Did John Bolton Shield Israel from the ICC?

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Did US National Security Advisor John Bolton’s speech on Monday attacking the International Criminal Court permanently change the playing field in the war crimes debate over Israel?

Or was Bolton’s support for Israel rhetorical, and his real message to the ICC was to stay away from bothering the US?

In November 2017, the ICC Prosecution asked the ICC Pretrial Chamber to approve moving the US’s conduct in the Afghanistan War and its interrogation of its prisoners from a preliminary review to a full criminal war crimes investigation.

Bolton’s speech was a preemptive strike on a potential legal war between the US and the ICC. The ICC Pretrial Chamber is imminently expected to give a green light to the full criminal investigation against top US defense officials.

Part of what commentators have been asking is whether Bolton’s speech was truly a turning point of heightened conflict with the ICC, or merely a 2.0 edition of butting heads rewinding to when Bolton led the Bush administration to reject cooperation with the ICC in 2002?

Former ICC Prosecution coordinator and current Harvard law professor Alex Whiting wrote in the Just Security legal blog that though much of what Bolton said could seem like just rehashing past grievances, that this time Trump’s national security adviser was far more threatening.

He said that while it was unclear whether Bolton’s threats to be ready to arrest ICC officials and freeze their financial accounts could legally pass muster, that even making the threats showed a new level of commitment to wound and confront the ICC.

In 2002, Bolton and the Bush administration were focused on ignoring the ICC and making side deals with ICC members to ensure they would not extradite US security forces – not on threatening the ICC.

There was also some confusion about whether the threats pertained to ICC’s treatment of Israel.

The ICC Prosecution has been preliminarily reviewing alleged war crimes issues against Israel since January 2015.

In parts of the speech, Bolton seemed to refer to ICC treatment of the US, Israel and other allies as one collective issue. But when he came to the specific threats of prosecution and freezing assets, it was in the context of talking about retaliation for treatment of the US.

In other words, Bolton and the US might condemn the ICC if it moves forward against Israelis for alleged war crimes, but only up the ante to real world retaliation if the ICC moved against the US itself.

John Bellinger was a top legal adviser for the US State Department, National Security Council and Justice Department from 1997-2009 and wrote in the Lawfare blog that the ICC should back down to avoid further damage both to itself and the US.

IN COMMUNICATIONS with The Jerusalem Post, Bellinger said he thought, “Bolton was also very clear that the US would respond to threats from the Court both to the United States and US allies, including Israel.”

Whiting suggested ways that the ICC Prosecution could informally de-prioritize the US case, in terms of investing more staff time on other cases, to avoid a conflagration even if the ICC Pretrial Chamber authorized a full criminal investigation.

But Whiting in different articles has alluded to the fact that the ICC’s precedents to date would make it difficult for it to ignore the US case.

If it did seem to ignore the US case, this could empower critics who have said that the ICC is only really tough on African countries.

Still, maybe the most striking point that Whiting has made was that the ICC, even with 123 member countries, is politically far weaker today than it was when the Bush administration worked to isolate it somewhat in 2002.

Back then, there was optimism that it would help address a number of recent genocides and possibly deter future ones.

Since then, the ICC has really only had any effect if the state from which those accused originate from was willing to hand over evidence.

Where countries have refused to cooperate, the ICC has been ignored and sometimes been embarrassed when member states, like South Africa, declined to even arrest war criminals like Sudanese President Omar al-Bashir during a visit.

Some ICC members came to its defense after the Bolton speech. But will they really stick their neck out to defend it if the US threatens sanctions for cooperation with the ICC regarding US security forces? That may be the bottom line in Bolton’s speech.

Israel is certainly a weaker diplomatic target than the US.

However, whether the US will prosecute ICC officials and freeze their US funds if it goes after Israelis or not, because of Bolton’s speech, it will be easier for Israel to ignore the ICC if the two sides reach a confrontation point.