How ICC, Benny Gantz led to High Court ruling on settlements – analysis

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The first petition to nix the Settlements Regulations Law was filed in February 2017, and a major hearing was held on the issue in June 2018.

With that timeline, why did the High Court of Justice wait to nix the law until June 9, 2020, and why specifically now and not a few months from now?

In short, there were three main factors: 1) waiting for formation of the national-unity rotation government; 2) developments before the International Criminal Court; and 3) Prime Minister Benjamin Netanyahu’s push to potentially make some kind of annexation announcement at the start of July, which also ties back into the ICC issue.

What is so important about these three factors?

First, the key question always hovering over the High Court is whether the Knesset will attempt to pass a Basic Law to give it a veto over High Court vetoes. This would end or at least limit the court’s judicial-review powers.

Every time the High Court issued a controversial decision during the 20th Knesset, which disbursed in December 2018, the government started talking about limiting judicial review.

Throughout the three rounds of election that concluded with forming a government in early May, several parties campaigned on limiting judicial review.

In this environment, nixing the Settlements Law could have pushed the enthusiasm over the top and maybe led to such a law.

But in early May, Benny Gantz’s Blue and White Party started to share the reins of power, including Avi Nissenkorn becoming justice minister and saying: “I will be a wall for the courts” against attacks.

This gave the High Court the feeling it was finally safe to rule without losing its judicial-review power.

This still does not explain why the High Court ruled now as opposed to a few months down the road.

Here, the timing could be tied to the ICC Pretrial Chamber. It is in the process of deciding whether to endorse ICC Chief Prosecutor Fatou Bensouda’s request to open a full criminal war-crimes probe against Israel and Hamas.

The High Court’s decision to beat back the retroactive legalization of 4,000 outposts could significantly boost its credibility and perceived independence globally.

This could encourage the ICC to leave judging disputes over the settlement enterprise and Operation Protective Edge (the Israel-Gaza conflict in 2014) to Israel’s justice system. This is because under the ICC’s Rome Statute, the ICC cannot get involved with a country that investigates its own alleged war crimes.

Even as the High Court justices are committed to issuing rulings primarily based on Israeli law, they do keep a close eye on ICC developments, people familiar with the matter told The Jerusalem Post.

How interested is the ICC in our High Court’s rulings?

Instances in which the High Court has approved specific settlements as legal could provide a complete defense to any allegations that they are war crimes, former ICC chief prosecutor Luis Moreno Ocampo told the Post in December 2015.

The Palestinian Authority was furious with Moreno Ocampo, and Bensouda may not agree with him, but the ICC Pretrial Chamber may not have made up its mind.

More specifically, on May 27, the Pretrial Chamber requested that all key parties clarify the status of the Oslo Accords and their impact on the war-crimes probe.

First, the ICC asked the PA to explain whether the Oslo Accords still apply in the war-crimes case it is assessing. It wanted clarification on this issue, following PA President Mahmoud Abbas’s May 19 declaration that, in frustration with Israeli noises about making a West Bank annexation move, the PA no longer viewed itself as bound by the Oslo Accords.

Since the Pretrial Chamber asked for these explanations, both the PA and Bensouda have responded.

The remaining question is whether Israel will reply at all, and if it does, what position it will take.

Israel has until June 24 to reply. But it may choose not to reply so as not to show recognition of the ICC’s jurisdiction and in light of a large volume of legal briefs that countries that are parties to the ICC have filed on its behalf.

These countries have already argued the legal point that the Oslo Accords do not allow the PA to seek international legal intervention regarding alleged crimes from a body like the ICC.

But one takeaway from the ICC judges publicly asking for additional clarifications is that they are seriously struggling with the issues and are considering overturning Bensouda’s wish to move forward with probing Israel.

The headline of the current debate before the High Court is deciding whether a State of Palestine exists, which can grant it basic jurisdiction over alleged Israeli war crimes.

Yet another massive issue is whether the ICC believes Israel’s court system is independent enough to probe potential illegalities.

In legal briefs in both December 2018 and December 2019, Bensouda tried to push Israel’s High Court out of the game by saying it had declined to rule on whether the settlement policy is a judicial issue.

While recognizing that the High Court has already ruled on some settlements, Bensouda’s reports set up a scenario in which they could declare the settlement enterprise as a war crime and only drop certain settlements from the probe if the High Court were to deal with them.

In addition, Bensouda’s reports generally ignored a May 2018 High Court ruling that the IDF’s rules of engagement during the 2018-2019 Gaza border conflict were legal. This once again suggested that Bensouda’s view likely is that High Court rulings will not provide Israel much of a defense.

But the ICC Pretrial Chamber may agree with Moreno-Ocampo, and a big and independent decision like Tuesday’s on the settlements may be exactly what convinces the judges of Israel’s argument.

Finally, the High Court may have issued this ruling now as a warning shot to Netanyahu’s annexation plans.

It is highly doubtful that the High Court could block a full-fledged annexation move by the government.

But the way the High Court approaches the issue in terms of urging taking into account Palestinian rights has unmistakable implications for whether annexation should be done unilaterally or as part of a bilateral negotiation.