ICC prosecutor ordered to reexamine Gaza flotilla incident — for the third time

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Judges at the International Criminal Court have ordered the court’s chief prosecutor to reopen for the third time her probe into the May 2010 flotilla incident, during which Israeli commandos killed 10 Turkish citizens aboard a naval vessel that was aiming to break the Gaza blockade.

Israel has reacted scornfully to the pre-trial chambers’s decision last week to require Fatou Bensouda to reconsider a case that she had repeatedly sought to close due to lack of gravity.

One official in Jerusalem said that the court was wasting its limited resources on a frivolous suit in a manner that reflected poorly on other outstanding cases, including an ongoing preliminary examination into alleged crimes committed by Israelis in the Palestinian territories.

“When this is the quality of the court’s decisions, and when its exploitation for political ends is so easily and repeatedly allowed, it is no wonder that so many are deeply concerned that the court has lost its way,” a senior Israeli official told The Times of Israel this week.

### Thousands of pages, no end in sight

The Hague’s five-year engagement with the flotilla incident is a procedural saga of Kafkaesque proportions, with thousands of pages of legal arguments and counterarguments — not about the alleged crimes themselves but rather about who has jurisdiction to close and reopen probes — and no end in sight.

It started in May 2013, when the Comoros, a small Muslim-majority nation in the Indian ocean, asked the ICC’s prosecutor to investigate the Israeli raid on the Gaza-bound Mavi Marmara three years earlier, during which troops clashed with pro-Palestinian activists. Ten Turks were killed and a number of Israeli soldiers were injured. Israel said the soldiers were violently attacked by those on board.

The incident sparked a severe diplomatic crisis with Ankara, but since the Marmara sailed under the flag of the Comoros, it was that state that referred it to the ICC.

In November 2014, Bensouda, the chief prosecutor, decided that there was “no reasonable basis to proceed with an investigation” on the matter. She argued that Israeli forces may have committed war crimes when they stormed the Marmara, but that the possible offenses were not grave enough to merit a prosecution at the ICC.

The Comoros appealed her decision a few weeks later, asking the court’s pre-trial to order her to reconsider. Bensouda asked the judges to dismiss the appeal.

On July, 16, 2015, the three judges of the pre-trial chamber requested that she reconsider her decision not to initiate an investigation into the matter, ruling that she had “committed material errors” in her assessment of the case’s gravity.

Bensouda did not give up. Eleven days later, she appealed the judges’ decision. But on November 6, 2015, the Appeals Chamber dismissed the prosecutor’s appeal based on an interpretation article 82(1)(a) of the Rome Statute, the ICC’s founding document, and Bensouda had to review the case for a second time.

Two years later, on November 29, 2017, Bensouda handed down what she hoped would be her “final decision” on the flotilla incident, stating that she “remains of the view that there is no reasonable basis to proceed with an investigation,” and that the preliminary examination “must be closed.”

The Comoros in February 2018 applied to the Appeals Chamber for a “Judicial Review,” of the prosecutor’s repeated decisions to close the case, citing “discernable [sic] errors in each of them.”

Bensouda, in turn, argued that the Appeals Chamber may not have jurisdiction to rule in the case, suggesting that it dismiss the Comoros’ requests.

Many other requests and appeals were filed by both sides, arguing about jurisdiction and timetables, until last week, when the pre-trial chamber ruled that the prosecutor’s ostensible “final decision” from November 2017 “cannot be considered to be final” and ordered her to consider the case for a third time.

The chamber’s three judges gave her a May 15, 2019, deadline to hand down her final decision.

Although Israel was not directly involved in the legalistic back-and-forth, officials in Jerusalem have followed with great disdain the efforts and resources the ICC has invested in this particular case.

They argue that the flotilla incident has no place in a court created to deal with tragedies of a much greater scope than the case, which occurred more than eight years ago and which has already been probed by an Israeli committee headed by jurist Jacob Turkel with the participation of international observers.

“The ICC was established to deal with mass atrocities of concern to the international community as a whole,” the Israeli official told The Times of Israel, speaking on condition of anonymity.

“Instead, it has wasted more than five years of its time and resources on an incident that has already been thoroughly reviewed and brought to a close by national and international panels of inquiry, including twice by the court’s own prosecutor.”

The official also noted with chagrin that the three judges who ordered Bensouda to review the Marmara case — Péter Kovács, Marc Perrin de Brichambaut and Reine Adélaïde Sophie Alapini-Gansou — in July launched [a campaign to reach out to victims](https://www.timesofisrael.com/in-rare-step-international-criminal-court-reaches-out-to-palestinian-victims/) of alleged Israeli human rights violations in the Palestinian territories.

“It is worth noting that this is a decision by the same panel of judges that only a few months ago inexplicably ordered ‘outreach’ to victims in the so-called ‘Situation in Palestine,’ before even the question of the court’s jurisdiction had been determined,” the official said.

“Israel has consistently been of the view that there was no basis to open a preliminary examination [into the ‘Situation in Palestine’] in the first place on a matter that was so obviously legally unfounded and politically motivated,” the official added.

Under the ICC’s rules, the body can only investigate cases that have not already been sufficiently probed by their home countries.

Jerusalem has long argued that the court has no jurisdiction over matters relating to the Israeli-Palestinian conflict, since it has no jurisdiction over Israel (which is not a member state) and because Palestine is not a state and therefore cannot exercise jurisdiction over the West Bank.