

*INSS Insight* No. 999, December 17, 2017

**The ICC: The Flotilla Case is Closed, Settlements and Operation  
Protective Edge Remain under Examination**

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More than seven years after the Gaza flotilla incident, it appears that the legal handling of the matter by the International Criminal Court (ICC) has come to an end. On November 30, 2017, Court Prosecutor Fatou Bensouda submitted her final decision to the Pre-Trial Chamber and confirmed her decision of 2014 not to open an investigation against Israel with respect to the “flotilla incident.” The decision was made after a preliminary examination conducted by the prosecutor following a request by the Union of the Comoros, where the Mavi Marmara was registered, to open a criminal investigation against IDF soldiers for war crimes and crimes against humanity against those on board the flotilla ships. Following the earlier decision, a Pre-Trial Chamber of the Court accepted the request by the Comoros, and asked the prosecutor to reconsider her ruling. The prosecutor’s appeal of this ruling was dismissed by the Appeals Chamber in November 2015, which ruled that the matter would be returned to the prosecutor for reconsideration. This reconsideration led to the prosecutor’s current decision that there are no grounds for changing the original decision not to open an investigation in this matter.

In her current decision, the prosecutor repeated her earlier conclusion that there is a reasonable basis for believing that war crimes were committed by IDF soldiers in the incident, but that the gravity requirement in the Court statute was not met. There is therefore no reasonable basis for opening an investigation.

More specifically, the prosecutor explained that the request by the Court panel for reconsideration of the decision was based on an incorrect analysis of the factors considered regarding the gravity of the crimes – their extent, their effect on direct and indirect victims, their nature, and how they were committed. Ten people were killed in the flotilla incident. Although an investigation can be justified even in cases in which the number of casualties is small, this is when circumstances exist in which the effect goes beyond the harm to the victims themselves, such as an attack against humanitarian personnel or peacekeeping forces, which is liable to impact negatively on additional circles. As for the nature of the deeds, the prosecutor emphasized that the examination is based on the type of alleged violation, but according to the facts of the case. Therefore, even if there was suspicion of a grave violation, torture, or inhuman actions, this does not

denote that the case is grave by definition; it is necessary to consider the facts of the event. As for how crimes were committed, the prosecutor argued that the Court ignored the context of the violent opposition encountered by IDF soldiers when they came up on the deck of the Mavi Marmara – a fact that is not in dispute, and which was of much weight in determining that there was no reasonable basis for believing that the crimes were committed as part of a deliberate plan or policy by Israel. At the same time, the prosecutor emphasized that the violent opposition did not deny the conclusion that there was a reasonable basis for believing that crimes had been committed, such as deliberate killing of civilians by a number of soldiers.

The prosecutor's decision not to accept the broad interpretation of the Pre-Trial Chamber of the gravity requirement prevented the gravity requirement of being stripped of meaning, which would have distorted the Court's role in dealing with "most serious offenses of international concern." Adhering to this purpose is important for the court's legitimacy among its member states and their cooperation with it.

Together with this success, Israel faces a greater challenge from the Court – dealing with the preliminary examination taking place about the situation in "Palestine." This includes an assessment of war crimes allegedly committed by Israelis starting in June 2014 in the Gaza Strip, the West Bank, and East Jerusalem. If this examination results in an investigation, it will be far more comprehensive and broader in scope of time, area, and the acts it encompasses.

According to the annual report published by the prosecutor on December 4, 2017, the preliminary examination concerning Israel in the past year focused on the West Bank and East Jerusalem, mainly on activity relating to the settlements. According to the report, this activity included, inter alia, planning and authorization of settlement expansions, construction in settlements, regularization of illegal outposts, confiscation of land, and provision of funding, incentives, and economic assistance to encourage settlements. The security cabinet's decision to establish a new settlement for the first time in decades (for those settlers evacuated from Amona); the substantial number of confiscations and/or demolition of Palestinian homes and buildings leading to the displacement of many Palestinians; and the advancement of plans for moving Bedouin communities from their location were cited specifically. The current report does not include two types of crimes mentioned in the previous report: improper treatment of arrested, imprisoned, and prosecuted Palestinians, and illegal killing and the use of excessive force against Palestinians by Israel security forces. On the other hand, the report states that the prosecutor has received information regarding the purported establishment of an institutionalized regime of systematic discrimination that allegedly deprives Palestinians of a number of their fundamental human rights. This wording is alarming, because it

includes some of the elements appearing in the clause defining the crime of “apartheid” in the Statute establishing the court.

