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The International Criminal Court on the *Mavi Marmara*, Continued

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More than five years since the *Marmara* flotilla to Gaza, the international legal preoccupation with the incident has not ended. On July 16, 2015, a Pre-Trial Chamber of the International Criminal Court (ICC), by a majority of two to one, accepted the request by the Union of the Comoros to review the decision by the ICC prosecutor not to investigate the incident and requested that the prosecutor reconsider her decision. The *Marmara* was registered as a Comoros ship and flew the Comoros flag at the time of the incident. On November 6, 2014, following a preliminary examination of the events, the ICC prosecutor decided that there were reasonable grounds for believing that war crimes were committed on the *Marmara*, but the gravity of the crimes was not sufficient to meet the threshold demand under the Statute of the Court, and therefore there was no basis for opening an investigation. However, on January 29, 2015, the Comoros, a party to the Statute of the Court, submitted an Application for Review of the prosecutor's decision pursuant to Article 53(3)(a) of the Statute. Two principal arguments were made in the application: (a) The prosecutor's failure to take additional facts relevant to the incident into account, beyond what occurred on the three vessels over which the Court has territorial jurisdiction. With this argument, the Comoros mainly referred to the broader context of IDF activity vis-à-vis the Gaza Strip. (b) The prosecutor erred in her assessment of the factors relevant to the determination of gravity under article 17(1)(d) of the Statute.

Regarding the first argument, the prosecutor had argued that she is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Marmara* in reference to other crimes allegedly committed by the IDF in Gaza, which fall outside the jurisdiction of the Court. According to the prosecutor's approach, there is also no rational and direct link between the flotilla incident and the events in Gaza. In contrast, the two judges on the Chamber offered a broader interpretation and determined that the prosecutor has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes as well as their gravity. The prosecutor should therefore, for the purpose of assessing the gravity of the *Marmara* incident, also consider additional relevant circumstances, including events outside the Court's jurisdiction,

without these constituting an issue for judicial proceedings. However, the judges noted that in spite of her general approach, the prosecutor actually examined the greater context of the flotilla and the events in Gaza, and therefore, the “erroneous abstract principle” that she adopted did not ultimately affect the validity of her assessment of gravity.

In regard to the second and central argument of the gravity threshold, the judges examined the manner in which the prosecutor evaluated the gravity of the war crimes by the IDF in accordance with their scale, nature, manner of commission, and impact. In relation to the scale of the crimes, the majority noted that the death of ten passengers, the injuring of 55 people, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment, are a compelling indicator of sufficient, and not insufficient gravity. Accordingly, the factor of scale should have been taken into account by the prosecutor as militating in favor of sufficient gravity, rather than the opposite.

In relation to the nature of the crimes, the majority determined that the prosecutor's conclusion that the treatment of the *Marmara* passengers did not amount to the war crime of torture or inhuman treatment was premature. They argued that the treatment of the passengers, which included, inter alia, overly tight handcuffing, beating, denial of access to toilet facilities, denial of medication, and provision of only limited access to food and drink, should have led the prosecutor, at a stage before an investigation was opened, to the conclusion that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, in addition to the other crimes that the prosecutor found, and to take this into account in her assessment of gravity.

Regarding the manner of commission, the majority criticized the prosecutor's conclusion that the information available to her does not suggest that the alleged crimes committed by IDF soldiers were systematic or resulted from a deliberate plan or policy to attack, kill, or injure civilians. For example, the judges noted the prosecutor's disregard of the claims of use of live fire by the IDF helicopters prior to boarding the *Marmara*. They contended that the prosecutor's claim that the available information does not allow her to determine the exact chain of events given the significantly conflicting accounts by the parties is erroneous, and that the fact that there are conflicting versions itself calls for an investigation, rather than the opposite.

In regard to the impact of the crimes, the majority rejected the prosecutor's conclusion that the impact of the crimes on the victims is not sufficiently grave to warrant an investigation. In addition, the judges criticized the prosecutor's position that the crimes did not have significant impact on the civilian population in Gaza, inter alia, because humanitarian supplies were ultimately later distributed in Gaza. In their approach and as the Comoros argued, the commission of the crimes on the *Marmara*, would have sent a clear and strong a message to the people in Gaza (and beyond) that the naval blockade of

Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities. Moreover, the worldwide attention that the flotilla received, including several fact-finding missions, is in odds to "the prosecutor's simplistic conclusion" as to insufficient gravity.

