Analysis: The ICC Decision on ‘Mavi Marmara’ May Actually Be Good for Israel

November 9, 2015

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The Jerusalem Post

<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/The-ICC-decision-on-Mavi-Marmara-may-actually-be-good-for-Israel-432435>

How can the International Criminal Court Appeal’s Chamber decision keeping alive the 2010 Mavi Marmara flotilla war crimes allegations be positive for Israel? Friday’s ruling said that ICC Prosecutor Fatou Bensouda must reconsider her decision to close the file without moving forward with a full criminal investigation from the current preliminary stage.

This means that Israeli soldiers could still be closer to the embarrassment and delegitimization process of major war crimes trials than ever before.

So the initial reaction to the decision from the Israeli perspective is certainly disappointment that the ICC Appeals Chamber did not immediately kill the file as Bensouda had suggested.

Its first ruling related to the Israeli-Arab conflict placed the ICC’s top body seemingly squarely against Israel and aligned with an ICC Pretrial Chamber (lower court) opinion which seemed to go out of its way to say that Israeli soldiers had committed war crimes, even though only procedural issues were at stake.

But reading between the lines, the real likely outcome of the decision will be what Israel wanted, to close the file without it going a step further.

Why? The ICC Appeals Chamber did not really rule for or against Israel as much as it explained its view on various procedural issues.

Bensouda had asked Chamber to toss out the lower court’s ruling so that she could close the file and her work would be done.

She did not even want to waste more time and resources on the file because she thought that 10 dead flotilla participants, while tragic, was too small a number to divert her resources from her mandate of focusing on massive genocides.

Although the Chamber said ‘no,’ it did so while telling her she still has complete discretion over whether to close the file, and that all she has been asked to do by the lower court is to consider changing her mind.

Bensouda argued that the lower court’s ruling was so harsh on her and in its description of Israel’s actions that she needed the ICC Appeals Chamber to jump in and save her from its negative ruling and abrasive tone.

The Chamber essentially said: ignore the harsh language and tone, you can still do whatever you want and once you have given matters a bit more thought, if you stick to your guns, the pro-flotilla side, the Island of Comoros, cannot ask any ICC courts to second-guess you again.

And that is what Bensouda will most likely do – namely, stick to her guns and close the file once and for all.

If the ICC lower court and the ICC Appeals Chamber had been unanimous against her, she might have felt compelled to change her decision and delve deeper into the Israeli-Arab conflict than ever before.

But the lower court was split 2-1 when it told her to reconsider and the Chamber was split 3-2 when it confirmed that decision.

Anyone who has been speaking of the ICC as being a unified body which is for, against or neutral on Israel must now realize that the ICC is as divided on the Israeli-Arab conflict as can be, with each individual judge ruling differently.

That is not only potentially good for Israel in having hope that there are ears within the ICC’s court system willing to listen, it also gives Bensouda a pretty free hand to close the file.

Judging from how adamant she was in criticizing the ICC lower court’s second- guessing her initial decision, closing the file is probably what she will do.

It is a more convoluted route to putting the flotilla behind Israel than if the Chamber had nixed the case itself, but if it has cleared the way for ending the case, it is about as good as Israel could have hoped for.