



MIDDLE EAST INSIGHTS

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THE INTERNATIONAL CRIMINAL COURT ON THE GAZA FREEDOM FLOTILLA

BY VICTOR KATTAN

In the early hours of the morning on the 31 May 2010, Israeli Special Forces stormed a flotilla of ships sailing on the high seas towards the Gaza Strip. The “Gaza Freedom Flotilla” was attempting to break Israel’s maritime blockade and provide food and medical supplies to the residents of the besieged, impoverished, and overcrowded strip of land that has been occupied by Israel since 1967. The Turkish organizers of the flotilla also wanted to draw international attention to the plight of Gaza’s residents struggling to rebuild their shattered homes, schools, and hospitals, following Israel’s 22-day conflict with Hamas—during Operation Cast Lead—that began in December 2008. Although Israel succeeded with its primary aim of halting the flotilla, in the process its Special Forces shot and killed ten Turkish nationals, including a man with dual US citizenship, onboard the MV *Mavi Marmara*, the largest ship in the flotilla.

The international community was outraged. Newspaper columnists that usually support Israel warned Israel’s government that they would no longer be able to support Israel if its military behaved in such a fashion in the future.¹ The new Likud Government in Israel was nervous. Prime Minister Netanyahu did not want another UN Mission accusing Israel’s armed forces of committing war crimes in connection with Gaza after the publication in the previous year of the report of the UN Fact-Finding Mission chaired by Justice Richard Goldstone.² President Obama was giving Netanyahu a hard time because of his government’s expansion of illegal settlements on Palestinian land that was jeopardizing peace talks with the Palestinians, and Israel’s relations with Turkey, once a close ally, deteriorated after Turkey’s Prime Minister Tayyip Erdoğan stormed off the stage at the World Economic Forum in Davos during a debate on the conflict with Israel’s President Shimon Peres.³

Israel had learned the lessons following the criticisms levelled against it after the publication of the Goldstone Report: it is better to appoint your own commission of inquiry rather than wait for the UN to pick one. And so Israel established The Public Commission to Examine the Maritime Incident of 31 May 2010 otherwise known as “The Turkel Commission”.⁴ Turkey followed suit with the Turkish National Commission of Inquiry, as did the UN Human Rights Council with another Fact-Finding Mission.⁵ The UN Secretary-General’s set up its own Panel of Inquiry.⁶ The findings of these commissions of inquiries were to play an important role in the preliminary examination undertaken by Office of the Prosecutor of the International Criminal Court (ICC) in its report into the events that took place onboard the *Mavi Marmara* after the tiny Indian Ocean island state of the Comoros referred the matter to the court in 2013.⁷ Although neither Israel nor Turkey are parties to the Rome Statute, the ICC can exercise its jurisdiction over Israeli citizens if they are suspected of having committed crimes onboard a vessel that has been registered with a state party.⁸ The *Mavi Marmara*, formerly owned and

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operated by a Turkish company, is a Comoros-flagged passenger ship. The Comoros ratified the Rome Statute in 2006.

In November 2014, the Office of the Prosecutor published the report of its 61-page preliminary examination.⁹ The Prosecutor's office explained that although there was a reasonable basis to believe that war crimes had been committed by Israel onboard the *Mavi Marmara*, there was not a reasonable basis to proceed with an investigation because the deaths of ten Turkish nationals were not of sufficient gravity to justify further action by the Court.¹⁰ The gravity test was added to the draft of the Rome Statute in 1994 to prevent the court from being "swamped" with "peripheral complaints" which remained unchanged when the Rome Statute was adopted at the diplomatic conference in 1998.¹¹ The report explained that because the Office of the Prosecutor does not enjoy investigative powers it was unable to collect evidence itself, and therefore its preliminary investigation could be reopened by the Comoros in the light of new facts or evidence. This means that no further action will be taken by the Office of the Prosecutor to reopen its investigation unless the Comoros appeals the decision in light of new facts or evidence. It is difficult to see how the Comoros will be able to produce new facts or evidence to satisfy the gravity test as they are not going to be able to produce any more dead bodies beyond the ten dead Turks.

