How the ICC going after US for war crimes impacts Israel

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From the Israeli perspective, there is both some bad news and some good news with regards to the legal bombshell that the International Criminal Court prosecutor dropped on the US on Monday.

The ICC prosecutor filed a formal submission to move the US’s conduct in the Afghanistan War and its interrogation of its prisoners to a full criminal war crimes investigation.

In short, the bad news for Israel is four-fold. The ICC crossed the Rubicon in daring: 1) to go after a democracy, the US, which said it had investigated itself, 2) to go after the world’s superpower despite the diplomatic consequences, 3) to go after “war crimes” beyond the traditional paradigm of prosecuting genocide, namely the US’s “torture” interrogations, which many thought the ICC would stay away from, and 4) to go after top US defense and intelligence officials and not just the rank and file.

Until now, Israel’s main hopeful defenses to keep the ICC out of its affairs have been: 1) that it is a democracy which said it had investigated itself, 2) that the ICC would be afraid to endure diplomatic sanctions from the US and other Israeli allies, 3) that it would shy away from going after non-traditional “war crimes” beyond genocide, such as the settlement enterprise or Israeli interrogations of Palestinians, and 4) it would be deterred from going after senior Israeli officials.

But if the ICC dared to go after the US despite all four of these issues, what will stop it from going after little Israel next? If it went after the Americans for torture (and after Malians for destruction of cultural heritage sites as war crimes), why won’t it go after Israel for settlements and interrogations – even if these have never been prosecuted as war crimes before? The simple answer is that the ICC going after the US ensures that it is more likely than ever that it will also go after Israel at some point.

And yet there is also good news from the Israeli perspective.

The ICC is not going after the US for its targeting decisions which killed Afghan civilians. This is despite its conclusion that the US and allied forces have killed at least 1,600 civilians.

It has explained that, “The information available does not provide a reasonable basis to believe that the military forces intended the civilian population... to be the object of the attack.”

This is the biggest game at stake for Israel.

Around 2,100 Palestinians were killed by the IDF during the 2014 Gaza War, between 50-80% of them civilians. The approximately 500 preliminary probes and over 30 criminal investigations by the IDF to date have mostly led to the conclusion that the civilian deaths were mistakes, such as misidentifying four Palestinian minors on a beach as Hamas naval commandos.

Top ICC expert Alex Whiting told The Jerusalem Post that the ICC decision regarding US targeting probably came about because “there just isn’t enough evidence of intent or that there was a policy to target civilians. They fall too much on the side of error rather than [of war crimes].”

This could be considered surprising as many of the incidents where Afghan civilians were killed by the US produced horrific stories, involved the killing of large numbers of civilians and were well-publicized in the media.

That the ICC decided it could not prove intent, despite some media and human rights groups already having damned the US as a war criminal, could bode well for Israel. The IDF will need the ICC to similarly disregard media and human rights condemnations of its war-targeting decisions.

Another positive aspect for Israel with regards to this investigation is time. With the US, the ICC took 10 years to decide to move from a preliminary probe to a full criminal war crimes investigation.

Since January 2015, Palestinians have repeatedly pressed for the ICC to move from a preliminary probe of Israel to a full criminal war crimes investigation. But more than three years after the war ended, there are few signs that the ICC is even close to a decision.

If the ICC took 10 years with the US, Israel may still have plenty more years before coming into legal conflict with the ICC.

This also means that if the ICC does go after Israel, possibly in as much as seven more years, the world’s attention will be less prominent than it would have been in the first years after the war.

This combines with the final point of good news for Israel: it does not have to go first.

By the time the ICC goes after Israel, if it still has the stomach, it will likely have endured years of legal and diplomatic warfare with another democracy, the US.

There is no way the US is going to cooperate with the ICC’s investigation, certainly not under the Trump administration. That means that the ICC’s challenge to the US will almost certainly blow up in its face.

Whiting said that if the ICC had given senior US officials a pass, it could have been boxed in with other future cases. He said, “I don’t think it necessarily wanted to focus on the US, but the statute and the precedents made it very difficult not to.”

Regardless of the reason, if the ICC goes after Israel, by the time it does, the world will have gotten used to the idea of democracies ignoring it when it is perceived as having overreached.