

War Crimes Committed Against Humanitarian Flotillas: Insufficient Gravity for the ICC?

Dr. Polona Florijančič

In 2010 the Gaza Freedom Flotilla came under attack by the IDF. On the Mavi Marmara 9 people were killed, most execution style, 55 others were injured and there were hundreds of instances of outrages upon personal dignity committed both on board and on Israeli territory once the passengers were forcibly transferred there. The Human Rights Council's Fact Finding Mission described the conduct of the Israeli military and other personnel as “not only disproportionate to the occasion but demonstrat[ing] levels of totally unnecessary and incredible violence.”¹

The Mavi Marmara was sailing under the flag of Comoros, a Member State of the International Criminal Court (ICC), and in 2013 the Union of the Comoros exercised its right to make a referral to the ICC requesting the Office of the Prosecutor (OTP) to initiate an investigation into the crimes committed within the Court's jurisdiction.² The OTP conducted a preliminary examination under Article 53 of the Rome Statute and despite finding that there was a reasonable basis to believe that Israeli forces had committed war crimes it decided not to open an investigation into the raid.³

The official reasoning was that “potential case(s) that would likely arise from an investigation would not be of sufficient gravity” and that the “limited nature of the referred situation” affected this gravity.⁴ The OTP further based this evaluation on a narrow interpretation of the Court's jurisdiction which excluded from the scope of the situation the crimes committed on Israeli territory.⁵ Objections to the decision were raised multiple times, however the OTP refused to change their stance and after a lengthy back and forth with the Pre-Trial Chamber the matter was finally closed in 2020.

The discretion of the ICC prosecutor in selecting which investigations to pursue has been the basis of most of the controversy surrounding the Court continuously calling into question its legitimacy. It is an open secret that such decisions rest on policy considerations and not some objectively or universally applied legal standard. If the OTP wishes to find jurisdiction or sufficient gravity, it can easily find the arguments to back its claim. The opposite is equally true.

At the time, the OTP justified its decision by stating that the total number of victims reached relatively limited proportions as compared, generally, to other cases investigated by the Office (the scale of the crimes); that the outrages upon personal dignity did not amount to torture or inhumane

¹ UNGA, Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian Assistance, A/HRC/15/21, 27 September 2010, <https://docs.un.org/en/A/HRC/15/21>, para. 264.

² Union of Comoros, Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Referral-from-Comoros.pdf>.

³ ICC, Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, 6 November 2014, [https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf), para. 3.

⁴ Ibid., paras. 24, 143.

⁵ Ibid., para. 25.

treatment (the nature of the crimes); that there was no reasonable basis to believe that the crimes were systematic or part of a deliberate plan or policy by Israel nor that there were senior IDF commanders or Israeli leaders responsible for the crimes as perpetrators or planners (manner of commission); and that the crimes did not have a significant impact on the civilian population of Gaza since the supplies carried by the vessels were ultimately distributed thus the crimes “could not be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels” (impact of crimes).⁶

In terms of the number of victims, parallels were inevitably drawn with the case of Abu Garda where merely 12 peacekeepers were killed and 8 others were wounded but the gravity threshold was nevertheless considered to have been met despite the low number of direct victims, since the crimes seriously impacted the broader community.⁷

The OTP however drew a distinction between peacekeepers and activists, stating that attacks against the former were of exceptionally serious gravity since they were “directed against the international community (itself) and strike at the very heart of the international legal system... because they are committed against persons who... risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind.”⁸ The prosecution also noted that following the attack the peacekeepers “reduced their activities in the area, leaving a large number of civilians without protection” having “a grave impact on the local population”.⁹ On the other hand when it came to the Freedom Flotilla the OTP denied its mission as being exclusively humanitarian and did not consider the status of the victims to be en par either with peacekeepers or humanitarian assistance workers due to the quote “apparent lack of neutrality and impartiality as evidenced in the flotilla’s explicit and primary political objectives (as opposed to a purpose limited to delivery of humanitarian aid) ” and “apparent primary purpose of challenging the blockade and raising publicity for this cause, failure to obtain Israeli consent, and refusal to cooperate with the Israeli authorities in their proposals for alternative methods of distributing relief supplies.”¹⁰ In other words what was held against the Freedom Flotilla was the fact that it sought to contribute to the end of the illegal blockade itself, that is, substantially alleviating the suffering of the population of Gaza, and not just bring some momentary relief. The OTP did recognize that the Flotilla campaign was in a broader sense related to the humanitarian crisis faced by the civilian population of Gaza which was a matter of international concern but then inexplicably concluded that “this issue must be distinguished from the assessment of gravity of the alleged crimes” committed during the raid.¹¹

The PTC disagreed with the assessment of the OTP noting that the incident sparked international concern and had impact beyond the direct and indirect victims because it ‘sent a clear and strong message to the people of Gaza (and beyond) that the blockade of Gaza was in full force and that

⁶ Ibid. paras. 138-141 referring to the non-exhaustive list of criteria for evaluating gravity set out in Regulation 29 para. 2 of the Regulations of the Office of the Prosecutor, i.e. scale, nature, manner of commission, and impact. ICC Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23th April 2009, <https://www.icc-cpi.int/sites/default/files/Publications/Regulations-of-the-Office-of-the-Prosecutor.pdf>.

