the report set up a scenario where it could declare the settlement enterprise as a war crime and only drop certain settlements from the probe if the High Court were to deal with them.

The report also focused on the Gaza border conflict since March 2018.

Bensouda appeared to largely favor the Palestinian narrative that most protesters have been peaceful and only a minority of them violent. However, this differs drastically from Israeli popular opinion, where most Palestinian protesters who have been killed were violent.

Her report left room for further evaluation as additional information comes out, including some IDF probes.

Most importantly, Bensouda did not mention a previous ruling by the High Court that the IDF’s rules of engagement were legal, once again suggesting that High Court rulings may provide Israel a limited defense where it has not specifically probed the current allegations.

A big question will be whether Attorney-General Avichai Mandelblit will make good on his public musings in November about publicizing Israel’s full case against ICC jurisdiction over the country, and present an intense legal attack on the idea that “Palestine” is a state.

In January 2015, Bensouda accepted Palestine as a state despite Israel’s strenuous objections to the issue.