Analysis: Could ICC Ruling on Kenya Impact ‘Mavi Marmara’ Case?

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A major International Criminal Court ruling on Wednesday on a war crimes investigation of top Kenyan officials could have a serious impact on the ongoing ICC review of the 2010 Mavi Marmara flotilla incident.

The ICC’s top court, the Appeals Chamber, reversed an ICC lower-court ruling in favor of an appeal by the ICC prosecution, reopening the possibility that the ICC prosecutor will ratchet up pressure on Kenya to cooperate in its war crimes investigations.

Kenya’s President Uhuru Kenyatta was previously charged as an indirect co-perpetrator with five counts of crimes against humanity allegedly committed during post-election violence in Kenya in 2007- 2008.

In 2012, Kenyatta’s case was scheduled for trial along with several other Kenyan officials, but by March 2015, the case had fallen off the rails with the ICC prosecution complaining that continuing was impossible because Kenyatta and Kenya were either attacking or intimidating witnesses and destroying evidence.

While the ICC prosecution asked the ICC lower court to refer Kenya to the ICC’s Assembly of State Parties (ASP) or the UN Security Council due to its noncompliance, the ICC lower court rejected the request.

Rather, the ICC lower court essentially questioned the prosecution’s judgment; speculated that the prosecution could have been more creative in gaining Kenya’s cooperation; and blamed the prosecution for not being diligent enough in pursuing evidence from Kenya.

The ICC Appeals Chamber ruled that the ICC lower court’s analysis was flawed and that it must reconsider the idea of referring Kenya to the ASP or UN Security Council.

If involved, the ASP or UN Security Council potentially could take multilateral actions to pressure Kenya to cooperate more fully with the ICC prosecution.

**Why does all of this matter to Israel?**

In mid-July, in a shocking 2-1 decision, a different ICC lower court ordered ICC Prosecutor Fatou Bensouda to consider opening a full criminal investigation into 2010 Mavi Marmara flotilla war crimes allegations against IDF personnel just seven months after Bensouda had closed the file.

The decision put the ICC the closest it has ever been to intervening directly in the Israeli-Arab conflict and placed the court in the position of potentially being harsher on Israel than Bensouda, who herself has been criticized by Israel for recognizing a State of Palestine.

Bensouda could still decide to close the file again, but the court’s order meant there was a very serious chance that Israelis would face a full criminal investigation – something that has not even yet occurred regarding the 2014 Gaza war.

In November 2014, Bensouda rejected the Comoros Islands’ war crimes complaints and request to open a full investigation against Israeli soldiers and leaders regarding the 2010 Mavi Marmara incident, saying essentially that the incident did not involve a large enough number of casualties.

Wednesday’s decision gives Israel a first read into how the ICC’s top court might respond to an appeal by the ICC Prosecutor to quash the file once more.

The good news for Israel is that the ICC Appeals Chamber was ready to trust the prosecution’s judgment over that of the lower court.

This is good in the Mavi Marmara case since, whereas the lower court appeared to push for the file to be reopened, the prosecution wanted to close the case.

On the flip side, the ICC Appeals Chamber showed a strong readiness to question a country’s good faith in cooperating with the ICC.

Although Wednesday the country in the ICC’s crosshairs was Kenya, and an excellent argument can be made that Kenya has openly undermined investigations of its officials whereas, and Israel, in contrast, may prosecute dozens of its officials on its own, the fact that Israel could be the ICC’s next target should give the country pause.

It remains unclear whether the most important result of the ICC Appeals Chamber’s intervention is to support the prosecutor over the lower court or to press countries who the prosecutor says are not cooperative.

It is now clear, however, that any ICC ruling on Israel will not be set in stone until the ICC top court has its say.