⁷ Ibid. para. 145; ICC, Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, No. ICC-01/12, 16 July 2015, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_13139.PDF, para. 26.

⁸ Ibid. para. 145.

⁹ Ibid.

¹⁰ Ibid. paras. 125, 164.

¹¹ Ibid. para. 26.

even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities'.¹²

The reasoning of the OTP was not convincing then, and it would be even less convincing in the context of the current and potential intensified or even deadly attacks on the Sumud Flotilla. The humanitarian activists should not be required to seek consent from or cooperate with the illegal occupier imposing an illegal blockade, much less in the context of that blockade being used to sustain a genocidal famine. Furthermore, in the current situation it is not only a matter of the blockade being in full force and the delivery of humanitarian aid being controlled or restricted, but it being almost entirely blocked. The recent arrest warrants for Netanyahu and Gallant at the ICC, issued specifically on the basis of inter alia, starvation as a weapon of war, further attest to this.¹³ It is also unreasonable to expect humanitarian activists to be entirely neutral in the face of such a one-sided assault on a defenceless population, as we are currently witnessing, in order for their mission not to be regarded as less worthy than those of UN peacekeepers. The Sumud Flotilla's aim of establishing a humanitarian corridor inevitably includes a challenge to the illegal and criminal blockade, yet this 'political aspect' does not detract from the humanitarian aim. It is incorrect to consider the political and the humanitarian as inevitably two separate issues.

In addition, the fact that at the time aid from the boats was eventually distributed did not negate the most important impact of the crimes, which was the intentionally created climate of fear aimed at dissuading anyone else from attempting another flotilla in the future or indeed any other help at any level to the Palestinian people, through a display of brazen disregard by the IDF for human life and human dignity not just when it comes to Palestinians but anyone, regardless of passport or jurisdiction. The impact in this regard cannot be overstated. The fact that there were still thousands of individuals signing up to join the Sumud Flotilla, willing to accept even the possibility of death to try and break the siege does not negate this impact. If we were not all terrified of the entirely disinhibited IDF consistently shielded with absolute impunity, we would be sailing in the millions.

The gravity at the time should have further been evaluated in the context of the murders of other activists such as those of Rachel Corrie, James Henry Miller and Tom Hurndall, all of which took place well before the 2010 raid. Israel intimidates through unhinged criminality as a matter of policy in order to scare people away from acting in solidarity with Palestine. Other international activists have since been killed, such as Aysenur Ezgi Eygi and the attacks on the Conscience, Madleen, Handala and now the Sumud Flotilla further prove this point. As a motion signed by 49 UK Members of Parliament has noted: Israel's threats and attacks against humanitarian missions, like the Madleen, carrying essential aid and international human rights defenders, reflect a broader pattern of impunity and disregard for international norms. One could add here that showing off this impunity is part of the *raison d'être* of these attacks. In a normal world Israel would 'lose' less by allowing baby formula and some other essential albeit symbolic humanitarian aid to enter Gaza, than by attacking such missions. But in our world, it is the contrary. Israel gains the perception of untouchability with each such attack sending a signal to others that it is simply not worth trying.

¹² ICC, Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, No. ICC-01/12, 16 July 2015, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_13139.PDF, para. 48.

¹³ ICC, News, Statement of ICC Prosecutor Karim A.A. Khan KC On The Issuance of Arrest Warrants In The Situation In The State of Palestine, 21 November 2024, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-state-palestine>.

One would hope that a potential assessment of gravity today would also take into account not only the obvious context of the genocidal famine but also the attacks on UNRWA, the over 360 UNRWA employees killed, the attacks the World Central Kitchen convoy, and their 7 aid workers killed, as well as the massacres which occur daily at the killing machine, soon to be concentration camp, carrying the Orwellian name of Gaza Humanitarian Foundation. What should also be taken into account is the complete abandonment of the Palestinian people by all world governments, including those that talk the talk but do not take a single step to walk the walk. In other words the abject failure of the so-called international community to protect the people and the fact that civil society has had to step in to fill this gap.

For all the above, attacks on human rights defenders who are willing to put their lives on the line in these circumstances should be attributed the same level of gravity, if not greater, as attacks on UN peacekeepers. In this context it is not just an attack on the international community but on humanity itself.

