ICC to rule on 'War Crimes,' how will it rule post U.S decision? -analysis

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The US decision to declare that Israeli towns over the Green Line are not illegal under international law is expected to have a number of reverberating consequences around the world.

However, it is not expected to be decisive regarding the International Criminal Court prosecutor’s decision regarding Israel and alleged war crimes that may come out in the next two weeks.

Unfortunately, at this point, the ICC and the US are at a crossroads in which there is little serious dialogue, compromise or influence between the sides.

The US-ICC relationship has always been complex, but the elevated recent hostility came after ICC Chief Prosecutor Fatou Bensouda’s decision to go after the US itself for alleged torture of detainees in Afghanistan.

Following that decision, the US canceled Bensodua’s visa.

In the meantime, an ICC pretrial chamber told Bensodua that she should drop the case.

After cutting through all of the carefully worded legalese, the bottom-line was that the ICC pretrial chamber told Bensouda she was biting off more than she could chew.

Bensouda did not back down and has appealed that ruling to the ICC appeals chamber.

Against this background, ICC President Judge Chile Eboe-Osuji gave a speech in the US last week calling the tension “most unfortunate.” He almost begged the Trump administration to return to the days of the Nuremberg trials when the US led the global campaign for international criminal justice.

But like other ICC officials, Eboe-Osuji ignored that the US investigated the torture allegations. He and the ICC have been unsatisfied that the US decided administrative reviews, as opposed to criminal charges, were the appropriate remedy.

In December 2018, Bensouda’s annual report hinted that she was more likely to go after Israel’s settlements as alleged war crimes than she was to go after the IDF for the 2014 Gaza War.

When she dropped the hint, the US was already at loggerheads with the ICC.

This means that if Bensouda chooses not to go after Israel’s settlement enterprise, it will likely not be related to the US per se, but to fundamental problems with treating the settlements as war crimes even if a majority of the world’s countries may view them as illegal.

Flying through a country’s airspace without permission is also illegal under international law, but no one would call it a war crime.

The ICC and every war crimes tribunal dating back to Nuremberg was created to prosecute widespread genocide, as well as mass killings and rape.

If the ICC decides to prosecute Israel’s building houses, it will be the first in history to do so. It would also be prosecuting at a time when UN Security Council Resolution 242, which calls for a negotiated resolution to the question of borders between Israel and the Palestinians, is still in effect.

The ICC would also need to ignore Israel’s arguments that Palestine is not yet a formal state that can refer cases to the ICC, and other arguments.

One reason to think that the current ICC will at least put some pressure on the Israeli settlement enterprise is that it ignored its own former chief prosecutor, Luis Moreno-Ocampo, when he told The Jerusalem Post that Israeli Supreme Court decisions ordering some Israeli settlements demolished and some changes in the West Bank barrier might protect Israel from ICC pressure on the settlements issue.

But the ICC’s later reports suggested that it would view Israeli Supreme Court decisions as narrowly limited to instances in which it ruled, leaving any land dispute where it did not rule (meaning most of the land over the Green Line) open to ICC jurisdiction.

That is a legal move from someone who is looking to jump in, not someone who is looking for a technical excuses to opt out.

If US-ICC bilateral relations were not as fraught as they are, the ICC might have had incentive to avoid crossing the US on the legality of the settlements.

Sadly, the bilateral situation is already so low that Israel will have to hope that some of the general defenses listed above will be enough. Alternatively, Israel can hope that if the ICC digs deeper into the issues, it least it will do so slowly and with dialogue on the table as it has done in its probe in Colombia and some other countries.