

HAND DELIVERED

Mrs. Fatou Bensouda
Prosecutor
International Criminal Court (ICC)

14 May 2013

Re: Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation

Dear Prosecutor of the ICC, Mrs. Fatou Bensouda,

We, the undersigned, act on behalf of the Union of the Comoros a State Party to the ICC, as well as the registered State of *MV Mavi Marmara* vessel, -one of the passenger vessels of the humanitarian aid flotilla bound for Gaza on 31 May 2010, in which nine (9) victims were killed on board and more than dozens were seriously injured, as a consequence of the attacks of the Israel Defence Forces, in international waters.

We bring your kind attention to the enclosed Referral along with its annexes, which together form a substantial body of material concerning the incident of 31 May 2010.

The materials respectfully submitted clearly demonstrate that the ICC possesses both subject matter and territorial jurisdiction under Article 12 (2) (a) of the Rome Statute and further support the position that reasonable basis exist to proceed with an investigation into the said incident.

On behalf of the Union of the Comoros Union and in line with the Article 14 of the Rome Statute, we kindly request initiation of an urgent investigation for the purpose of determining whether one or more specific persons should be charged with the commission of alleged crimes.

It is our hope that you and the respected office you represent give a favorable response to our request by triggering her investigation.

Should you require further information or elaborations on the materials submitted, our office would be pleased to be of assistance.

Sincerely yours,

Att. Ramazan ARITÜRK
ELMADAĞ LAW FIRM | ISTANBUL

Att. Cihat GÖKDEMİR
ELMADAĞ LAW FIRM | ISTANBUL

Cc: Office of the Prosecutor | Office and Information Unit (otp.informationdesk@icc-cpi.int)

Referral

of the "Union of the Comoros" with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, requesting the Prosecutor of the International Criminal Court pursuant to Articles 12, 13 and 14 of the Rome Statute¹ to initiate an investigation into the crimes committed within the Court's jurisdiction, arising from this raid

1. This referral along with its particulars are submitted to the Madame Prosecutor of the International Criminal Court (hereinafter "ICC") by Union of the Comoros (hereinafter "Comoros"), a State Party to the ICC², as well as the registered State of *MV Mavi Marmara* vessel, -one of the passenger vessels of the humanitarian aid flotilla bound for Gaza on 31 May 2010, in which nine (9) victims were killed on board and more than dozens were seriously injured, as a consequence of the attacks of the Israel Defence Forces (hereinafter the "IDF"), *in international waters*.
2. This referral is submitted to the attention of the Madame Prosecutor by Att. Ramazan Arıtürk and Att. Cihat Gökdemir, the undersigned, the legal representatives of the Comoros state, authorized by the Power of Attorney (PoA) enclosed herewith. For all intents and purposes, at the time of the execution, the PoA empowers for a State Referral for this specific incident before the ICC.
3. We, acting on behalf of the Comoros state, are of the view that the crimes that have been committed on the humanitarian aid flotilla, (Gaza Freedom Flotilla), specifically on board the *MV Mavi Marmara* vessel, falls within the jurisdiction of the Court. The majority of the crimes have been committed within the territorial jurisdiction of the Comoros, namely on board the *Mavi Marmara* vessel.
4. We therefore respectfully request the Prosecutor of the ICC, to initiate an investigation pursuant to Articles 13 (a) and (14) of the Rome Statute into War Crimes and Crimes Against Humanity, arising from IDF's attack on the humanitarian aid flotilla on the 31st May 2010. In light of the respectful submission of Comoros and for reasons delineated below, the ICC has jurisdiction to consider this matter under Article 12(2)(a) of the Rome Statute.
5. Our request relies on significant primary evidence in our possession and on the *Report of the International Fact-Finding Mission*³, which was convened to investigate violations of international law, including international humanitarian and human rights law, resulting

¹ The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force on 1 July 2000).

² The Union of the Comoros ratified the Rome Statute on 18 August 2006.

³ See 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", U.N. Doc. A/HRC/15/21, (27 September 2010), available at: <<http://unispal.un.org/pdfs/AHRC1521.pdf>>, [hereinafter the "Gaza Flotilla Report"].

from the Israeli attacks on the flotilla of vessels carrying humanitarian assistance, (hereinafter the "Gaza Flotilla Report") submitted to the United Nations Human Rights Council on the 22nd September 2010. The Human Rights Council endorsed the Report on the 29th September 2010.⁴

6. The present submission is organized in accordance with the following scheme:

- A. Referral
- B. Jurisdiction
 - Complementarity
 - Gravity
- C. Facts
- D. Legal Characterization
- E. International crimes
- F. Conclusion

A. REFERRAL

7. On 22 September 2000, Comoros, has signed the Rome Statute, subsequently, ratified the Statute dated 18 August 2006. Since then, the State is eager to assist the Court for its work in providing justice to the international community.
8. The IDF attacks to this humanitarian aid flotilla consisted of eight (8) boats bound for Gaza and were directed to Gaza Strip carrying humanitarian aid. In particular the majority of the crimes took place on board *MV Mavi Marmara*, a vessel which is registered to the Comoros. Therefore, Comoros has a relevant interest in this matter. Not only the concerned crimes fall within the jurisdiction of the ICC, but also occurred on the territorial jurisdiction of Comoros.
9. Comoros is aware of the fact that, on 14 October 2010, the Legal Representatives ("Elmadağ Law Firm") of the Turkish victims of the aid flotilla and the Turkish NGO, "Foundation for Human Rights and Freedoms and Humanitarian Relief" (hereinafter the "IHH"), submitted its communication, via hand, pursuant to Article 15 of the Rome Statute, to the Office of the Prosecutor (hereinafter the "OTP") of the ICC, in the Hague-Netherlands.
10. It is to be highlighted that, Comoros supports the "communication" of Elmadağ Law Firm within this Referral, of which the receipt was acknowledged by the OTP and registered within the Communication Register of the Office, Reference No. "OTP-CR-292/10".
11. We note that we have a collection of evidence, witness and victims' statements as well as video and photographic material recording the events, which are under our possession. A selection of these statements, videos and photographic evidence are enclosed for the

⁴ See Human Rights Council, 15th Session, UN Doc. A/HRC/15/L.33, 27 September 2010.