In his partly dissenting opinion, the minority judge came out strongly against the majority's conclusions. From the institutional aspect, the judge maintained that the Chamber exceeded its power, since it was not called upon to sit as a court of appeals with respect to the prosecutor's decisions, but rather its supervisory role is merely to ensure that the prosecutor does not abuse her discretion in reaching the conclusion not to open an investigation. His conclusion was that the stringent review that the majority judges conducted "clearly interferes with the prosecutor's margin of discretion." In regard to gravity, the judge sided with the prosecutor's conclusion that the gravity of the events does not warrant opening an investigation. Furthermore, the judge described in detail the context in which IDF soldiers operated on the *Marmara*, the legality of the naval blockade, the severe violence encountered by the soldiers, and the absence of their intent to kill or injure civilians. He argued that beyond the gravity requirement, the ostensible war crimes that the prosecutor cited in her decision are also unfounded and do not warrant opening an investigation.

On July 27, 2015, the ICC prosecutor submitted a notice of appeal and rejected the Pre-Trial Chamber's decision, pointing to the validity of the minority judge's opinion and the errors of the majority. The prosecutor claimed that the Pre-Trial Chamber had exceeded its mandate by applying a strict and mistaken standard to review her decision. In addition, she charged that there was faulty interpretation of the legal standard required of her at the preliminary examination stage, which would change the mandate given to her under the Statute of the Court and require her to disregard all equivocations, contradictions or limitations in the available information in order to give proper scope for investigation and to overlook the necessity of evaluating information in context, not in isolation. The prosecutors also charged that the majority's decision was insufficiently reasoned and mischaracterized the basis of her decision, for example, inadequate reasoning regarding the unique context of violent resistance aboard the *Marmara*. As a result, the interpretation by the majority might have broader implications on the admissibility of all situations currently undergoing preliminary examinations at the Court and on how cases may be selected. According to the prosecutor, this may radically affect the scope of the Court's operation, now and for the years to come.

Ramifications

There is no doubt that the interpretation given by the majority to what constitutes gravity, and their conclusions in regard to the overall gravity threshold of the *Marmara* incident is problematic, and it is difficult to subject it to the objective for which the gravity

requirement was inserted into the Statute of the Court – to deal with "the most serious crimes of international concern." Such interpretation is liable to have wide implications for the Court's degree of legitimacy in the eyes of the international community and the level of commitment by countries to obey its rulings.

Additional problematic aspects include, for example, the reversal of the burden of proof by the Court, so that situations with lack of information are ruled to the detriment of countries and are liable necessarily to lead to a criminal investigation. In fact, the manner in which the majority interpreted the evidentiary bar that requires opening an investigation robs the prosecutor's discretion of almost all content and will cause the Court to be swamped with cases. Likewise the Court's attention to the international political context as a factor of evaluating gravity, e.g., in the establishment of numerous international fact-finding missions with regard to Israel, is highly problematic.

It appears that putting Israelis on trial in regard to the flotilla is far from becoming a reality. Beyond gravity, the complementarity requirement must also be examined – which the prosecutor did not address in her original decision – and prove that Israel did not satisfactorily investigate the events. This task will be difficult, primarily given the public Turkel Commission, which examined the flotilla incident. This is in addition to the UN Secretary General's report (the Palmer Report), which determined that the naval blockade of the Gaza Strip by Israel is legal and implemented in accordance with international law. Even if an investigation is opened, there are still many barriers to putting Israelis on trial, such as proving *mens rea* and the existence of defenses, e.g. self-defense.

Nonetheless, the continued preoccupation with the flotilla indicates that future cases before the Court will be more complex. It appears that the manner in which the majority examined the prosecutor's decision on the gravity threshold is intended to signal to the prosecutor to open an investigation into Operation Protective Edge, which, at this stage, is under preliminary examination. Apparently, the gravity threshold of events in Operation Protective Edge will satisfy the Court, so the challenge in this case will tend toward the complementarity requirement with a focus on senior Israeli military and political leaders. Israel must prepare for this contingency and strengthen examination and investigation mechanisms beyond the investigations conducted by the IDF Military Advocate General and the State Comptroller. The more the cracks in complementarity (through which the prosecutor can draw Operation Protective Edge into the Court's jurisdiction) are reduced, the better Israel will deal with the international legal arena and avoid a years-long entanglement before the Court.