In the Gaza Strip, the examination is assessing suspicions of crimes committed in the framework of Operation Protective Edge in 2014. The report makes it clear in this context that all the parties in the conflict are alleged to have committed crimes in the framework of the hostilities. It has been alleged that the IDF directed attacks affecting civilians and civilian objects, including attacks on residential buildings and medical facilities and personnel. In addition, it has been alleged that Palestinian armed groups fired rockets against Israel, used civilians as human shields, and executed those accused of collaborating with Israel.

Among the actions taken over the past year, the report cites a meeting with senior Palestinian government representatives and monthly reports from the Palestinian government about alleged ongoing crimes. It also states that the prosecutor’s office will examine information about the relevant state proceedings taken. This examination is related to determining whether the country has conducted a genuine investigation that under the complementarity principle renders the Court’s intervention unnecessary. It is also made clear that alleged crimes committed in the future are likely to be added to the prosecutor’s examination.

The current report, in contrast to the earlier annual reports, refers for the first time to the Court’s subject matter jurisdiction with respect to the crimes being examined, and notes that the examination raises factual and legal challenges. It specifically refers to the legal complexity. The prosecutor describes Israel’s position that the West Bank is “disputed territory,” not occupied territory, and that the Geneva Convention does not legally apply to it. On the other hand, the prosecutor cites the position of most international agencies, including the International Court of Justice (ICJ) and the UN Security Council and General Assembly, which have decided many times that the West Bank, including East Jerusalem, has been occupied since 1967. Most recently, Security Council Resolution 2334 in December 2016 repeated this position and condemned the settlements. With respect to Operation Protective Edge in the Gaza Strip, the prosecutor cites the legal dispute about the classification of the conflict as an international armed conflict or a non-international armed conflict – this classification has consequences for the incidence of the provisions dealing with certain crimes, which apply only to a conflict classified as international.

The presentation of the legal complexity of the situation by the prosecutor hints that she plans to conduct an independent examination that will weigh all positions and will not exclusively rely on the findings of other international agencies. She has also signaled that

the assessment concerning the subject matter jurisdiction is likely to take time. According to the procedures of the Prosecutor's Office, only after completing the phase of assessing jurisdiction will the office advance to an examination of the admissibility of the case, including the two requirements previously mentioned: complementarity and gravity. While gravity constituted a barrier to opening a criminal investigation in the flotilla event, in the current preliminary examination, which includes large scale events, it does not appear that an argument that they fall below the required gravity threshold will be accepted. On the issues involved in Operation Protective Edge, Israel's chances of avoiding a criminal investigation are focused on the question of whether the foundations for crimes stated in the Statute exist, since Israel's position is that it acted in compliance with international law. In addition, the complementarity requirement might prevent the opening of an investigation, although a condition for this is that it will be found that Israel genuinely investigated suspicions that crimes were committed in the context of these events. On the issue of the settlements, there is no possibility of using the complementarity argument, because Israel does not regard the matter as a violation justifying an investigation. The effort will therefore focus on legal arguments and on contentions that such an investigation into a matter that is the focus of a political dispute will lead to politicization of the Court.

While all the Court's investigations in its early years were conducted against countries from the African continent, an investigation of the case of Georgia was opened in 2016 that also referred to allegations against Russia. In early December 2017, the prosecutor asked for authorization from the Pre-Trial Chamber to open an investigation into the case of Afghanistan, including claims that crimes were allegedly committed by members of the US military and the CIA. Thus, the prosecutor is not deterred from opening investigations even against superpowers and Western countries, which increases the possibility that an investigation might be opened into Israel's affairs.