Prosecutor's consideration. Should the Prosecutor requests access to further material or clarifications on the materials submitted as part of this "referral". We, as the legal representatives of the Comoros, will be pleased to be of further assistance.

12. When the humanitarian aid flotilla was attacked en route to Gaza by the IDF, nine (9) civilians on board the *MV Mavi Marmara* were killed as a result of the IDF attack. The individuals killed are listed below:

- Furkan Doğan | DOB: 20 October 1991 | Autopsy Report: Appendix IX
- İbrahim Bilgen | DOB: 2 March 1949 | Autopsy Report: Appendix IX
- Fahri Yaldiz | DOB: 1967 | Autopsy Report: Appendix IX
- Ali Heyder Bengi | DOB: 11 September 1971 | Autopsy Report: Appendix IX
- Cevdet Kiliçlar | DOB: 5 May 1972 | Autopsy Report: Appendix IX
- Cengiz Akyüz | DOB: 1969 | Autopsy Report: Appendix IX
- Cengiz Songür | DOB: 4 June 1963 | Autopsy Report: Appendix IX
- Çetin Topçuoğlu | DOB: 1956 | Autopsy Report: Appendix IX
- Necdet Yildirim | DOB: 1978 | Autopsy Report: Appendix IX

In addition, more than 50 civilians were seriously injured on board the *MV Mavi Marmara*.

13. Furthermore, some statements also provide evidence of significant probative value into the conduct of the IDF during the course of the attacks. For instance, the statement of Ahmet Aydan Bekar is of assistance in this regard. His account of the events aboard the *MV Mavi Marmara* is as follows:

All of a sudden a helicopter appeared above us. And it gave a strong wind below towards the ship. By force of the wind all of our belongings there flew to the sea. In fact, it was so effective that some of our friends lost their balance. Then, they dropped various bombs like tear gas, blast, smoke and gas bombs. The attack continued for a long time. Afterwards, without landing on the ship they started to shoot with guns using real bullets. Several friends were shot and fell down [wounded]. While gunfire was continuing, they released ropes and began to land to the ship. During that time, they were still shooting. First landers [sic] were made ineffective by friends. However, the numbers of our brothers wounded were increasing. I couldn't stay in my place, I moved towards the place where the soldiers were landing. At that moment, I started to struggle with a soldier. While struggling I was shot from right of my back, soon after a bullet came through my right arm pit...

A bullet shred my lung when I was shot. That's why, because I lost so much blood, I was enfeebled, my hands and feet started to become numb, my lips were dried. I was panting. At those moments, the soldiers were completely boarded on the ship, indiscriminately shooting around while I was laying down on the floor. At that moment, a bullet hit my head too, but because I was wearing a gas mask, it scratched my head, didn't get in.

*See Appendix IV – Statement No. XXXVII at page 139, paras. 470ff.

B. JURISDICTION

14. Comoros is a State Party to the ICC, and therefore, pursuant to Articles 13 (a) and 14 of the Rome Statute, may refer to the Prosecutor a situation, of which it believes that crimes appeared to be committed within the jurisdiction of the Court.

15. The flotilla comprised eight (8) vessels, of which six (6) were attacked on 31st May 2010. These six (6) were:

- i. *M.V. Mavi Marmara*
- ii. *M.V. Defne Y*
- iii. *M.V. Gazze 1*
- iv. *M.V. Sfendoni or Sfendone*
- v. *M.V. Eleftheri Mesogios or Sofia*
- vi. *Challenger 1*

A seventh vessel, *MV Rachel Corrie*, was attacked on 6th June 2010.

16. It should also be noted that, the *M.V. Eleftheri Mesogios or Sofia* is registered in Greece and the *MV Rachel Corrie* is registered in Cambodia. Greece and Cambodia are State Parties to the ICC.⁵

17. The *M.V. Mavi Marmara*, where countless humanitarian workers were seriously injured and where fatalities (Nine deceased) took place, was registered in Comoros on the 19th May 2010. [A copy of the registration is appended for the Prosecutor's consideration as Appendix VII.]

18. Given the facts at hand, it is submitted that the ICC has jurisdiction to investigate and prosecute those responsible for the crimes committed by the IDF during the said incident, by virtue of Article 12(2)(a), as the crimes in question were committed on board vessels registered in states that are parties to the Rome Statute.⁶

19. It is acknowledged that, pursuant to Article 12(2)(a) of the Rome Statute of the ICC, Comoros has territorial jurisdiction on *M.V. Mavi Marmara*, meaning, the crimes occurred on board the *MV Mavi Marmara*, as a result of the IDF attacks, falls within the jurisdiction of the Court.

20. On another note, it is submitted that the ICC will also have jurisdiction over this matter if it decides to accept the declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute in January 2009. This submission is based on the fact that the attack on the flotilla has serious consequences for, and effect, on the situation in Gaza. In essence, the

⁵ Greece ratified on 15 May 2002 and Cambodia ratified on 11 April 2002, (full list of state parties available at: http://www.iccnw.org/documents/RATIFICATIONSbyRegion_18_August2010_eng.pdf).