The Office of the Prosecutor went into extraordinary details to explain why it could not proceed with an investigation into the events that occurred onboard the *Mavi Marmara*, which is unusual since all it did was conclude that the deaths were not sufficiently grave to warrant further action by the court. It has been suggested that the court felt compelled to provide a detailed report due to the criticisms that were leveled against it when the Prosecutor's Office refused to open an investigation into British war crimes in Iraq.¹² The court may have also felt it necessary to justify itself in this instance because it has been heavily criticized for its failure to open an investigation into the events that took place in the Gaza Strip after Palestine's Minister of Justice attempted to confer jurisdiction on the court in January 2009.¹³ This attempt was dismissed by the Office of the Prosecutor in April 2012.¹⁴ The report also came on the heels of Operation Protective Edge when another attempt was made to confer jurisdiction on the court during which the Prosecutor was criticized for giving into political pressure, an allegation she refuted in *The Guardian*.¹⁵

In its report, the Office of the Prosecutor relied to a great extent on the findings of fact made by the commissions of inquiry from the UN, Israel, and Turkey in their respective reports. The report produced by Israel's Turkel Commission was referenced 79 times in the Prosecutor's report, which is almost double the number of references in the report for Turkey's Commission of Inquiry at 39 references. The UN Human Rights Council's report garnered only 50 references, whereas the UN Secretary-General's Panel of Inquiry, which controversially included as Vice-Chair Álvaro Uribe, the former President of Colombia, whose government was accused of severe human rights violations when he was in power, garnered 64 references.¹⁶ In other words, the Prosecutor's Office relied to a greater extent on the reports produced by Israel and the President of Columbia, an Israeli ally, who was close to the Bush administration, than it did on the reports produced by the UN Human Rights Council and Turkey. In addition, the report of the Office of the Prosecutor relied on Western media reports referencing *The New York Times* and *Congressional Research* twice, and *The Times of Israel*, *CNN*, *The LA Times*, and *Al Jazeera* once. Not a single Arabic, Hebrew, or Turkish news report or website is referenced in the report.

The report of the Office of the Prosecutor is illuminating not only for the sources it used to support its findings, but also for the way it reached its conclusions. The Office of the Prosecutor appears to have been swayed by the findings in the Turkel report that the Gaza Freedom Flotilla was not a humanitarian mission. It is true that the Office of the Prosecutor did

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not agree with the Turkel Commission that a “hardcore” group of activists linked to IHH, a Turkish NGO based in Istanbul, directly participated in the violence against Israel’s Special Forces – which in the opinion of the Turkel Commission – made them legitimate targets for attack.¹⁷ In the opinion of the Office of the Prosecutor, the participants in the Gaza Freedom Flotilla were civilians and therefore protected persons under international law who did not seek a fight with Israel’s Special Forces but instead wanted to generate publicity about the serious humanitarian situation in Gaza and to protest the blockade.¹⁸ Nevertheless, the Office of the Prosecutor did not believe that Israel’s Special Forces intentionally sought to attack the vessel in the knowledge that such an attack would cause incidental loss of life or injury to civilians—even though they were sent in response to a prior altercation with activists on the vessel.¹⁹ The Office of the Prosecutor explained that the flotilla did not fall within the humanitarian assistance paradigm in the Rome Statute “due to its apparent lack of neutrality and impartiality as evidenced in the flotilla’s explicit and primary political objectives”.²⁰ The reason why the Prosecutor did not believe that the Freedom Flotilla was a humanitarian mission was because it did not obtain Israel’s consent to send the goods to Gaza (which would not have been given prior to the incident onboard the *Mavi Marmara*) and refused to cooperate with Israel in sending the goods to Gaza via Ashdod.

Despite the Office of the Prosecutor’s decision to close its examination, it has been suggested that Palestine should nonetheless press ahead and accede to the Rome Statute.²¹ Indeed, the Office of the Prosecutor seemed to suggest in its report that its analysis may have been different had Palestine been a party to the Rome Statute.²² Apart from the fact that the Office of the Prosecutor rejected Palestine’s first attempt to confer jurisdiction on the court in January 2009, Palestine should be wary of immediately acceding to the Rome Statute.²³ There is little doubt that war crimes and crimes against humanity have been committed in the Gaza Strip by both Israel and Hamas, which should be investigated by the ICC. Nonetheless, there will be economic and political consequences should Palestine press ahead with accession. On the plus side, the Office of the Prosecutor concluded that the Gaza Strip remains occupied territory under international law.²⁴ Also, the Prosecutor would not be able to rely on the gravity test to dismiss Palestine’s application in its preliminary examination were Palestine to confer jurisdiction on the court for Israel’s attack in the Gaza Strip over the summer. On the negative side, it took the Prosecutor’s Office 18 months to produce its preliminary findings in which it relied to a great extent on Israeli and American sources of authority, and the Prosecutor was also unable to make a finding with regard to the legality of Israel’s seven year maritime blockade of Gaza.²⁵ Israel could also argue that it is investigating the conduct of its soldiers with a view to prosecuting them to prevent the ICC from proceeding with an investigation.

