[How to Gut the Principles of Law in One Easy Verdict](https://www.commentarymagazine.com/2015/07/20/international-criminal-court-activism/)

July 20, 2015

By Evelyn Gordon

Commentary Magazine

<https://www.commentarymagazine.com/2015/07/20/international-criminal-court-activism/>

Any legal case has two main components – the facts and the law. In my [last post](https://www.commentarymagazine.com/2015/07/17/the-icc-channels-the-queen-of-hearts-on-israel/), I analyzed the International Criminal Court’s disregard of salient facts in its [ruling](http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf) on Thursday overturning the chief prosecutor’s decision not to investigate Israel’s botched raid on a 2010 flotilla to Gaza. But the ruling was equally contemptuous of several fundamental legal principles.

The first of these is that judicial decisions should be dictated by law, not politics. The majority judges threw this principle out the window when they asserted that whether the alleged crime was sufficiently grave to merit ICC attention should depend not on what actually happened, but on the amount of “attention and concern that these events attracted” from the international community, as reflected in “several fact-finding efforts on behalf of States and the United Nations.” In other words, the ICC’s choice of cases will depend not on their objective legal merits, but on how many resolutions the dictators who dominate the U.N. Human Rights Council decide to devote to it.

As legal scholar Eugene Kontorovich aptly [noted](https://twitter.com/evkontorovich), the ICC is thereby “saying ‘drop dead’ to victims U.N. not interested in,” which is a travesty in and of itself: It means the court will spend its scarce resources investigating 10 people killed while attacking soldiers intercepting a blockade-busting flotilla, but ignore – to cite just one example – the tens of thousands of Syrian civilians killed by their own government’s barrel bombs.

No less appalling, however, is that this is a standard of justice used only in the most benighted regimes: Prosecutions will be based on neither facts nor law, but solely on whether they serve the interests of the politicians in power.

The second fundamental legal principle the decision guts is that the same person shouldn’t be prosecutor, judge and jury. Since a prosecutor is obviously invested in his own case, he cannot be an impartial judge.

But the ICC judges, sitting as a “pre-trial chamber,” decided to actively force the prosecutor to pursue an investigation she considered unjustified (technically, they only ordered her to “reconsider” her decision, but in practice, that order leaves her little choice). Thus the court is no longer an impartial arbiter between prosecution and defense; it is now actively invested in the success of the case.

This blurring of boundaries is justifiable only in extraordinary circumstances. That is why, as Judge Peter Kovacs noted in his [dissent](http://www.icc-cpi.int/iccdocs/doc/doc2015870.pdf), “the Pre-Trial Chamber’s role is merely to make sure that the Prosecutor has not abused her discretion” – or at least, it ought to be. Instead, the majority decided to leave her no discretion at all.

Finally, the court ignored the law itself. As Kovacs also noted in his dissent, customary international law explicitly allows countries to enforce a lawful blockade, including by force if necessary. The blockade of Gaza is legal according to one of the very U.N. fact-finding committees the majority cited in its decision. And force was necessary in this case, since the ship refused repeated orders to halt and then attacked the Israeli boarding party with “fists, knives, chains, wooden clubs, iron rods, and slingshots with metal and glass projectiles.” Thus the casualties “were apparently incidental to lawful action taken in conjunction with protection of the blockade,” and as such, it’s likely that “most if not all of those acts will not qualify as war crimes.”

Yet the majority judges’ opinion doesn’t even mention the laws of blockade much less discuss their application to this case. Evidently, they consider customary international law irrelevant to their decisions.

In my earlier post, I compared the majority ruling to something out of Alice in Wonderland. And in fact, the three elements cited above are precisely the elements that make the Queen of Hearts’ courtroom so arbitrary: The law is irrelevant; judgment depends solely on the whim of the rulers; and the same person is prosecutor, judge and jury.

But the Queen of Hearts is actually preferable, because at least she’s honest about the arbitrary nature of her decisions: “Sentence first – verdict afterwards.” The ICC maintains an expensive taxpayer-funded legal bureaucracy in an effort to disguise it.