⁶ See the Rome Statute of International Criminal Court:

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [emphasis added].

Flotilla raid is directly linked to the Gaza situation. These consequences resulted in the commission of Crimes Against Humanity and War Crimes.

- **Complementarity**

21. The circumstances in which the crimes were committed in the present case preclude the possibility of prosecution before national courts. There are several factors for which the complementarity test under Article 17 of the Rome Statute is not satisfied, and hence the case is admissible before the ICC. First and foremost, the highly political and sensitive nature of Israeli socio-political reality on the ground does not enable the Israeli legal system to act independently and pursue and try those responsible (e.g. IDF soldiers, generals or political figures who may have authorized the raid) for the commission of crimes aboard the above-listed vessels on 31 May 2010. Moreover, there is no political will to allow for independent and impartial investigations and prosecutions to take place. This of course emanates from the fact that (i) given the turmoil history of Israel since its creation, the IDF is highly praised as an important arm of the state for the important role it plays in the defence of the country, and (ii) it could very well be that individuals at the highest echelons of power in Israel may ultimately be found responsible for authorizing the raid and the commission of the crimes which ensued (knowingly or ought to have known). On these aspects alone, the Court cannot reasonably rely on the Israeli authorities to willingly or genuinely carry out comprehensive, independent and impartial investigations and prosecution of crimes committed as a result of the flotilla raid. The lack of cooperation on behalf of the Israeli authorities with the UN *International Fact-Finding Mission*⁷ is a testament to the veracity of the position that it is unlikely that the Israeli authorities will initiate or carry out proceedings at the national level independently, impartially with a genuine and *bona fides* intent to bring the perpetrators of the crimes committed on 31 May 2010 to justice.
22. Moreover, as it has been established, the crimes were committed on vessels floating in international waters and the perpetrators of the crimes in question (IDF personnel and their superiors) are all residents of the state of Israel.
23. It is submitted that, to date Comoros does not recognize the statehood of Israel and therefore it is impractical for Comoros to initiate investigations and prosecutions against the perpetrators of the crimes in question.
24. Similarly, no attempt has been made to initiate prosecutions in either Greece or Cambodia.

- **Gravity**

25. The crimes committed meet the test of gravity provided for under Articles 17(1)(d) and 53 of the Rome Statute for the following reasons:

⁷ See Gaza Flotilla Report, *supra* note 3, pages 4-5, paras. 16ff.

- i. **ICC as an avenue for redress** – The attack on the flotilla in general, and the *MV Mavi Marmara* in particular, would in normal circumstances constitute a *casus belli*⁸ (act of war). One of the reasons that Israel's attack on the flotilla did not result in armed conflict is the fact that institutions such as the ICC provide a remedy for redress;
- ii. **International reaction** – As stated by the Appeals Chamber of the ICC, an assessment of the gravity of the relevant conduct "depends upon subjective and contingent reactions to crimes rather than upon their objective gravity."⁹ The attack on the flotilla has had serious international repercussions. These include, *inter alia*, Security Council condemnation,¹⁰ the appointment of a fact-finding mission by the UN Human Rights Council,¹¹ debates in the UN Human Rights Council,¹² the appointment of a commission of inquiry by the Secretary General of the United Nations¹³ and investigations in Turkey and Israel into the events in question.¹⁴ Civil society was also outraged by the attack and has demanded that Israel be held accountable for its actions;¹⁵
- iii. **The wider context of the IDF attack** – The attack on the flotilla must be seen in the wider context of the Israel-Palestine conflict. It is a follow up to and a consequence of Operation Cast Lead (December 2008 – January 2009), which is still the subject of investigation by the Human Rights Council and was condemned by the Goldstone inquiry report.¹⁶ Furthermore, the blockade of Gaza has been condemned by the United Nations and the international community at large as a collective punishment that deprives the people of Gaza of the most basic of commodities and services. Indeed, the UNFFM described the situation in Gaza as totally intolerable and unacceptable".¹⁷ The situation in Gaza is grave and the attack on the flotilla, which was aimed at perpetuating the situation, must therefore meet the test of gravity;
- iv. **Deliberate plan and policy** – The specific gravity threshold is met as the actions of the IDF were manifestations of a plan or policy to use violence to dissuade the humanitarian flotillas to directly reach a blockaded Gaza (*see Facts section of the present submission below and the Gaza Flotilla Report);

⁸ See, interview of Abdullah GUL, the President of Republic of Turkey, "In the old world, in the old times, if such an incident were to take place, wars would follow..." 21 September 2010, available at: <<http://www.haaretz.com/news/diplomacy-defense/turkey-president-in-old-times-israel-flotilla-raid-would-have-sparked-war-1.314957>>.

⁹ See *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber I, Case No. ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, [hereinafter DRC Appeals Chamber Judgment] at para. 72.

¹⁰ See Department of Public Information, News and Media Division (June 1, 2010). "Security Council Condemns Acts Resulting in Civilian Deaths during Israeli Operation against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement". 6325th & 6326th Meetings (PM & Night). UN.org. <<http://www.un.org/News/Press/docs/2010/sc9940.doc.htm>>. Retrieved June 2, 2010

¹¹ Gaza Flotilla Report, *supra* note 3.

¹² See Human Rights Council, UN Doc No. A/HRC/RES/14/1, 23 June 2010, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES.14.1_AEV.pdf>.

¹³ See Press Release <<http://www.un.org/News/Press/docs/2010/sgsm13032.doc.htm>>.

