Requiem for the International Criminal Court

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The chief prosecutor of the International Criminal Court has[just made a decision](https://www.jpost.com/israel-news/icc-is-probing-israelis-for-war-crimes-what-happens-now-analysis-660859)that self-inflicts a lethal wound on what could have been a noble international experiment. The prosecutor, with a long record of bias against Western democracies, has ruled that a criminal investigation should be opened against both the democratic nation of Israel and the terrorist group Hamas. By suggesting a moral equivalent between the two, she has destroyed the credibility of her court.

This benighted decision marks the end of any hope for the ICC. Both the United States and Israel openly oppose this decision, along with many other Western democracies which are silently against it.

In the first place the ICC has absolutely no jurisdiction over either the United States or Israel, both of which adamantly refused to sign the Rome Treaty which created that court. Secretary of State Tony Blinken has categorically rejected the ICC’s claim of jurisdiction over Israel or the US. A court simply cannot assert jurisdiction over sovereign nations which have refused to accept its jurisdiction.

Second, in order to unlawfully seize jurisdiction in clear violation of the intent of the Rome Statute, the prosecutor has unilaterally declared Palestine to be a state. But Palestine is not a state. It has no recognized borders and it has none of the other attributes of statehood. Nor does the prosecutor’s ill-advised decision purport to include the terrorist controlled Gaza Strip as a state, despite its claim to be able to assess the conduct of Hamas terrorists. Gaza is no more a state than the fictional caliphate of ISIS.

 The prosecutor claims she will look neutrally and equally at the alleged crimes committed by Hamas and the Israel Defense Forces. But Hamas doesn’t even purport to accept the rule of law. It boasts about its desire to kill Israeli civilians, including babies, women and the elderly. It targets schools with rockets and terror tunnels. It glorifies terrorists who have killed civilians. The IDF, on the other hand, is regulated by the rule of law, governed by its advocate general, and answerable to the Israeli Supreme Court.

This brings us to yet another reason [why the ICC](https://www.jpost.com/breaking-news/icc-prosecutor-announces-formal-investigation-into-israeli-war-crimes-660818) has no jurisdiction over Israel. The Rome Treaty provides for a concept called complementarity.

This important principle of international law denies the ICC jurisdiction over acts committed by any nation which has a legal system that deals with allegations of criminal misconduct under the rule of law. Israel’s judicial system is highly regarded among objective jurists and scholars. Israel’s Supreme Court is one of the best in the world. It repeatedly holds individual Israeli soldiers accountable for any violations of the law of war or international law in general. Accordingly, under the Rome Treaty, the ICC has no jurisdiction to second guess the decisions of the Israeli judiciary. Nor does it have jurisdiction to condemn Israel’s settlement policy. Regardless of whether that policy is wise or unwise, the issue is a political one to be resolved by negotiation rather than judicial fiat.

So it is the ICC that is acting lawlessly. It has placed itself above the law and the very treaty that created it.

Not surprisingly, Hamas announced that it is thrilled with the decision of the ICC to investigate both Israel and Hamas, because the decision puts that undemocratic terrorist group on the same plane as a democratic nation governed by rule of law. Interestingly the ICC will not be investigating the crimes of the Palestinian Authority, which is the entity which actually claims statehood. The PA has adopted a “pay for slay” policy under which terrorism against innocent Israeli civilians by Palestinians is rewarded with payment to the terrorist’s family. The US, along with many other nations, strongly opposes this pay for slay policy, but the ICC has apparently not included it within the scope of its investigation.

There was hope that perhaps someday the US might sign on to the Rome Treaty and join the ICC. That hope is now gone. After investigating Israel’s self-defense actions in Gaza, the ICC’s next target might well be the military actions of American military service men and women in Afghanistan, as well as in other places where we have engaged in military operations. No American administration will agree to allow a court so obviously biased against Western democracies to have jurisdiction over the brave young men and women who fight in our military.

So good riddance to the ICC as a potential mechanism for preventing and punishing genocide. By ignoring actual genocides in Syria and massive war crimes in many other parts of the world, and focusing instead on a democracy that is trying to defend itself against terrorists who have called for its destruction, the ICC prosecutor has destroyed the credibility of her court.