**Facing possible ICC probe, Israel still has options before judgment day**

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A pre-trial chamber of three International Criminal Court judges ruled on Friday that the court has jurisdiction to investigate potential war crimes by Israel and the Palestinians.

Prime Minister Benjamin Netanyahu called the controversial decision — opposed by ICC members states Germany, Austria, the Czech Republic, Australia, Brazil, and Uganda — “pure anti-Semitism.” Foreign Minister Gabi Ashkenazi said the decision “distorts international law and turns this institution into a political tool of anti-Israel propaganda.”

There is no question that Israel takes the development seriously, evidenced not least of all by the fact that the Foreign Ministry took the rare step of offering a briefing to journalists on Friday night, after the start of the Jewish Shabbat. Netanyahu also released his reaction on the Shabbat.

There are certainly reasons for concern. At the same time, there are elements that limit how alarmed Israel should be, especially in the short term.

For starters, there has not yet been a decision to pursue an investigation. Friday’s pre-trial chamber ruled that the court has the jurisdiction to look into potential war crimes. But chief prosecutor Fatou Bensouda can still decide not to pursue an investigation, even though the court has jurisdiction.

Prof. Yuval Shany, vice president of the Israel Democracy Institute, noted that the ICC could still decide that Israel’s own investigation was sufficient and decide not to drop the case.

“We have a long way to go before the investigations mature into indictments against specific individuals and arrest warrants,” he said. “In a similar case involving allegations that British soldiers committed war crimes in Iraq, the prosecutor recently imposed low standards on formal investigation, which increases the likelihood that military investigations into Operation Protective Edge… will prevent proceedings against IDF soldiers in connection with this operation.”

There is also the fact that the ICC is under heavy pressure to undergo reforms, which could result in the case being dropped.

In a 2019 Atlantic Council blog post entitled “The International Criminal Court Needs Fixing,” four past presidents of the ICC’s management and legislative body wrote, “We are disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential.”

The court’s April 2019 refusal to initiate an investigation into war crimes committed in Afghanistan, saying it “would not serve the interests of justice,” called the court’s understanding of its own mission and its ability to carry it out into serious question.

There are also a slew of governance issues, with judges openly criticizing each other and complaining about pay. A Japanese judge was allowed to stay on the court after she became her country’s ambassador to Estonia, even though holding both positions clearly violated ICC rules.

Bensouda, of The Gambia, has come under criticism as well for focusing primarily on African conflicts, while suffering some high-profile failures in its investigations.

Bensouda’s term is slated to end with the selection of a new chief prosecutor in June, and that individual will be tasked with carrying out the badly needed reforms. Many observers expect the new chief prosecutor to clean shop and force out many ICC veterans who are responsible for recent misfires.

The next chief prosecutor is expected to come from a Western country, after the first two prosecutors were a South American and an African.

“The new prosecutor has maybe a last chance to either lead the reform of the ICC, or acknowledge that it is indeed a kangaroo court,” said Blue and White MK Michal Cotler-Wunsh, the Knesset’s first-ever Official Representative on Matters Relating to the International Criminal Criminal Court.

As part of the reforms, the replacement will have the authority to shut down the investigation, even if Bensouda does decide beforehand to initiate proceedings. Such a move would be a clear signal from the new prosecutor that the court will avoid heavily politicized investigations, such as the probe into Israel and Hamas.

Hampered, but not out

Though Israeli officials and NGOs reacted furiously to the ICC decision, the worst case scenario is not all that bad. Several years from now, senior IDF commanders and government officials could have trouble traveling to many countries if the prosecutor decides to open an investigation, if those Israeli officials are named as subjects of the investigation, and if they are indicted.

“Any serious consequences are many years down the road,” said Anne Hertzberg, legal advisor of NGO Monitor.

Still, this potential investigation plays into a broader strategy of Israel’s adversaries, which seek to delegitimize the Israel Defense Force’s use of some munitions or practices.

In the past, Israeli commanders have spoken about avoiding practices that are legal, but also perceived as illegitimate.

For example, white phosphorus is illegal to use against personnel, but is entirely legal to use as a smokescreen to mask military movements. Some militaries have chosen to refrain from even legal uses of white phosphorus because of legitimacy challenges. After Operation Cast Lead in Gaza in 2008 and 2009, the IDF deputy chief of staff said that the “big buzz in the media” – not legal issues – led to an order during the operation to stop using such munitions.

“These shells were used only to create smokescreens, in keeping with international law,” he emphasized.

If raising a hue and cry can force Israel to shift tactics, having an ICC tribunal hanging overhead like a sword of Damocles could seriously hamper Israel’s military freedom of action.

Diplomatic push

Some believe that the ICC move was timed with the intention of catching a small amount of guff from the Joe Biden administration rather than the hellfire, brimstone and sanctions expected from his predecessor.

“I think that’s without a doubt,” said Herzberg.

Last year, the Trump administration imposed sanctions against ICC officials, including revoking chief prosecutor Fatou Bensouda’s entry visa, in response to the court’s attempts to prosecute American troops for actions in Afghanistan.

In May, then-US secretary of state Mike Pompeo threatened that the US would “exact consequences” if the ICC went ahead with its investigation into Israel and Hamas.

In contrast, the US State Department said Friday that it had “serious concerns” about the ICC decision.

Israel, though, may still react furiously and could retaliate against the PA for turning to international bodies in order to prosecute Israelis. Measures could range from reducing work permits all the way to annexation of Israeli-controlled areas of the West Bank, though neither option has been raised publicly with any seriousness.

Cotler-Wunsh suggested that Israel should embark on a proactive diplomatic effort to try to alter the actual outcome of the ICC process and to head off future investigations.

Engaging with parliamentarians around the world will encourage them to hold their governments to account and to demand that their governments hold the ICC accountable to its mission, she suggested.

“At this point, we have to engage after this very political decision, with all those trustees of international law and human rights,” she said, “so that they uphold and fulfill their responsibility to hold the court to account.”