¹⁴ Information concerning the Israeli Inquiry is available here <<http://www.guardian.co.uk/world/2010/jun/07/israel-inquiry-gaza-flotilla-killings>> (Please refer to the Gaza Flotilla Report for further information).

¹⁵ See Human Rights Council, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict", U.N. Doc. A/HRC/12/48, 25 September 2009, [hereinafter the "Goldstone Report"].

¹⁶ Available at: <<http://www.todayszaman.com/tz-web/news-211688-israeli-assault-on-gaza-flotilla-draws-sharp-reaction-from-turkish-civil-society.html>>.

¹⁷ Gaza Flotilla Report, *supra* note 3, para. 25.

- v. **Number of victims** – In addition to the nine (9) civilians killed, more than 600 civilians from more than thirty countries on board of the Gaza flotilla were victimized by the conduct of the IDF in violation of international humanitarian law, human rights law and international criminal law (**kindly refer to the Appendices provided*). Furthermore, given the proportion of the force used, it is clear that the initial aim was to cause a large bloodshed by killing more numbers. However, after the armed forces realized that not all live broadcasting communication was cut and a back-up was still in force, they quit shooting indiscriminately. This can be found in the radio communication of the IDF which was made public.

26. It bears noting that aggravating factors are to be considered in an assessment of gravity. The need to consider such aggravating factors is supported by the jurisprudence of the ICC. For example, the Pre-trial Chamber II made clear that such aggravating factors were crucial in assessing gravity. The Pre-trial chamber stated that

... gravity may be examined following a quantitative as well as a qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.¹⁸ (On the admissibility of the situation in the Republic of Kenya para. 62)

27. Further, the Appeals Chamber has confirmed that in the definitions of the crimes within the Court's jurisdiction, in particular, the definition of war crimes, the drafters have explicitly rejected a requirement that of large-scale conduct.¹⁹ This supports the suggestion that the gravity threshold should exclude only fairly *de minimis* conduct, in contrast to the flotilla raid.

28. Based on the aforesaid, the incident aboard the flotilla consequently meets the requirements of sufficient gravity stipulated under Article 17(1)(d) of the Rome Statute.

C. FACTS

29. For a full account of the facts bearing on the present letter, the Gaza Flotilla Report, is referred to the attention of the OTP of the ICC, [it is contained in its entirety in Appendix X]. Below, a brief overview of the events is provided to the consideration of the Prosecutor and her Office.

30. The Flotilla was a humanitarian aid convoy, organized in partner vessel between six (6) international relief organizations, including the IHH. As established by the Gaza Flotilla Report, the flotilla was carrying nothing more than humanitarian aid, medical supplies, and construction materials, intent on reaching the inhabitants of the Gaza Strip through the Israeli imposed blockade.

31. These organization comprise of:

¹⁸ ICC, *Situation in Republic of Kenya*, Pre-Trial Chamber III, No. ICC-01/09-19-Corr, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", (31 March 2010), para 62 [on the admissibility of the situation in the Republic of Kenya].

¹⁹ DRC Appeals Chamber Judgment, *supra* note 9, paras. 69-71.

- i. The Free Gaza Movement²⁰,
- ii. IHH²¹,
- iii. The European Campaign to End the Siege on Gaza (the "ECESG"),²²
- iv. The Greek Ship to Gaza Campaign²³,
- v. The Swedish Ship to Gaza²⁴, and
- vi. International Committee to End the Siege on Gaza.

32. Eight (8) vessels, consisting of four (4) passenger vessels and four (4) cargo vessels, set out from the Republic of Turkey with 10,000 tons of humanitarian assistance for Gaza, as well as unarmed civilian passengers who were humanitarian assistance personnel.

1. **Challenger I**: The US-flagged *Challenger I* was operated by the Free Gaza Movement
 2. **Challenger II**: The US-flagged *Challenger II* was operated by the Free Gaza Movement
 3. **Sofia**: Greek-flagged cargo vessel operated by the Swedish-Greek organization *Ship to Gaza*. Also called the *Eleftheri Mesogeios* (Ελευθέρη Μεσόγειος, *Free Mediterranean*). 30 passengers were also on board.
 4. **Sfendoni**: The *Sfendoni* (Σφενδόνη, *Slingshot*) a Togo-flagged passenger vessel operated by the Greek Ship to Gaza Campaign and the European Campaign to End the Siege of Gaza. The Vessel carried 43 passengers.
 5. **Mavi Marmara**: The *Mavi Marmara* ("Blue Marmara") is a Comoros-flagged passenger vessel, which was formerly owned and operated by Istanbul Fast Ferries Co. Inc., in the Sea of Marmara. It was purchased especially for the trip to Gaza by the IHH. It carried 581 activists, around 400 of whom were Turkish.
 6. **Gazze**: The *Gazze* ("Gaza") is a Turkish-flagged cargo vessel owned and operated by the IHH. Its cargo consisted of 2,104 tons of cement, 600 tons of construction steel, and 50 tons of tiles. It also carried 13 Turkish crew members and 5 activists.
 7. **Defne Y**: The Kiribati-flagged *Defne Y* ("Laurel Y") is a cargo vessel owned and operated by IHH. It carried a mixed cargo of goods including 150 tons of iron, 98 power units, 50 precast homes, 16 units of children's playground equipment and various items of specialist medical equipment. There were 20 passengers on board.
 8. **Rachel Corrie**: The Cambodia-flagged Rachel CORRIE is a cargo vessel carrying twenty passengers.
33. The 10,000 tons of humanitarian assistance consisted of food, medicine, home construction supplies, pre-constructed children's playgrounds, wood, cement, power generators, hardware supplies, desalination units, and paper.²⁵
34. The Flotilla included over 700 passengers from 36 countries. The passengers were nationals of Algeria, Australia, Bahrain, Belgium, Bosnia and Herzegovina, Canada, Egypt, France,

²⁰ See: <<http://www.freegaza.org/>>.

