U.S., Israel press ICC against full war crimes probes

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The last few days saw the US, Israel and their allies fire warning shots across the bow of the International Criminal Court about diving deeper into the Israeli-Palestinian conflict.

Since September, there has been speculation that the US might take concrete actions against the ICC if it pressured Israel with a full war crimes investigation.

This past weekend, US Secretary of State Mike Pompeo made that threat real. He said that any member of the ICC who was involved in a criminal investigation of Israelis would be blocked from traveling to the US and might face financial sanctions.

The official response from the ICC has essentially been that – with the support of around 125 nations– it will act as it sees fit, come what may.

But the US threat may have an impact when combined with a new legal brief, the most comprehensive defense to date of Israeli settlements against a war crimes probe, filed at the end of last week by UK Lawyers for Israel (UKLFI) and the Lawfare Project.

The two groups wrote the first public comprehensive brief, taking on the narrative that Israel’s settlement enterprise could constitute war crimes.

The Israeli government and some of its allies have previously challenged the jurisdiction of the court to address anything related to Israel and the Palestinians.

In fact, in November, Attorney-General Avichai Mandelblit essentially threatened the ICC with a public legal campaign, aggressively contesting its jurisdiction.

Whether realizing that such an approach would be futile, deciding to fight ICC involvement in other ways, or deciding to hold off on this campaign until the next big ICC Prosecution decision-moment, Mandelblit has not acted on his threat.

In any case, the ICC Prosecution pretty much ruled on that issue in January 2015. It already decided, rightly or wrongly, that Palestine is a state and that a referral from that “state of Palestine” has given it jurisdiction.

Israel’s next line of defense would be to claim that the ICC Prosecution cannot get involved because Israel itself has already probed any potential war crimes by its citizens.

The ICC’s own Rome Statute prohibits it from getting involved if a state has already reasonably investigated the issue.

UKLFI and the Lawfare Project are the first to meticulously argue that Israeli courts have probed legal claims against settlements, and that this precludes ICC Prosecution involvement.

Their legal brief is important because in December, the ICC Prosecution implied that Israel’s High Court of Justice has mostly ignored the settlements issue.

In February, B’Tselem–The Israel Information Center for Human Rights in the Occupied Territories came out with a report labeling the High Court a whitewashing accomplice to war crimes committed by the Israeli settlement enterprise.

These conclusions would potentially leave Israel vulnerable to ICC prosecutors.

A decisive point could be how the ICC Prosecution interprets the Israeli High Court regarding something called “justiciability,” the limits of a court’s jurisdiction and judicial authority.

Justiciability here asks: Has the Israeli High Court ruled about settlements legality?

UKLFI AND the Lawfare Project acknowledge that Israel has not criminally prosecuted its citizens in relation to the settlements, and that the High Court has not made a global ruling about the settlements’ legality. But they contend that a massive volume of High Court rulings on individual disputes over settlements removes most settlements from ICC jurisdiction.

In these rulings, the High Court has declared some settlements lawful, and others unlawful.

The High Court is also expected to declare the Settlements Regulations Law – designed to retroactively legalize a large number of unauthorized Jewish outposts built on private Palestinian land – unconstitutional.

Further, it immediately froze that law two years ago before it went into effect.

An eye needs to be kept on how the High Court treats the state’s recent legal brief regarding the settlement at Mitzpe Kramim, which could make it easier for some Jewish outposts to become legalized.

However, in the past, top legal sources have said that this expansion might be as small as 10% of the legalizations that the Settlements Regulations Law would have accomplished. That may be an underestimate, but if correct, it would make the change insignificant.

All of this is important because if only a small number of settlements’ issues have not come before the High Court, the ICC Prosecution could decide to forego a full war crimes probe due to a lack of “gravity.” Gravity is a reference to the idea that the ICC only gets involved when a critical mass of crimes are in play.

In other words, quoting the 1979 Elon Moreh decision, the Jewish groups say the High Court has been ready to address any individual Palestinian rights claimed to be violated.

They also say that the ICC Prosecution should defer to judicial systems like Israel’s, which are democratic and well-established, unless there is convincing evidence the systems are failing to do justice.

B’Tselem’s recent report said the problem is not merely the cases that are coming before the High Court, but that the system of granting approvals to build new structures in the West Bank massively favors Israel.

UKLFI and the Lawfare Project do not specifically address this. But former Foreign Ministry legal adviser Robbie Sabel has told The Jerusalem Post that the still in-force Oslo Accords do not restrict Israeli settlement building.

In other words, one can debate whether or not building new Israeli settlements is conducive to a resolution of the conflict. But there would be no legal basis for the ICC Prosecution to intervene on the issue.

Yet, B’Tselem’s report also said the High Court virtually never saves Palestinian structures from demolition for missing permits, while ignoring that Israel only grants 4% of Palestinian permit applications.

Put differently, B’Tselem said Israel’s permit authority is so unequal that it compels Palestinians to build illegally.

Israel says it keeps most of its building in settlement blocs, and that it does not want to allow the Palestinians to grab large swaths of land in Area C outside of peace negotiations.

In any event, Israel would likely say again that this is a diplomatic issue, not a legal issue for the ICC Prosecution.

The truth is, no one knows how the ICC will view its jurisdiction regarding settlements, because no judicial body has ever prosecuted building as a crime.

In all of this mix, the new legal brief filed by UKLFI and the Lawfare Project could give the ICC Prosecution a basis to stand down, especially if it does not want a head-on collision with the US.