The ICC Declares War on Israel

July 16, 2015

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The Times of Israel

http://blogs.timesofisrael.com/the-icc-declares-war-on-israel/

The Pre-Trial Chamber of the International Criminal Court, for the first time in its history, has [ordered](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1133.aspx) the ICC Prosecutor to pursue an investigation she has decided to close. The Chamber ruled that the Prosecutor was wrong to close the preliminary investigation into war crimes charges against Israel for crimes allegedly committed in boarding the Mavi Marmara and other vessels during the flotilla incident of 2010.

The ruling of the Pre-Trial Chamber is remarkable.

It holds that the Prosecutor should have taken into account facts and actions that are outside the jurisdiction of the court in deciding whether to bring charges.

It holds that the Prosecutor should assume the truth of even the wildest accusations in deciding whether to bring charges; in other words, there should be an irrebuttable presumption of guilt in the preliminary investigation stage.

And most shockingly, it holds that crimes have sufficient gravity to interest the court, even if they have very few actual victims, as long as they are widely covered by the media, and are subject to a lot of political activity at the UN.

Needless to say, none of these holdings are accompanied by any citation to precedent. That’s because they are without any precedent.

And it’s a safe bet that last two of these “rules” will never be applied to any non-Jewish, non-Israeli defendant. That’s because the rules, if universally applied, would require the Prosecutor to investigate thousands of non-crimes every year, making the prosecution of real crime impossible. And it would make the Prosecutor throw away legal standards and make her choices based on the most political UN proceedings.

There is a strong dissent to the Pre-Trial Chamber’s ruling by Judge Péter Kovács that addresses the issues far more persuasively. First, Judge Kovács points out, it requires serious distortion of both the facts and the law to come to the conclusion that Israel committed any crimes at all. As Kovács noted, “The injuries sustained by the individuals on board the Mavi Marmara were apparently incidental to lawful action taken in conjunction with protection of the blockade.” Kovács observes, “a ship that is non-violent and not resisting may nonetheless be captured because of its attempting to breach a blockade. It is clear that not only was it the Mavi Marmara’s intention to breach the blockade, but this was its main purpose, as an act of protest. With this in mind, Israeli forces had a right to capture the vessel in protection of their blockade. … Faced with a potential breach of the blockade, the IDF acted out of necessity.”

Moreover even if Israeli actions in stopping the flotilla were criminal, they are outside the jurisdiction of the court, because they are of insufficient “gravity.” The “gravity” rule states that the Court should only pursue the largest and most serious international crimes. It is clear that if there were any Israeli crimes here, they were not of that magnitude.

As Kovács writes, “Upon comparison, for instance, between the number of deaths in the flotilla incident with the number of murders and serious injuries which prompted [the] Pre-Trial Chamber [] to authorize, by majority, the Prosecutor to open an investigation into the situation in the Republic of Kenya, one may observe a huge discrepancy. The violence in the Kenya situation resulted in the death of about 1,220 and the serious injury of 3,561 persons in six out of the eight Kenyan provinces.” Kovacs concludes that it is doubtful that “the death of ten persons and the injury of 55 others in the context described in the Prosecutor’s report and the Comoros submission is sufficiently grave to warrant the opening of an investigation into this situation.”

What does it say that Pre-Trial Chamber is so willing to set aside its own precedent, the law and the facts in order to order the Prosecutor to jump back into the anti-Israel investigation?

Sadly, the conclusion is clear.

The ICC, like altogether too many other international institutions that claim to protect law and justice, is just another political institution. And like all those other political international institutions, it is all too ready to fabricate new and uniquely harsh standards of “law” to apply only to the detriment of the Jewish state, and to fabricate facts to find the leaders and Jewish citizens of the Jewish state guilty of all manner of horrible crimes.

The PLO, calling itself “the state of Palestine,” recently joined the ICC for the sole purpose of getting the court to prosecute Israeli leaders. Legal observers doubted that the PLO move could succeed. They noted that the PLO is not actually a state, and cannot confer jurisdiction on the court. They noted, as well, that Israel has a system for prosecuting its own criminals, so even if the PLO move were effective, the court would lack jurisdiction, since it can only prosecute where a state lets criminals run free. They noted that the alleged Israeli crimes lack the gravity to be prosecuted by the court. And they noted that jumping into the Arab-Israeli conflict would over-politicize a court that is already criticized for selective prosecutions.

But it seems that the court — or at least the Pre-Trial Chamber — views politicization as an attraction, rather than a flaw. Enough that the Chamber finds cases to have great gravity, not on the basis of legally relevant facts, but on the basis of political pronouncements. Enough that the Chamber wants to run forward on an investigation that will lead to criminal charges that are laughable.

It is now clear where the PLO’s joining the court will lead. Palestinian terrorists and war criminals will continue to enjoy absolute impunity. The ICC will earn its reputation as another failed hope for international law, and another embarrassing institution devoted to persecuting the Jewish state. And Israeli Jews will once again find themselves in a world where it is criminal simply to exist, and where stepping foot in the wrong country means instant arrest.