International Court May Not Reopen Flotilla Case, Prosecutor Says

July 22, 2015

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The Times of Israel

<http://www.timesofisrael.com/international-court-may-not-reopen-flotilla-case-prosecutor-says/>

The International Criminal Court will not necessarily open an investigation into the 2010 Mavi Marmara incident, despite a pretrial chamber ordering the prosecutor last week to [reconsider her decision](http://www.timesofisrael.com/gaza-flotilla-lawyers-ask-icc-to-reconsider-probe/) to close her initial probe into the case, the court’s chief prosecutor said Tuesday.

“The decision on whether to open an investigation depends on the facts and circumstances of each situation,” said Fatou Bensouda. “We are carefully studying the decision and will decide on the next steps in due course.”

In an email exchange with The Times of Israel, the Gambian-born Bensouda said she was aware of the United Nations Human Rights Council [report on last year’s Gaza war](http://www.timesofisrael.com/unhrc-endorses-gaza-report-with-european-support/) and would consider “all credible and reliable sources of information.”

At the same time, she promised to conduct her own “independent analysis” of the controversial report.

In November 2014, Bensouda had closed her preliminary examination into the Marmara case, during which Israeli troops killed 10 Turkish citizens after being attacked during a raid on a Gaza-bound vessel trying to break Israel’s naval blockade of the strip. In her decision to drop the case, 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.

Israel [hailed Bensouda’s move](http://www.timesofisrael.com/as-marmara-case-closed-israel-calls-international-probe-pointless/), saying she should have never bothered with the “pointless” and “unfounded and politically motivated” complaint filed by Comoros, under whose flag the Marmara was sailing. Comoros appealed her decision, leading a pretrial chamber of three judges to state on Thursday that Bensouda “committed material errors” in her assessment of the case’s gravity.

Consequently, the [judges ordered Bensouda](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1133.aspx) to reconsider “as soon as possible” her decision not to proceed with a full investigation.

Some Israeli legal analysts said that this ruling leaves Bensouda no choice but to launch investigations not only into the flotilla case but also into Israel’s alleged crimes against Palestinians.

The judges’ decision “has wider implications for preliminary examinations by the prosecutor on Israeli-Palestinian issues,” Tel Aviv University’s international law expert Aeyal Gross [wrote in Haaretz](http://www.haaretz.com/news/diplomacy-defense/.premium-1.666658). “The decision will make it difficult for her not to investigate alleged war crimes by both sides in last summer’s Gaza war… Also, the decision might accelerate her launching of an investigation into construction in the settlements as well.”

But Bensouda — who in 2011 [said](http://www.alarabiya.net/articles/2011/12/15/182694.html) that her Muslim faith “definitely” helped her in her job as prosecutor, since Islam is a religion of peace that provides her with “inner strength” and a “sense of justice” — insisted that she will be guided exclusively by the facts and what the law says about them.

The prosecutor’s office “will execute its mandate independently and impartially, based solely on the law,” Bensouda declared. Her office is currently conducting a preliminary examination into alleged Israeli offenses in the West Bank and Gaza and will in “due course” decide how to proceed, she said.

Bensouda is currently weighing “whether to continue to collect information to establish a sufficient factual and legal basis to render a determination; initiate an investigation, subject to judicial review as appropriate; or decline to initiate an investigation should we determine that the legal criteria for opening an investigation have not been met,” she said. “At this stage, with respect to the ongoing preliminary examination of the situation in Palestine, we continue to do our work.”

Here is the full transcript of our exchange:

**The Times of Israel: Israel recently decided to** [cooperate with the ICC’s preliminary examination](http://www.timesofisrael.com/israel-to-engage-with-icc-over-war-crimes-probe/) **[into** [the situation in Palestine](http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx)**], but only in a limited way. How would you characterize your work with the Israeli authorities so far? Are you satisfied with the access and the information you have been receiving from Jerusalem?**  
  
**Fatou Bensouda:** We have been encouraging all parties to cooperate with the Court and the Israeli government’s recent decision to engage with the Office is therefore a welcome development. It is in the interests of both Palestine and Israel to fully cooperate with my Office’s preliminary examination into the situation.

