ICC, Israel, US: Now what? - analysis

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There has been a whirlwind of International Criminal Court developments in recent days which could impact the preliminary review of war crimes allegations against Israel.

From the US to Sudan, Libya and Jordan, the ICC’s rulings have increasingly filled in pieces of a mosaic portraying Israel’s fate with mixed messages, but overall to the country’s advantage.

In December 2017, the ICC rebuked Jordan for failing to arrest and extradite Sudanese President Omar al-Bashir, which it was required to do because of its obligations as an ICC member.

Jordan appealed that ruling; a decision is expected in May.

On April 5, the ICC rejected Libya’s claim that its own judicial proceedings against war criminal Saif al-Islam Qaddafi were sufficient and prevented the court from having the authority to get involved.

Typically, the ICC only has war crimes jurisdiction if the home state of an alleged war criminal refuses to bring him to trial.

Muammar Qaddafi was tried and convicted, but later pardoned as part of a general amnesty to help reduce conflict within Libya.

Each of these developments suggested a readiness by the ICC to challenge other countries’ legal systems if it did not agree with the result that those systems arrived at.

This could have portended poorly for Israel, since one of the Jewish state’s main arguments against ICC intervention is that it probes war crimes allegations against its own soldiers, making ICC involvement superfluous.

But more recent events paint a different picture.

The ICC’s rejection of its prosecution’s request to criminally probe the US for alleged war crimes of torture in Afghanistan is a major turning point.

There is a vibrant debate right now about how to frame the decision: Did the ICC blink when, only shortly before, the US revoked Chief Prosecutor Fatou Bensouda’s visa?

Or was the decision – which said that the main reason it rejected letting the case go forward was because of the lack of cooperation from the US, and therefore, the lack of a chance of collecting evidence – about a more broad prioritization of cases which are more likely to succeed?

The ICC’s decision regarding the US comes after several other countries which once cooperated with the ICC later decided to stonewall it, causing several cases to fall apart.

If the countries will not turn over defendants or witnesses, there can be no trial.

If the ICC succumbed because of US pressure, then it seems that Washington is ready to keep up the same level of pressure should the court go after Israel. And this could lead the ICC to end its four-year-long initial review of the Jewish state.

If it was based on the availability of evidence and of access to bringing the defendants to court, there is more of a mixed result.

Human rights groups and the Palestinians have provided the ICC with significant amounts of potential evidence and could also provide some witnesses.

At the same time, every sign is that Israel would refuse to provide witnesses or be willing to transfer defendants to the ICC, so it is not clear that the court could hold a standard trial even if it wanted to.

Another reason the ICC was perceived as going after the US and Israel was to show it was not only interested in Africa.

In addition, it had so few convictions in its almost 17 years of existence, that opening preliminary probes was one of the only ways it could score points to show it was doing something.

The toppling of al-Bashir last week may help solve this problem and give the ICC a much needed victory.

It is not clear yet whether the Sudanese dictator will be extradited to the ICC. But it does seem that if he is not, it will be because Sudan itself brings him to trial.

If so, the narrative regarding the highest profile war criminal – who has scoffed at the ICC and visited several member states without consequence, including Jordan – would finally turn from an embarrassment to a big win.

The ICC could argue, true or not, that part of his fall and his eventual trial came from the pressure it has kept on him, defining him as a war criminal for years.

Maybe a victory with al-Bashir would give the ICC more of a basis to say it has racked up more wins, and that its four years of probing Israel have gotten Israel to act more aggressively in prosecuting its own – in one case even convincing Jerusalem to hold off demolishing the Bedouin village of Khan al-Ahmar that the government views as illegal.

The ICC can then say it has achieved its goals of deterring crimes and that achieving this goal is more important than whether it always seeks to bring someone to trial.

On the flip side, the ICC may gamble that Israel is a weaker link than the US and that it can go after Israel with less diplomatic bruising.

Although all of the recent developments mean that the picture is still mixed, Israel definitely is in a much stronger position in its standoff with the ICC than it was a week ago.