Apart from denying sufficient impact, the Prosecutor also downplayed the gravity by essentially interpreting the incident as a series of unrelated crimes without the existence of a plan or policy, or any involvement of senior IDF commanders and Israeli leaders, despite the Comoros and the Victims repeatedly referring to the public testimony before the Turkel Commission from senior Israeli political and military leaders about their involvement at all levels of the operation, including the planning, coordinating, ordering and command of the operation.¹⁴ Despite this the OTP sought to paint the incident as a result of a few bad and unrelated apples united “only” by the same national allegiance and service to the same government.¹⁵ The “unlinking” of different stages of criminality furthermore served the claim that the ICC lacked jurisdiction over crimes committed on Israeli soil. This contention was particularly problematic and the question was raised whether it was not “in direct contradiction, not only with the notion of continuing crimes, but especially with argument regarding the crimes alleged to have taken place in Myanmar and Bangladesh, that the “conduct” requirement in Article 12(2)(a) of the Statute means that it is sufficient that “at least one legal element of an Article 5 crime” must occur on the territory of a State Party,” yet the Prosecution insisted that the two situations were fundamentally different.¹⁶

The Myanmar/Bangladesh situation related to single crime of deportation, started on the territory of a non-State Party and completed in the territory of a State Party which was sufficient for the Prosecution to establish a jurisdictional hook; on the contrary when it came to Mavi Marmara the Prosecution took the position that the hook was not there, since the crimes were not “inextricably connected.”¹⁷ This kind of interpretation would mean that any one of us can be kidnapped from territories the ICC has jurisdiction over, taken to Israel and we would no longer enjoy the protection of the ICC for any subsequent crimes committed against us there. It would also mean the ICC

¹⁴ ICC, Pre Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, No. ICC/01-13, 26 May 2020, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02106.PDF, para. 36.

¹⁵ ICC-01/13, Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), dated 6 November 2014 with Public Annexes A-C, E-G and Confidential Annex D 29 November 2017, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2017_07028.PDF, para. 141.

¹⁶ ICC-01/13, Appeals Hearing, Open Session, 1 May 2019, <https://www.legal-tools.org/doc/350767/pdf/>, p. 10.

¹⁷ Ibid, p. 61.

would have no jurisdiction over potential crimes committed against the children supposedly kidnapped from Ukraine, once on Russian territory. A highly unlikely stance for the OTP to take.

Indeed the situation of Mavi Marmara was different from Myanmar/Bangladesh, but it was different in a way that would make a jurisdictional hook even easier to argue. In Myanmar/Bangladesh the criminality started on the territory of a *non-member* State. In the case of Mavi Marmara, the criminality started on the territory of a *Member* State where the individuals were unlawfully detained, tortured and then forcibly moved into a non-member State where special tents had been set up for them to be further abused there.¹⁸ Whether the victims were passed from one abuser to another should not be a determining factor. And the Prosecution was furthermore wrong in downplaying the nexus between them in the sense that they “only” all served the Israeli government. If abusive and criminal behaviour coupled with complete impunity is so widespread within army personnel, this in itself shows a policy of such behaviour and a link between individual incidents. We have now all witnessed how the IDF systematically and as a matter of policy murders, rapes, kidnapps and commits all sorts of other war crimes and crimes against humanity in broad daylight. And we also know from many soldiers’ testimonies that perpetrating abuse in order to manufacture fear in the Palestinian population is part of the essence of serving in the IDF. The attacks on international human rights defenders are not unconnected but rather a part of the same mission. In other words, the IDF, together with the Israeli government is a joint criminal enterprise with the criminal aim of ethnic cleansing for the sake of Greater Israel.

After a long struggle by the Palestinian people to bring Israeli criminality in front of the ICC and right before the question of investigating the Freedom Flotilla attack was finally closed, the OTP decided to open an investigation into the Palestine Situation. While making the announcement, the Prosecutor curiously used the opportunity to profess that her decision in the case of the Mavi Marmara was principled, non-partisan, with no agenda other than to meet statutory duties under the Rome Statute with professional integrity, and that the lack of a reasonable basis to proceed with the investigation was determined through a “clinical assessment of the Rome Statute criteria.”¹⁹ In other words, the Prosecutor wanted no further questions asked on the matter, despite, as Comoros rightly observed, the opening of the investigation into the Palestine Situation providing the opportunity to connect the two thus allowing for a finding of even greater situational (and thereby case) gravity. The current context of the famine, the genocide and the two already issued arrest warrants at the ICC, make this argument that much stronger today.

¹⁸ Ibid, p. 73.

¹⁹ ICC, News Statement of ICC Prosecutor, Fatou Bensouda, Respecting An Investigation of The Situation In Palestine, <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>,