ICC permanently closes flotilla war crimes case

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The International Criminal Court on Wednesday closed for good the case of war crimes allegations against Israel concerning the 2010 Mavi Marmara incident in which 10 Turkish citizens were killed during a clash with IDF naval commandos.

The decision by the [ICC](http://jpost.com/tags/icc)’s Pretrial Chamber followed a decision by the ICC prosecutor to close the case for a third time in December 2019, as well as prior rulings by the ICC’s highest body, the appeals chamber, which appeared to undermine attempts to force the ICC prosecutor to move forward with the case.

This is the first time that the ICC Pretrial Chamber has thrown in the towel after appeals against the ICC prosecutor’s decision to close the case.

In its December 2019 decision, the ICC Prosecution made some of its most complimentary statements regarding the [IDF](http://jpost.com/tags/idf) and Israeli positions on some war crimes issues.

From a technical perspective, ICC Prosecutor Fatou Bensouda’s third consecutive decision to close her preliminary probe of the alleged war crimes was nothing new. She and the ICC Pretrial Chamber have been at loggerheads over the case since 2014.

The ICC pushed her three times to open a full criminal investigation, and each time she said that there was no basis to move forward.  
But this time was different. Because the latest ICC ruling directed Bensouda to accept certain facts, she needed to more deeply analyze the IDF’s behavior.

In her past two decisions to close the case, she merely said that 10 dead activists who clashed with the IDF are not a high enough number of casualties to warrant her office’s attention, which deals mostly with genocide or mass killings.

However, the Island of Comoros – which was acting on behalf of the Palestinians – kept pushing Bensouda to analyze the case more deeply.

In hindsight, they probably wish they had not pushed so hard.

The compliments to the IDF were all indirect, but they were unmistakable to anyone who closely follows this arena, especially since international human rights forums frequently condemn Israel.

One of the reasons Bensouda gave for not proceeding with a criminal probe was that the case had been investigated by the IDF legal division.

Even if this was not a full sign-off on all investigations by the IDF legal division and only in the context of “command responsibility,” Bensouda could have come to the same conclusion without mentioning the IDF legal division.

Bensouda further explained that if a country’s legal division’s probe had been a sham, it would not have been afforded any protection by the ICC. This, in effect, means that Bensouda agreed that the probe was not a sham.

Along the same lines, she pointed out that Spain, the United Kingdom, Sweden and Germany had all dismissed any war crimes allegations against the IDF over the incident. Some of the countries dismissed the allegations on the basis of recognizing Israel’s justice system as legitimate and as having properly probed the issue.

Next, the ICC Pretrial Chamber had previously ordered Bensouda to act as if IDF forces had started shooting before they boarded the Mavi Marmara – even though this claim was strongly disputed.

Bensouda said that even if the claim were true, the IDF had tried to take control of the Mavi Marmara by surprise in order to avoid an altercation, and that it tried to use other nonlethal means to avoid injuring passengers.

Moreover, the ICC Prosecution wrote that only one of the 10 people who died might have been killed in the initial shooting.

Even after the altercation, the ICC Prosecution said, the IDF tried to provide swift medical attention to passengers who had been hurt.

This narrative made it sound as if Bensouda viewed many, even if not all, of the IDF’s actions in a positive light, and that it was a military that cared about the rule of law.

Bensouda distinguished between broad allegations made by passengers that they were uncomfortable and slightly roughed up, versus very limited allegations of actual possible inhuman treatment.

This was notable, as often, critics of Israel simply lump any uncomfortable treatment by Israel of arrested persons as full-fledged “torture.”

Even more surprising were the ICC Prosecution’s comments made directly against the Palestinian-Comoros Island’s position.

While Israel’s critics portrayed the Mavi Marmara passengers as having practically the status of UN peacekeepers, Bensouda declared their aim to be political.

She also dismissed any attempt by the ICC Pretrial Chamber to view Israel’s blockade of Gaza as part of the war crimes’ scenario, saying that analyzing this issue was inherently subjective.

Despite the ruling, a major question still remains as to what the ICC Pretrial Chamber will decide concerning the war crimes allegations in the 2014 Gaza war and Israel’s settlement building enterprise.