²¹ See: <<http://www.ihh.org.tr/anasayfa/en/>>.

²² See: <<http://www.savegaza.eu/eng/>>.

²³ See: <<http://www.shiptogaza.gr/>>.

²⁴ See: <<http://shiptogaza.se/>>.

²⁵ The Report of IHH: "Palestine Our Route Humanitarian Aid Our Load" Flotilla Campaign Summary Report", page. 14 available at: <http://www.ihh.org.tr/uploads/2010/insaniyardim-filosu-ozet-raporu_en.pdf>.

Germany, Greece, Indonesia, Ireland, Italy, Jordan, Kosovo, Kuwait, Lebanon, Macedonia, Malaysia, Mauritania, Morocco, New Zealand, Norway, Oman, Pakistan, Palestine, Poland, Serbia, South Africa, Spain, Sweden, Syria, Turkey, United Kingdom, United States of America, and Yemen. Their ages ranged from a one year old baby to 80 years old. Some passengers were members of Parliament from Germany, Kuwait, Israel, Ireland, Sweden, Greece, Cyprus, Morocco, Yemen, Egypt, and Algeria. The flotilla was also carrying religious scholars, notable intellectuals, and NGO representatives from Europe, the Americas, the Far East, Africa, and the Middle East, and representatives of media organizations from Turkey, Kuwait, Qatar, Venezuela, Brunei, United Arab Emirates, and South Africa.²⁶

35. The members of the Flotilla (from Comoros, the *MV Mavi Marmara*, from Turkey *Gazze* and *Defne*, from Greece the *Challenger I*, *MS Sofia* and the *Sfendoni*) met in international waters, in the Mediterranean Sea on Friday, 28th May 2010. Two other Free Gaza Movement vessels, *Challenger II* (USA flagged) and *Rachel Corrie* (Cambodia flagged) were behind the rest of the flotilla due to mechanical problems. The US-flagged *Challenger II* had to abort halfway during its journey, but the *Rachel Corrie* continued its journey. Subsequently, the Flotilla, consisting of six (6) vessels (*Mavi Marmara*, *Defne Y*, *Gazze*, *Challenger I*, *Sfendoni* and *Sofia*) set out for Gaza on 30 May 2010.²⁷
36. The Israeli Navy made initial contact with the Flotilla on 30th May 2010 at 22:30. Consequently, on the morning of 31st May 2010 at 04:30²⁸, Israeli warships surrounded the flotilla on the high seas in international waters, approximately 79 miles from Israel's coastline. The Gaza flotilla raid is characterized as code named 'Operation Sea Breeze' by IDF, as the boarding and seizure of six (6) vessels of the Flotilla. The flotilla was surrounded by four (4) battleships, two (2) submarines, and 30 Zodiac boats, each bearing ten (10) armed men.²⁹
37. None of the vessels that were part of the flotilla were armed. There was nothing else on the vessels other than the humanitarian aid materials. All of the vessels were clearly identified to Israeli military sources as civilian and carrying humanitarian assistance to Gaza.³⁰ Moreover, before departure in Antalya, Police and Customs officers searched all passengers and goods on the *MV Mavi Marmara*, *Gazze* and *Defne Y* vessels right before they departed the port of Antalya, to ensure that they were not carrying weapons.³¹

²⁶ *Ibid*, page 15; [None of the passengers were members of the military, none were armed. Their ages ranged from three to 90 years old. The personnel were religious persons, including Christians, Muslims, Buddhists, as well as atheists. All of these passengers embarked on this endeavor as part of a humanitarian aid mission to the besieged Gaza.]

²⁷ *Ibid*, page 18.

²⁸ The timing of the IDF attack is questionable, because the attack has commenced not only during the time when people are heavily a sleep at around 04:30 AM, but also it was the time of the morning prayer of Muslim passengers. Therefore, it is to be noted that the timing of the attack just by itself is a "provocative" action against the passengers on the *Mavi Marmara* vessel.

²⁹ See Gaza Flotilla Report, *supra* note 3, paras. 91 and 112-115.

³⁰ *Ibid*, paras. 84 -90.

³¹ "The personnel were cleared by customs officers, and were searched by Turkish officers using security equipment and X-ray machines right before the departure. All of the passengers were required to carry valid, stamped passports on the journey. Bags were manually searched. Individual humanitarian personnel completed applications and signed contracts with IHH. Each contract included the following commitment: "During the journey, I will not be carrying any cutting tools, chemicals, explosives or fire arms regarded as weapons of destruction / arms by

- *Pre-planned response to the flotilla*

38. The Gaza Flotilla Report confirmed that the response to the flotilla had been planned for months in advance by Israel. The UN Inquiry reported that on 13 May 2010, the Israeli Chief of General Staff, Gabi Ashkenazi, sent a letter to the Defence Minister, Ehud Barak and Prime Minister, Benjamin Netanyahu, setting out options for dealing with the flotilla, including the military option of commandeering and impounding the vessels and detaining the passengers.³²
39. A further evaluation was made on 26 May and the Defence Minister formally authorized the operation. Extensive training and planning was undertaken, including the setting up of a processing centre for detainees at the Port of Ashdod.³³
40. Furthermore, the Gaza Flotilla Report confirmed that the passengers of the flotilla had been under surveillance for a period before the vessels set sail. The Gaza Flotilla Report stated:

