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**The Decision on the Gaza Flotilla by the ICC Prosecutor:
A Warning for the Future**

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On November 6, 2014, the prosecutor of the International Criminal Court (ICC) issued a report determining that there will be no investigation against Israel regarding the *Mavi Marmara* incident, which took place in late May 2010. This decision came at the end of a preliminary examination carried out in response to a complaint submitted in May 2013 by the Union of the Comoros, where the *Mavi Marmara* was registered and whose flag it was flying at the time of the incident. The complaint, which asked that a criminal investigation be opened against IDF soldiers for perpetrating war crimes and crimes against humanity against the flotilla ships and their passengers, was actually submitted by a Turkish law firm. Unlike Israel and Turkey, the Comoros is a party to the Statute of the Court.

The flotilla incident has been reviewed and investigated by four different commissions of inquiry: the Hudson-Phillips Commission, appointed by the UN Human Rights Council; the Palmer Committee, appointed by the UN secretary general; a Turkish commission of inquiry; and Israel's Turkel Commission. The prosecutor's report is based largely on the reports of these commissions. The report states clearly that since the prosecutor's office lacks investigative powers at the preliminary investigation stage, the analysis is based on available information and is not the result of an investigation.

Legal Analysis

Before analyzing the events on their merits, the report addresses a number of aspects of the legal background relevant to an examination of the incident:

Gaza as an occupied territory: The report states that there is reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement. This is in keeping with the prevalent view within the international community and application of the "effective control" test, which is based on the level of control Israel has retained in Gaza, which includes, inter alia, land and sea borders, airspace, and the ability to infiltrate the Gaza Strip for military operations.

Classification of the conflict: According to the report, since the conflict between Israel and Hamas is not a conflict between states, it therefore may be considered a “non-international armed conflict.” On the other hand, in light of the determination that Gaza is occupied territory, the laws of international armed conflict, which apply in any situation of occupation, are applicable. The report emphasizes that most of the analysis concerning war crimes conducted in the report is valid for both types of conflicts, and thus there is no need to reach a definitive conclusion on classification of the conflict.

Legality of the naval blockade: The report does not reach a decision on this question, on which the different commissions of inquiry have differences of opinion, because according to the report, the legality of the naval blockade is relevant to only one of the alleged crimes (the crime of intentionally directing an attack against civilian objects, that is, the takeover of the *Mavi Marmara*) and does not impact on the assessment of the other war crimes examined.

Substantive Crimes

Claims that were accepted: The report states that there is a reasonable basis to believe that war crimes were committed by IDF soldiers, specifically, the willful killing and injuring of protected civilians. The claim accepted by the Turkel Commission, that the violent IHH activists should be seen as civilians taking direct part in hostilities, and therefore, as a legitimate military target for attack, was rejected. According to the report, all passengers on the ship, including these activists, are considered protected civilians and thus may not be attacked. The report notes that the use of force against violent civilians endangering the soldiers’ lives can be perhaps justified by self-defense. However, it determined that this must be examined in the investigation and trial stages and not at the stage of preliminary examination. The report also states that according to the information available, at least in some instances, IDF soldiers appear to have used excessive force that went beyond what was required for self-defense. In addition, the report states that there is a reasonable basis to believe that IDF soldiers perpetrated war crimes against the detainees on the *Mavi Marmara*, by committing “outrages upon personal dignity.” It also notes that if Israel’s naval blockade of Gaza was unlawful (as mentioned, the report is not definitive on this issue), then the war crime of intentionally directing an attack against civilian objects would also be added.

Claims that were rejected: The report rejects a significant number of other allegations made against IDF soldiers. These include willful infliction of suffering; inhuman treatment; unjustified extensive destruction of property; intentional attacks on protected civilians; intentional attacks with the knowledge that this would cause excessive “incidental loss of life or injury” to civilians; and deliberate attacks on people or objects involved in a humanitarian aid mission. (The report states that the Gaza flotilla did not involve humanitarian aid because of the organizers’ lack of neutrality and impartiality

and the primary political objectives that were the basis of the flotilla.) The prosecutor also rejected the serious allegation of crimes against humanity.

Admissibility

Since the report determined that there is a reasonable basis for assuming that war crimes were committed, it was then required to examine whether they meet the admissibility thresholds established in the Statute of the Court for determining that the court may hear the case: the gravity requirement and the complementarity requirement. The report concludes that the crimes allegedly carried out on the *Mavi Marmara* do not reach the required gravity threshold in terms of their scope, their nature, and their impact. This is particularly true given the demand in the Statute of the Court that war crimes be part of a plan or policy or carried out on a large scale. The report states that the gravity requirement has not been fulfilled, since the complaint addresses only the limited incident of the flotilla, in which ten people were killed, and the court lacks the jurisdiction to hear cases involving other crimes allegedly carried out as part of the Israeli-Palestinian conflict.

Since the gravity threshold was not met, the prosecutor had no need to consider the issue of complementarity, that is, to examine whether there were Israeli or other inquiries that were genuine and effective.

Ramifications

1. From the analysis in the report, which states that there is a basis for investigating commission of war crimes even in a situation where there was a violent clash endangering soldiers' lives, we can conclude that in high intensity operations, IDF actions might also be considered as allegedly falling within the war crimes listed in the Statute of the Court, at least in a way that justifies opening a criminal investigation.
2. If "Palestine" becomes a party to the Statute of the Court or gives the court ad hoc authority to hear cases involving events that took place on its territory, one can assume on the basis of the report that given the scope of Israeli military operations, the threshold requirement of gravity will be considered to have been met. In practice, the issue of complementarity would then become the last barrier to open investigative proceedings in the court.
3. In light of the report's position that Gaza is "occupied territory," it can be assumed that this will be the prosecution's starting point in the future as well. This means the application of additional legal norms (the laws of occupation, which impose obligations toward the civilian population in the Gaza Strip, and human rights law), beyond the requirements of the laws of armed conflict.
4. The court's extensive reliance on the findings of the various commissions of inquiry of both parties to the conflict as a basis for determining the facts illustrates the importance of these commissions.

Recommendations

1. It is important to reinforce Israel's potential argument of complementarity by conducting internal investigations that are independent, thorough, swift, and transparent, and conform to international standards. It is also worth considering the establishment of a commission of inquiry to examine overall policy on the senior political and military levels, in order to counter potential allegations regarding Israeli policy on the use of force.
2. It is very important to publish reports and documents on behalf of the State of Israel that detail the facts and present the Israeli position regarding the events of the fighting. It is important to declassify as much intelligence as possible and provide visual material and testimony by soldiers who were on the field in order to provide a complete picture of the battle, instead of focusing only on the incidents on which complaints have been submitted and individual investigations opened. These reports will ultimately form part of the background the prosecutor and the court will refer to in making a decision on initiating criminal proceedings.
3. In light of the great weight given to the findings of international commissions of inquiry, it is important to examine cooperation with external international commissions of inquiry, even when they are biased by their nature, such as the Schabas Commission appointed by the UN Human Rights Council to investigate Operation protective Edge. Cooperation might lead to less decisive findings against Israel and then perhaps to a less damaging report, which could make it somewhat easier to deal with future proceedings. Commissions generally include some people who are less biased and who can perhaps exert their influence from within. Moreover, cooperating in and of itself does not imply acceptance of the justification, fairness, or professionalism of the commission of inquiry.

