Developments in the investigation launched at the ICC in The Hague

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For anyone who was waiting with bated breath for the decision of the judges in The Hague on the request of International Criminal Court (ICC) Prosecutor Fatou Bensouda to approve the territorial scope of an investigation into possible war crimes committed by Israel in the West Bank (including east Jerusalem) and the Gaza Strip, this decision has now been delivered earlier than expected, albeit not exactly on the anticipated issue.

On January 21, the ICC’s pre-trial court decided to reject the prosecutor’s request to allow her to submit a petition that exceeds the permitted length stipulated in the regulations, that is, to submit 110 pages instead of 30. The court criticized the prosecutor and ruled that it was improper for her to have presented a petition that exceeded the maximum length while simultaneously submitting a request to make an exception to the rule, and before the latter request had been authorized.

In effect, the judges found that the jurisdiction to rule on the Palestinian issue is indeed a complex and precedential legal question, but they ruled to strike down the request that was submitted. The judges allowed the prosecutor to submit a new petition of the same length (110 pages), but required that it should be inclusive of all the supplementary information the prosecutor wishes to bring before the court.

Several days after the submission of the original request, the prosecutor also submitted an additional 44-page supplement comprising memoranda from Israel’s attorney-general and Foreign Ministry.

Apart from the rather unpleasant public reprimand she endured, the prosecutor now faced a dilemma as to whether she should cut back her petition significantly or decline from submitting the Israeli memoranda, with the understanding that any change to the document would be closely scrutinized and trigger interpretations and complaints from both sides. The prosecutor resolved this dilemma on the day after the ruling by submitting a new petition of 110 pages and adding a link to Israeli memoranda to the list of authorities annexed, without attaching the documents themselves.

This whole episode might be summed up as a minor anecdote, an example of the type of petty pedantry that gives the legal profession a bad name, were it not for the fact that it has very real practical implications and is an indication of possible future developments. It is worth examining these more closely.

On a practical level, the ruling delays the substantive decision on whether or not to launch an investigation. The prosecutor requested the judges to decide within 120 days. A month has passed since the petition was submitted, and the clock has now been reset, while the possibility remains that the judges will decline to respond within the time frame requested by the prosecutor.

Looking toward the future, it is possible that the ruling reflects the difficult relationship between the pre-trial chamber which handles the Palestinian issue and the ICC prosecutor. It may well be that hovering in the background to the current case are the events of the Mavi Marmara affair, in which the prosecutor decided that there were no grounds for investigation.

The pre-trial chamber found in favor of an appeal against this decision and ordered the prosecutor to reconsider. She, in turn, gathered additional materials, and then announced that despite having considered the issue once again, she remained convinced that an investigation was not justified.

In the end, no investigation into the Marmara affair was launched, and the question of the relation between the prosecutor’s independence and the powers of the ICC’s pre-trial chamber remained unresolved. How, if at all, will this relationship affect the court’s decision on the Palestinian case? Time will tell.

In the midst of all this, it was announced that Israel is pursuing diplomatic efforts to persuade other countries to pressure the ICC to drop its investigation. There is a certain irony to this, as on the one hand the government claims the ICC’s decision to pursue an investigation was a political act driven by an anti-Israel bias, while on the other, it is attempting to apply political pressure on the Court to reverse its decision. There is clearly a risk that this pressure will in and of itself lead the ICC to dig in its heels in order to demonstrate its independence from political influence.