Advanced identification and surveillance of specific passengers by Israeli intelligence forces took place, as indicated by a laminated booklet, recovered from the possessions of one of the captured Israeli soldiers which contained the names and photographs of specific high profile individuals on each of the six ships as well as photographs of each ship. One passenger was able to confirm that the photograph of her included in the booklet was taken just a few days before the flotilla sailed. Advance surveillance is confirmed by evidence attributed to Defence Minister Ehud Barak before the Turkel Committee which indicated that specific orders were taken "to continue intelligence tracking of the flotilla organizers, with an emphasis on the possibility that amongst the passengers in the flotilla there would be terror elements who would attempt to harm Israeli forces."³⁴

- *Loss of life*

41. The first shot was fired at the *MV Mavi Marmara* from the Zodiac Boats as the IDF attack commenced. Soldiers from the Zodiac boats made unsuccessful attempts to board the *MV Mavi Marmara*. Minutes after soldiers from the Zodiac boats had made their initial unsuccessful attempts to board the *MV Mavi Marmara*; a helicopter approached the vessel, at approximately 0430 hours. The helicopter hovered above the top deck. At this point between 10 and 20 passengers were located in the central area of the top deck, although this number increased as other passengers learned of events on the top deck. The Israeli forces used smoke and stun grenades in an attempt to clear an area for the landing of soldiers.³⁵
42. The soldiers then attempted to board the *MV Mavi Marmara*. Their initial attempt at lowering a rope failed, as the first rope that was let down from the helicopter was taken by passengers

international laws, any tools that do not coincide with the goals of this journey, or any illegal substances onboard." All personnel promised that they participated in the flotilla missions for purely humanitarian reasons."

³² See Gaza Flotilla Report, *supra* note 3, paras. 94 – 95.

³³ *Ibid*, para. 95.

³⁴ *Ibid*, para. 97.

³⁵ *Ibid*, paras. 112-117.

and tied it to a part of the top deck and thereby rendered ineffective for the purpose of soldiers' descent. A second rope was then let down from the helicopter and the first group of soldiers descended. The Gaza Flotilla Report maintained that it was "not... plausible that soldiers were holding their weapons and firing as they descended on the rope. However, it has concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers."³⁶

43. The passengers aboard the *MV Mavi Marmara* were then attacked by the IDF soldiers, armed with heavy machine guns and a range of smaller weapons. At no time did any gunfire originate from the passengers of the flotilla. In all, nine (9) activists were killed by the Israeli troops, all of which were from the IHH. In addition, dozens were injured, and hundreds were detained.³⁷
44. Activists aboard the *MV Mavi Marmara* subsequently clashed with the Israeli Special Forces. Some of the activists armed themselves with metal rods and kitchen knives in an attempt to resist the soldiers.
45. The Gaza Flotilla Report provides as follows on the IDF action:

167. "... throughout the operation to seize control of the Mavi Marmara, including before the live fire restriction was eased, lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner which caused an unnecessarily large number of persons to be killed or seriously injured. Less extreme means could have been employed in nearly all instances of the Israeli operation, since there was no imminent threat to soldiers; for example in relation to the operation to move down to the bridge deck and seize control of the ship and the firing of live ammunition at passengers on the bow deck of the ship. Even in a situation where three individual soldiers have been injured and detained, the objective of freeing these soldiers does not legitimate the use of force outside applicable international standards and soldiers must continue to respect and preserve life and to minimize injury and damage.

168. In such circumstances the use of less extreme means, such as available less-lethal weaponry, would have been sufficient to achieve the required objective as required by Principle 4 of the Basic Principles on the Use of Firearms by Law Enforcement Officials. A well-trained force such as the Israeli Defence Force should have been able to successfully contain a relatively small group of passengers armed with sticks and knives and secure control of the ship without the loss of life or serious injury to either passengers or soldiers.

169. A large number of injured passengers received wounds to critical areas of the body containing vital organs – the abdomen, thorax and head. Furthermore, a number of passengers who were clearly not engaged in any activities to resist the boarding by the Israeli forces, including a number of journalists and persons who had been sheltering from the fire, received injuries, including fatal injuries. It is apparent that no effort was made to minimize injuries at certain stages of the operation and that the use of live fire was done in an extensive and arbitrary manner. It is difficult not to conclude that, once the order to use live fire had been given, no one was safe. Under the circumstances,

³⁶ *Ibid*, para 114.

³⁷ *Ibid*, paras, 112 – 117.

it seems a matter of pure chance that there were not more fatalities as a result. Principle 5 of the Basic Principles on the Use of firearms by Law Enforcement Officials stipulates that “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; and (b) Minimize damage and injury and respect and preserve human life.”

170. The circumstances of the killing of at least six of the passengers were in a manner consistent with an extra-legal, arbitrary and summary execution. Furkan Doğan and İbrahim Bilgen were shot at near range while the victims were lying injured on the top deck. Cevdet Kılıçlar, Cengiz Akyüz, Cengiz Songür and Çetin Topçuoğlu were shot on the bridge deck while not participating in activities that represented a threat to any Israeli soldier. In these instances and possibly other killings on the *Mavi Marmara*, Israeli forces carried out extralegal, arbitrary and summary executions prohibited by international human rights law, specifically article 6 of the International Covenant on Civil and Political Rights.

171. ... the use of firearms should have been preceded by clear warnings of the intent to do so. While the circumstances of the initial stages on the top deck may not have been conducive to the issuance of such warnings, later stages in the Israeli operation to secure control of the ship certainly were possible and necessary.