This work will proceed on the basis of available reliable information which will assist my Office in arriving at a fully informed decision at the end of the preliminary examination process. During the course of this process, the Office seeks to engage constructively, in particular with the parties directly concerned: Israel and Palestine.

**Have you been granted a permit to visit Israel and Palestine? If yes, when are you going to visit the region?**

FB: As part of its preliminary examination activities, the Office of the Prosecutor conducts field visits as it has done in the past with other situations under preliminary examinations.

From the outset, I have been consistent in stating that the situation in Palestine will not be treated any differently from the others. Therefore, the Office as per normal practice, is indeed considering a visit to the region during the course of its preliminary examination. No date has been confirmed yet and further planning is required. It is also important to stress here that a preliminary examination is not an investigation.

**To what extent are you consulting the UN Human Rights Council’s report on the 2014 Gaza conflict (the so-called Davis report) for the preliminary examination?**

FB: The preliminary examination process will proceed on the basis of available reliable information, which includes relevant information in the public domain. My Office will be looking at all credible and reliable sources of information. We are aware of the Commission’s report and will conduct our own independent analysis of the report as part of the ongoing preliminary examination.

The ICC’s procedures — including the preliminary examination — are independent and separate from the Commission of Inquiry. The Office continues to gather available reliable information, which will assist in arriving at a fully informed decision at the end of the process.

**Last week, a ICC pretrial chamber ruled you should reconsider your decision not to investigate the 2010 Mavi Marmara incident filed by Comoros. You were asked to resubmit your opinion ‘as soon as possible.’ When will you announce your decision?**

We are carefully studying the decision and will decide on the next steps in due course.

**The pretrial chamber said that you committed ‘material errors’ in your determination of the case’s gravity. That led some in Israel to say that it will be now impossible for you not to launch examinations into this incident, and into the 2014 Gaza war, and possibly into West Bank settlements. How do you respond to such claims?**  
  
The decision on whether to open an investigation depends on the facts and circumstances of each situation. The Office is currently conducting a preliminary examination of the situation in Palestine, following Palestine’s accession to the Rome Statute and its acceptance of the Court’s jurisdiction over alleged crimes committed in Palestine since June 13, 2014.

During this process, and as the Office has done with other preliminary examinations, it will execute its mandate independently and impartially, based solely on the law. The Office’s actions and decisions will at all times be strictly guided by the Rome Statute legal framework.

Again, it is important to emphasize that a preliminary examination is not an investigation. The purpose of a preliminary examination is to determine whether there is a reasonable basis to proceed with an investigation. This requires an examination of jurisdiction, national proceedings, the gravity of the alleged crimes, and the interests of justice.

In due course, the Office will decide whether to continue to collect information to establish a sufficient factual and legal basis to render a determination; initiate an investigation, subject to judicial review as appropriate; or decline to initiate an investigation should we determine that the legal criteria for opening an investigation have not been met. At this stage, with respect to the ongoing preliminary examination of the situation in Palestine, we continue to do our work.

**Israeli Prime Minister Netanyahu** [said](http://www.timesofisrael.com/pm-slams-icc-demand-to-reopen-probe-into-mavi-marmara-raid/)**, after Thursday’s ruling, that ‘the court chooses to deal with Israel for cynical political reasons.’ How do you respond to such claims, especially in light of the fact that you were asked to reconsider closing the Comoros case?**

The Office strictly applies the law in an independent and impartial manner. Political considerations do not form any part of our decision making. The Office’s actions and decisions are, at all times, strictly guided by the legal parameters of the Rome Statute. The reality is that we operate in a highly political world where we will face reactions to the legal decisions we take. Be that as it may, ours is a legal mandate which we will continue to execute without fear or favor.