ICC Takes Anti-Israel Bias to New Heights

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By [Evelyn Gordon](https://www.commentarymagazine.com/author/evelyn-gordon/)

Commentary

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The International Criminal Court’s blatant anti-Israel bias is no secret. Just two months ago, I [wrote](http://evelyncgordon.com/iccs-anti-israel-bias-shows-america-is-right-to-shun-it/) about its decision to launch an unprecedented fishing expedition against Israel. Nevertheless, its latest decision raises bias to an art form—the art in question being farce. It also completely destroys any pretensions the court has left of serving its original purpose: Ensuring that the world’s worst crimes don’t go unpunished.

On November 15, the pretrial chamber of judges ordered the court’s prosecutor—for the second time—to reconsider her refusal to investigate Israel’s 2010 raid on a flotilla to Gaza. Demanding one reconsideration is rare. Demanding two is unheard of. No such option even exists in the ICC’s rulebook.

Prosecutor Fatou Bensouda appealed this ruling last week. But regardless of what the Appeals Chamber decides, it’s already too late to salvage the pretense that the court is an unbiased judicial institution and not a cesspool of anti-Israel prejudice.

To understand why, a review of the case is in order. In May 2010, a flotilla tried to break Israel’s legal blockade of Gaza. Israel intercepted most of the ships peacefully. But on one, according to the same [UN inquiry](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf%20) that upheld the blockade’s legality, passengers attacked the soldiers with “fists, knives, chains, wooden clubs, iron rods, and slingshots,” seriously wounding nine. To protect themselves, the soldiers opened fire, killing ten people.

Comoros, whose flag that ship flew, filed a complaint against Israel over the incident in May 2013. In November 2014, Bensouda dismissed it. Despite concluding ([wrongly](http://evelyncgordon.com/what-the-uns-flotilla-inquiry-says-about-western-attitude-toward-military-force/)) that the soldiers used excessive force, she said the fact that they opened fire only after being attacked and the low number of deaths made the incident insufficiently grave to warrant attention from a court created to prosecute major atrocities. But in July 2015, the pretrial chamber ordered her to reconsider—the first time it had ever overturned a prosecutor’s decision.

I dissected the judges’ egregious errors of both [fact](http://evelyncgordon.com/the-icc-channels-the-queen-of-hearts-on-israel/) and [law](http://evelyncgordon.com/how-to-gut-the-principles-of-law-in-one-easy-verdict/) at the time, including their failure even to mention the passengers’ attack on the soldiers, which was central to Bensouda’s decision, and their astounding argument that the gravity of the case should be determined not by what happened, but by how much international “attention and concern” it attracted. Bensouda evidently found their ruling equally unpersuasive, since she appealed it. But after losing that appeal, she duly reconsidered.

In November 2017, she announced, unsurprisingly, that her opinion remained unchanged. That should have ended the story. After all, the same appellate judges who upheld the pretrial chamber’s demand for reconsideration also unequivocally authorized her to stick with her original conclusion if she still deemed it correct. Moreover, section 108(3) of the ICC’s own rules explicitly defines the prosecutor’s decision after reconsideration as a “final decision.”

But Comoros appealed again, and astoundingly, the pretrial judges once again ordered her to reconsider, saying her initial reconsideration hadn’t satisfied their requirements. The clear implication was that they would keep demanding reconsiderations until Bensouda produced the decision they wanted.

There are several glaring problems with this. First, of course, it ignores the plain meaning of section 108(3). Instead, the majority essentially argued that a “final decision” only becomes final once they approve the outcome.

Second, as Judge Peter Kovacs noted in his dissent, it “would mean that the Prosecutor’s decision would be subject to an indefinite number of reviews, which is an absurd conclusion”—one that could “open the door for endless reconsideration requests, even in relation to different situations before the Court.” In other words, no case would ever actually be closed, since any such decision could be reconsidered ad infinitum. And if cases can’t be closed, justice can’t be done.

Third, the ruling destroys prosecutorial independence, which is why Bensouda had to appeal. If she’s required to keep reconsidering until her decision meets the pretrial chamber’s approval, then she has no independent judgment; she’s merely a stenographer typing up whatever decision the chamber dictates.

Fourth, it disqualifies the pretrial chamber from doing its actual job: providing an unbiased initial review should Bensouda in fact file charges. Having arrogated to itself the role of prosecutor as well as judge, it would effectively be reviewing its own decision in violation of one of the most fundamental principles of justice.

Finally, it’s a colossal waste of the court’s time. The ICC has already spent more than five years on a case the prosecutor considers unworthy of its attention, and may yet spend much more, depending on the Appeals Chamber’s decision. But every moment the court devotes to this case is time it can’t devote to truly serious crimes.

Thus, in the interests of pursuing their anti-Israel vendetta, the pretrial judges have forced the court to squander years on a triviality, even as mass murderers around the globe go unpunished. They have thereby betrayed both the court’s stated mission and a fundamental principle of justice: that the magnitude of the ostensible crime should matter more than how much the judges dislike the perpetrator.

This is an evil the appellate judges can’t undo. Overturning the pretrial chamber’s latest ruling would reassert the principle of prosecutorial independence and the finality of decisions. But it wouldn’t erase the pretrial chamber’s blatant demonstration of bias, in defiance of the fundamental legal tenet that laws must apply equally to everyone. It wouldn’t dispel the suspicion, should Bensouda ever file charges against Israel in this or any other case, that it may be less because they are warranted than to spare herself endless hassles with the pre-trial chamber. Nor would it make the pretrial judges capable of giving Israel a fair hearing should it ever be indicted.

Above all, it wouldn’t undo the court’s fundamental betrayal of its own mission. Instead of prosecuting the world’s worst atrocities, it has wasted five years on a minor incident simply to satisfy its judges’ anti-Israel prejudice. In so doing, it has destroyed the primary justification for its existence. The only question left is why taxpayers worldwide should continue funding this travesty.