172. The Mission is satisfied that much of the force used by the Israeli soldiers on board the *Mavi Marmara* and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers. On the basis of the forensic and firearm evidence, at least six of the killings can be characterized as extra-legal, arbitrary and summary executions. As such, the conduct of the Israeli forces amounted to violations of the right to life and of the right to physical integrity, as stipulated in articles 6 and 7 of the International Covenant on Civil and Political Rights.³⁸

46. Statements collected by IHH support the findings of the UNFFM. For example, the statement provided by Erol Çıtır provides an eyewitness account of the murder of Cevdet Kılıçlar.

I saw the moment of the death of Cevdet Kılıçlar. He was shot while he was taking a photo, at the moment when his camera has flashed. He was shot in his forehead. Subsequently, I have attempted to bring him to the inside of the ship. While I was holding his head, I noticed a piece of his brain in my hand.³⁹

47. These statements are supported by the autopsy reports of the deceased, as provided herein in Appendix IX. The autopsy report of Cevdet Kılıçlar confirms that he was shot from above, finding the cause of death to be an “a typical firearm bullet entrance wound with abrasion ring in the glabella (between the eyebrows).”

- *Subsequent treatment of passengers*

48. The IDF and Israeli officials treated the passengers of the flotilla in an inhuman and degrading manner following their arrest and in the course of the processing, prior to their deportation from Israel. The Gaza Flotilla Report noted that the treatment meted out to the passengers of the flotilla was in violation of the *Convention Against Torture* and Article 7 of the *International Covenant on Civil and Political Rights*. In particular, “the abuses amounted to the

³⁸ *Ibid.*

³⁹ See Witness Statement of “Erol ÇITIR”, Appendix IV, page 32, para. 120.

deliberate punishment of the passengers, or were an attempt to intimidate or coerce one or more of the passengers for participation in the flotilla and/or activities to prevent the interception of the flotilla".⁴⁰ As a result, the treatment "tended towards torture".⁴¹

49. In the course of processing the passengers and prior to their deportation, the property and belongings of many passengers were stolen (paras. 245 – 248). In the opinion of the Gaza Flotilla Report:

The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds. It constituted grave violations of human rights law and international humanitarian law.⁴²

*Kindly refer to the Gaza Flotilla Report for further delineation of the facts (Appendix X), and Statement of Victims (Appendix IV).

D. LEGAL CHARACTERIZATION

50. Two issues require attention in the context of legal characterization of the crimes in question. First, the nexus between the attack on the flotilla and the Palestinian/Israeli conflict. Secondly, the unlawfulness of the blockade of Gaza.

• Occupation

51. For all intents and purposes, the State of Israel is an occupying power in Gaza.⁴³ This has been recognized by the International Court of Justice in its advisory opinion on the *Wall* case. The situation was correctly summed up by the Goldstone report as follows:

Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.⁴⁴

52. The rules of international law governing occupation are to be found in the *Fourth Geneva Convention 1949* ('GC IV'). The fact that Gaza is an occupied territory which falls within the

⁴⁰ See Gaza Flotilla Report, *supra* note, 3 paras. 181 – 219.

⁴¹ *Ibid*, para. 21.

⁴² *Ibid*, para. 264.

⁴³ See Goldstone Report, *supra* note 15; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 I.C.J. 136, [herein after the "Wall Case"].

⁴⁴ See Goldstone Report, *supra* note 15, para. 278.

ambit of the GC IV means that it is covered by the rules governing international armed conflicts.

53. The Gaza Flotilla Report further found that:

Flotilla passengers were civilians and in the context of the interception of the ships must be considered as protected persons. Under article 4 Fourth Geneva Convention, protected persons are those who, at a given moment and in any manner whatsoever, find themselves in the hands of a part to the conflict of occupying Power of which they are not nationals. In a situation of armed conflict, military force can only be used against a combatant or against civilians participating actively and directly in combat activities, which cannot be said of the civilians on the *Mavi Marmara*.⁴⁵

- **Blockade**

54. On 3 January 2009, Israel declared a "blockade" over the Gaza Strip.⁴⁶ The Gaza Flotilla Report concluded that there was no legal basis for the blockade. Referring to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (SRM), the Gaza Flotilla Report cited paragraph 102, maintaining that:

"[A] blockade is illegal if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade."⁴⁷

55. Accordingly, the Gaza Flotilla Report maintained that the blockade was not justified. The report went further and stated that the blockade may be seen as a form of collective punishment, contrary to Article 33 of GC IV.

56. Furthermore, as the Gaza Flotilla noted, Israel did not claim to be acting in self-defence.⁴⁸ According to the same report, "the flotilla presented no imminent threat."⁴⁹ Therefore, there is no legal basis for a claim to self defence. In summary, the Gaza Flotilla Report found that "no case can be made for the legality of the interception and the Mission therefore finds that the interception was illegal."⁵⁰

E. INTERNATIONAL CRIMES

57. The United Nations Fact Finding Mission was not mandated to identify the crimes committed by the IDF with a view to prosecution before the ICC. However, it is notable that a member of

⁴⁵ See Gaza Flotilla Report, *supra* note 3, para. 66.

⁴⁶ Available at: <http://info.mot.gov.il/EN/index.php?option=com_content&view=article&id=124:no12009&catid=17:notice_tomariners&Itemid=12>.

⁴⁷ See Gaza Flotilla Report, *supra* note 3, para. 51.

⁴⁸ *Ibid.*, paras. 56 – 58 and 262.

