ICC rules it has jurisdiction to probe war crimes charges against Israelis

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Israelis are a step closer to facing war crimes suits for actions against the Palestinians now that the ICC has ruled it has the jurisdiction to probe such allegations with respect to activity in Gaza, the West Bank and east Jerusalem.

Such war crimes suits could be leveled at Prime Minister Benjamin Netanyahu, defense ministers and any other high-level officials involved in such activity since June 13, 2014. Soldiers and commanders could also be targeted.

Friday’s 2-1 ruling by the International Criminal Court’s three-member Pre-Trial Chamber in The Hague significantly advanced the possibility of such suits, although this is not the final step.

The matter now returns to the hands of ICC Chief Prosecutor Fatou Bensouda for further investigation as whether war crimes suits could be filed. The process could still be a protracted and lengthy one.

Bensouda’s office tweeted Friday that it was “currently carefully analyzing the decision & will then decide its next step guided strictly by its independent & impartial mandate & obligations under the #RomeStatute.”

The United States rejected the ruling, and Israel charged that the decision was antisemitic. The Palestinians welcomed the ruling as a historic move in the direction of accountability.

Netanyahu vowed that “we will fight this perversion of justice with all our might.”

It was appalling, he said, that “the same court established to prevent atrocities like the Nazi Holocaust against the Jewish people is now targeting the one state of the Jewish people.”

This is particularly true, he said, when the “ICC refuses to investigate brutal dictatorships like Iran and Syria, who commit horrific atrocities almost daily.

“When the ICC investigates Israel for fake war crimes – this is pure antisemitism.”

Netanyahu attacked two of the main issues by which war crimes suits could be filed – settlement activity and military action in Gaza.

The ICC, “outrageously claims that when Jews live in our homeland, this is a war crime,” Netanyahu said. It also “claims that when democratic Israel defends itself against terrorists who murder our children and rocket our cities – we are committing another war crime,” Netanyahu said.

The PA had asked the ICC in 2015 to allow for war crimes suits to be filed against Israelis. It did so after signing that same year the Rome Statute, which governs the ICC. Neither Israel nor the US are parties to the statute.

The PA’s request also opened the door for war crimes suits to be filed against Palestinians, including Hamas, but Israel fears the court’s overwhelming focus will be on its citizens and leaders.

In December 2019 Bensouda announced she had reason to believe that both Israelis and Palestinians had committed war crimes and that she intended to open an investigation into the matter.

Prior to opening such a probe, Bensouda said, she wanted a ruling from the Pre-Trial Chamber as to whether the ICC has jurisdiction. She also asked for clarification as to the extent of the territory under which the ICC has jurisdiction.

The matter is complicated because the UN, which speaks of Gaza, the West Bank and east Jerusalem as occupied Palestinian territory, does not at the same time recognize Palestine as a state. The PA was able to sign the Rome Statute only because the UN General Assembly in 2012 granted the PA de facto statehood by recognizing Palestine as a non-member state.

The three-judge panel of Reine Adélaïde Sophie Alapini-Gansou, Marc Perrin de Brichambaut and Péter Kovács clarified that their ruling was solely about the court’s jurisdiction and should not be interpreted as recognition of Palestinian statehood. Nor they said, should it be viewed as determinative with regard to the borders of such a state.

Although the Pre-Trial Chamber skipped over the question of Palestinian statehood, it recognized the PA’s right to be a state party to the Rome Statute and stated that it should be treated as any other state party by the court.

“Palestine’s accession to the statute followed the correct and ordinary procedure and that the chamber has no authority to challenge and review the outcome of the accession procedure conducted by the Assembly of States Parties,” the Pre-Trial Chamber stated.

Its ruling with regard to the extent of the territory under the court’s jurisdiction was based in part on the text of the UN General Assembly’s 2012 Resolution 67/19, granting the Palestinians non-member state status.

That resolution reaffirmed “the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967.”

The judges also dismissed for the moment arguments that connected the issue of jurisdiction with the 1993 and 1995 Oslo Accords, but said it could become relevant later.

“Such matters and other further questions on jurisdiction may be examined when and if the prosecutor submits an application for the issuance of a warrant of arrest or summons to appear,” the judges said.

Not all aspects of the ruling were agreed upon by all three judges. Kovács submitted a dissenting opinion and Brichambaut submitted a different legal explanation.

US State Department spokesman Ned Price said the Biden administration did not believe the ICC had jurisdiction and that the Palestinians could not be considered a party to the Rome Statute.

“As we made clear when the Palestinians purported to join the Rome Statute in 2015, we do not believe the Palestinians qualify as a sovereign state, and therefore are not qualified to obtain membership as a state, or participate as a state in international organizations, entities or conferences, including the ICC,” he said.

“We have serious concerns about the ICC’s attempts to exercise its jurisdiction over Israeli personnel. The United States has always taken the position that the court’s jurisdiction should be reserved for countries that consent to it, or that are referred by the UN Security Council,” Price said.

Attorney-General Avichai Mandelblit on Saturday night rejected the ICC ruling, noting that Palestine was not a sovereign state and as such there was no territory that belonged to such a state.

“This position,” Mandelblit said, “received significant support from countries that are central and experts in [international] law, but the ICC judges in the majority decided to ignore most of the heavy legal arguments that were raised.”

In addition, he said, “the State of Israel is a democracy that follows the rule of law and has an independent legal establishment,” which “follows the foundations of international law and knows on its own how to analyze violations of that law.”

Given Israel’s independent judicial and prosecutorial apparatus, he said the ICC has no basis to intervene with the sovereignty of Israel.

The current ICC decision was political, and the Justice Ministry would continue to defend Israelis from any future legal threats, Mandelblit said.

Defense Minister Benny Gantz wrote a letter to the IDF Chief of Staff, his ministry’s director-general and senior security officials in which he attacked the decision and promised to prevent harm to any individual soldier as a result.

“The ICC was never meant to undermine the efforts of democratic states fighting terrorism and protecting their people,” Gantz wrote, adding that the IDF protects the state while “upholding both our moral standards” and “international law.”

“The defense establishment, and all of Israel’s institutional bodies, will continue to resolutely prevent any harm to IDF commanders or soldiers or the defense establishment at large.”

Israel Democracy Institute vice-president of research Prof. Yuval Shany said the Pre-Trial Chamber’s ruling does not necessarily mean it will lead to arrests.

“We have a long way to go before the investigations mature into indictments against specific individuals and arrest warrants,” Shany said. By then the prosecution will also have to formulate a position on whether IDF internal investigations are sufficient to prevent the prosecution of soldiers, he added.

The PA said it would continue to push for the ICC to allow for war crimes suits against Israelis.

Palestinian Authority Prime Minister Mohammad Shtayyeh praised the ruling as a “victory for justice and humanity and the values of truth, justice and freedom.”

The ruling, Shtayyeh said, was a “message to the perpetrators of crimes that their crimes will not be subject to a statute of limitations, and they will not go unpunished.”