The problem with the ICC is that it is difficult to see how it can contribute to a lasting peace between Israel and the Palestinians. Now that the United States Congress has become involved with threats to withdraw aid to the Palestinian Authority and UNRWA, President Abbas needs to be very careful how he makes his next move. This is especially so when one takes into account the slow pace at which the ICC operates. It took the Office of the Prosecutor three years to declare that Palestine’s attempt to confer jurisdiction on the court in 2009 was not valid and 18 months to produce its preliminary examination into the deaths of ten Turkish nationals. We must expect that the Prosecutor’s Office would take much longer to produce its preliminary examination into the deaths of over 2,000 people, on the assumption that Palestine attempts to confer retroactive jurisdiction on the court. Assuming that the UN Security Council does not step in to stop the Prosecutor from proceeding with her investigation, which it is entitled to do under the Rome Statute, Israel could also delay things because it is not under any obligation to cooperate with the court. This would give Israel and its supporters in the United States plenty of

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time to plot their next moves, while the Palestinian Authority teeters on the brink of bankruptcy, if not outright collapse, due to American and Israeli sanctions.

Victor Kattan, Post Doctoral Fellow, Faculty of Law, National University of Singapore. Most recently, Dr. Kattan was a legal adviser to the Government of Palestine in Ramallah on secondment from the United Nations Development Program (UNDP). Before this, he taught international law to Masters students at the Centre for International Studies and Diplomacy at SOAS (University of London). He has worked as a consultant with DfID, FCO, and UNDP, and has done assignments for the Jordanian, Palestinian, and South African Governments. Dr. Kattan is the author of *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (London: Pluto Press, 2009) and is the editor of *The Palestine Question in International Law* (London: The British Institute of International and Comparative Law, 2008).

¹ See e.g. Max Hastings, “It is Israel’s tragedy that too many of its people now believe permanent war is better than peace”, *The Daily Mail*, 2 June 2010 at <http://www.dailymail.co.uk/debate/article-1283292/GAZA-AID-FLOTILLA-RAID-Israels-people-believe-war-better-peace.html#ixzz3KKvjxtWV>. See also, Max Hastings, “I’ve always loved Israel but this brutality breaks my heart”, *The Daily Mail*, 24 July 2014 at <http://www.dailymail.co.uk/debate/article-2703531/MAX-HASTINGS-Ive-loved-Israel-brutality-breaks-heart.html#ixzz3KKw6aLyO>

² See Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 September 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

³ See Ian Traynor, “Gaza flotilla raid draws furious response from Turkey’s prime minister”, *The Guardian*, 1 June 2010, <http://www.theguardian.com/world/2010/jun/01/gaza-flotilla-raid-turkey-prime-minister-israel>

⁴ You can find the report of The Public Commission to Examine the Maritime Incident of 31 May 2010 on its website at <http://www.turkel-committee.gov.il/index-eng.html>

⁵ The Turkish Report is available on the website of its Ministry for Foreign Affairs: <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>. The UN Human Rights Council’s Fact-Finding Mission is available here: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf

⁶ See http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

⁷ The text of the referral can be found on the ICC’s website: <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>

⁸ See Article 12(2)(a) Rome Statute 1998.

⁹ Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, [http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)

¹⁰ *Ibid.*, Executive Summary, p. 3 at para. 3.

¹¹ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2011), p. 200.

¹² See Kevin Jon Heller, “Thoughts on the Baffling Comoros Declination”, *Opinio Juris*, 18 November 2014.

¹³ For a copy of the original letter see <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

¹⁴ See Update on the Situation in Palestine, 3 April 2012, <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

¹⁵ “Fatou Bensouda: The truth about the ICC and Gaza”, *The Guardian*, 29 August 2014, <http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>

¹⁶ See “Uribe’s appointment to flotilla probe guarantees its failure” by

José Antonio Gutiérrez and David Landy, *Electronic Intifada*, 6 August 2010, <http://electronicintifada.net/content/uribes-appointment-flotilla-probe-guarantees-its-failure/8968>

¹⁷ See Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, *supra* n. 9 at p. 25-26, para 45.

¹⁸ *Ibid*, pp. 27-28, paras. 50-53.

¹⁹ *Ibid*, p. 47, para. 110.

²⁰ *Ibid*, p. 52, paras. 125.

²¹ Michael Kearney, “Guest Post: Initial Thoughts on the ICC Prosecutor’s Mavi Marmara Report”, *Opinio Juris*, 8 November 2014, at <http://opiniojuris.org/2014/11/08/guest-post-initial-thoughts-icc-prosecutors-mavi-marmara-report/>

²² See Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, *supra* n. 9 at p. 55, para. 137.

²³ See Victor Kattan, “The Implications of Joining the ICC after Operation Protective Edge”, *The Journal of Palestine Studies*, forthcoming. See also, Victor Kattan, “Palestinian options at the United Nations and the International Court of Justice”, *European Council for Foreign Relations*, 23 October 2014, and Victor Kattan and Michael Kearney, “Palestine’s statehood options: a dialogue”, *Opendemocracy*, 6 November 2014.

²⁴ See Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, *supra* n. 9 at pp. 16-18, paras. 25-29.

²⁵ *Ibid*, pp. 18-20, paras. 30-35.