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International Efforts to Delegitimize Israel: Comoros versus Israel at the ICC

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In late November 2013 Israel and the EU reached a last minute compromise enabling Israel to join the EU's research and development program, Horizon 2020. Nonetheless, the EU guidelines adopted earlier this year relating to the settlements in the West Bank will likely continue to jeopardize Israel's international economic interests. According to the guidelines, projects carried out in Israeli settlements beyond the Green Line will not be eligible for EU grants, and organizations that operate beyond that line will not be eligible for EU loans and financial assistance.

Other developments on the international legitimacy front pose related threats to Israel's international standing. One concerns the Palestinian Authority, which recently revisited the intention of prosecution against Israel before the International Criminal Court (ICC). Indeed, the EU has encouraged the Palestinian Authority to join the ICC should Israel pursue its settlement policy.

On a different matter, nearly three years after the Israeli takeover of the ship *Mavi Marmara*, the Comoros Islands, a small African archipelago near Madagascar, filed a complaint against Israel with the ICC. Comoros, where the ship was registered, is a tiny 2000 square km United Nations member with a population of less than one million. As a signatory of the ICC it has the formal standing to bring such a claim.

The incident is now under preliminary examination to determine if the alleged crimes are serious enough for court intervention. This, despite the fact that the UN Palmer report acknowledged the legality of the Gaza blockade and recognized that Israeli combatants were responding to an initial attack by the passengers.

The Office of the Prosecutor (OTP) reported recently that the examination is currently in phase 2 – analysis. In fact, very few preliminary examinations actually lead to a full investigation, much less an actual trial or realistic possibility of conviction. The OTP is currently conducting preliminary examinations in eight situations only out of more than 550 submissions in the last year: four (including the Comoros file) on subject-matter

jurisdiction, and four on admissibility. Such proceedings should raise concern in Israel, however, in light of the Palestinian plea for membership in the United Nations and its expressed intention to apply to international tribunals and subsequently file claims against Israel and Israelis.

Although riddled with imperfections and often facing harsh criticism on issues such as its questionable legitimacy and insufficient means of enforceability, the International Criminal Court is a worldwide, easily recognizable establishment. Even if it is not universally acknowledged as the world's primary criminal court, the ICC has commanded the attention of many major media outlets, often indirectly dictating which stories receive international attention. Although the ICC claims to be an unbiased judicial entity, the practical consequences of the court are visibly political. Thus even cases that are not selected for trial receive a considerable amount of international media attention.

The ICC has 122 signatories, but many countries are hesitant to acknowledge the court's authority. For various reasons (including the United States standpoint that the ICC violates international law by imposing obligations without consent), it has failed to gain support of countries such as the United States, Russia, and China. Therefore, the ICC lacks influence in its ability to make a meaningful impact and legitimately enforce its convictions.

Israel is not a signatory of the act whereby the ICC was established according to the Rome Statute. Nevertheless, theoretically it can be brought under ICC jurisdiction in one of three ways: if the prosecutor receives a referral by the UN Security Council, if the crime was committed in the territory of a signatory, or (however unlikely) if Israel consents to being subject to the court's jurisdiction. Turkish lawyers representing Comoros claim that under Article 12 of the Rome Statute, which states that territorial jurisdiction is established if the crime took place on a signatory's vessel, Comoros has a legitimate claim in bringing Israel under the court's jurisdiction.

Realistically, the case in question is not likely to invoke further ICC intervention. The court was established with the idea of complementing national jurisdiction, not replacing it with international law. Thus, the ICC generally does not intervene when a country has the capability of conducting an independent, objective investigation. Moreover, the jurisdiction of the Court is questionable *prima facie* because the incident has already been the subject of multiple credible investigations. A thorough analysis of the incident was sponsored by Israel promptly after the event occurred through the Turkel Commission. Investigators found that any mistakes that were made were not criminal and certainly did not warrant further international probing.

Furthermore, this case would not likely proceed to trial due to the nature of the incident. The ICC was created with the intent of prosecuting truly heinous crimes, such as

genocide and torture, generally committed in a systematic manner over an extended period of time. The court was not meant for small scale, isolated events, let alone cases of self defense or a justifiable blockade. In determining what crimes warrant prosecution, the ICC uses a "gravity threshold," meaning the alleged crimes must have widespread and substantially grave consequences. Generally the court will examine the scale, nature, manner of commission, and impact of the crimes. In comparison to the treacherous acts in former ICC prosecutions, the events surrounding the *Marmara* are considerably mild.

Therefore, in acknowledging both the jurisdictional issues of the case and the obvious likelihood of inadmissibility due to the nature of the alleged crimes, one questions the motives in bringing a claim that is so clearly incompatible with past patterns of the court. Moreover, if the ICC eventually takes up the matter, it is bound to examine a situation as a whole and must consider all actions by any party in order to make its decision whom to prosecute and for which crimes: Palestinians and especially Hamas may well be also prosecuted. Hence the question: is this complaint brought as a legitimate means of seeking justice, or is the ICC being used – and not for the first time – as a political tool to invoke a media response?

In a world where international image carries immense weight, being in the worldwide spotlight due to alleged war crimes has the potential for bringing considerably grave impacts on the accused and, in Israel's case, further nurture the de-legitimization campaign against it – even if there is no substance to a claim. Moreover, it is particularly problematic that any signatory, without consequence or accountability, can easily bring accusations against citizens of any state, even one that has not consented to the jurisdiction of the ICC.

The claim regarding the *Marmara* incident is evidence that the ICC has the potential for dangerous manipulation. When countries can so easily mask political intent as a judicial claim, the court is more likely to be used as a tool for strategic media exposure, as opposed to its stated purpose as a mechanism to seek international justice.

There is temporary relief in the last minute understanding reached between the EU and Israel regarding Horizon 2020, and in negligible prospects for the Comoros ICC claim against Israel. However, Israel operates in an increasingly complicated and delicate environment, which demands constant sensitivity and accommodation to the numerous facets of the international arena.