⁴⁹ *Ibid.*, para. 57.

⁵⁰ *Ibid.*

the mission, Sir Desmond de Silva QC, has stated that the IDF had committed crimes, which should receive the attention of the ICC.⁵¹

58. The Gaza Flotilla Report unambiguously establishes that the following international crimes were committed by the IDF on 31 May 2010:

1. War Crimes, and
2. Crimes Against Humanity.

- *War Crimes*

59. The Gaza Flotilla Report preferred to examine the conduct of the IDF in terms of Article 147 of the Geneva Conventions, dealing with 'grave breaches'. This provision provides the basis for war crimes as contained in Article 8(2) of the Rome Statute. The Gaza Flotilla Report identified three grave breaches under Article 147 that are reflected in Article 8:

- i. Article 8(2)(a)(i) ('willful killing'),
- ii. Article 8(2)(a)(ii) ('torture or inhuman treatment'), and
- iii. Article 8(2)(a)(iii) ('willfully causing great suffering').

60. Further to the crimes established by the Gaza Flotilla Report the evidence provides that in addition to the crimes identified by the said report, the following non-exhaustive list of crimes were also committed by the IDF:

- i. Article 8(2)(b)(iii) ('Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict');
- ii. Article 8(2)(a)(iv) ('Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly');
- iii. Article 8(2)(a)(vii) (Unlawful deportation or transfer or unlawful confinement); [Relevant only to the passengers from countries with no diplomatic relations with Israel];
- iv. Article 8(2)(b)(i) (Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities);

⁵¹Available at:

<<http://www.google.com/hostednews/afp/article/ALeqM5igD3wuHvZ458Z2KEP8VOSY6vkHeg?docId=CNG.df9e6a188a034ac23300ab0760b91861.981>>.

- v. Article 8(2)(b)(ii) (Intentionally directing attacks against civilian objects, that is, objects which are not military objectives);
- vi. Article 8(2)(b)(iv) (Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated), and
- vii. Article 8(2)(b)(xxi) (Committing outrages upon personal dignity, in particular humiliating and degrading treatment).

61. Within this submission, a rigorous reading and analysis of the facts and evidence present in this case demonstrates that the elements of crime for establishing war crimes have been established. In the alternative, in interpreting the requirements of Article 8, the Appeals Chamber of the ICC has rejected the Pre-Trial Chamber's requirement of large-scale (or systematic conduct) for admissibility as inconsistent with the definitions of the crimes within the Court's jurisdiction, in particular, the definition of war crimes, for which the drafters explicitly rejected such a requirement.⁵² The Israeli raid of the flotilla therefore meets the requirements for a war crime under Article 8 of the Rome Statute.

**See also Expert Opinion of Prof. Cherif Bassiouni as Appendix VIII, and the Gaza Flotilla Report appended as Appendix X.*

- **Crimes Against Humanity**

62. It is submitted that, the conduct of the IDF constituted Crimes Against Humanity, in that it included acts of murder, torture and 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health', which was committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' (Article 7 of the Rome Statute).

63. Furthermore, the attack of the IDF involved multiple acts and was committed pursuant to, and in furtherance of, State policy to commit such an attack.

F. CONCLUSION

64. As the evidence demonstrates, the IDF attack on the flotilla – charged with bringing humanitarian aid to Gaza – resulted in the commission of War Crimes and Crimes Against Humanity falling within the ambit of the ICC's subject matter jurisdiction. These categories of crimes were committed on Gaza humanitarian flotilla, particularly on board the *MV Mavi Marmara*, a vessel registered in the Union of Comoros, a State Party to the ICC.

⁵² See DRC Appeals Chamber Judgment, *supra* note 9, para. 72.

65. The ICC has jurisdiction to consider this matter as the crimes were committed aboard vessels registered as State parties to the ICC statute.
66. The commission of serious crimes of concern to the international community as entrenched in the Rome Statute by the IDF aboard the *MV Mavi Marmara*, a vessel registered in Comoros, places the jurisdiction of the ICC beyond all doubt. Based on the circumstances present in this matter, the preconditions to the exercise of the Court's jurisdiction have been unambiguously satisfied.
67. The circumstances of this case and the facts at hand equally demonstrate:
- i) that the complementarity test has not been satisfied, meaning, that independent, impartial and good faith investigations and prosecutions have not and cannot be carried out at the national level and hence, the Court must seize jurisdiction over the case, and
 - ii) Sufficient gravity has been met in this case.
68. The Rome Statute specifically provides for a presumption in favour of investigations and prosecutions of international crimes of concern to the international community. A thorough consideration of all the circumstances surrounding this case leads to the reasonable conclusion that the interests of justice (Article 53 of the Rome Statute) will be served should the Prosecutor proceed to an investigation under Articles 12 (2) (a), 13 (a) and 14 of the Rome Statute. By so doing, not only will the spirit and *raison d'être* of the Rome Statute will be served, but the interests of the victims of the flotilla raid will be met. Moreover, by standing up to impunity, the Prosecutor of the ICC can facilitate the emergence of a global legal order which ultimately fosters international peace and security. In our humble submission, proceeding to an investigation in the present case carries with it positive ramifications for this latter consideration.
69. Based on the aforesaid, we, acting on behalf of the Union of the Comoros, respectfully request the Madame Prosecutor of the ICC to urgently 'initiate an investigation' as under Articles 13 (a) and 14 of the Rome Statute, into the attack on the Gaza Freedom Flotilla.

Att. RAMAZAN ARITÜRK



Att. Cihat ÇOKDEMİR



Date: 14 May 2013
The Hague, The Netherlands