Who Are the ICC Judges who Ruled Against Israel on the ‘Mavi Marmara’?

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Three International Criminal Court judges who were not household names probably anywhere but in their home countries gained fame or infamy last week.

Judges Joyce Aluoch of Kenya and Cuno Tarfusser of Italy voted 2-1 against Peter Kovacs of Hungary to order ICC Prosecutor Fatou Bensouda to seriously consider reopening her file on the May 2010 Mavi Marmara flotilla, a file which she had closed saying that the case was not grave enough for the ICC.

The focus of the file was the country of the island of Comoros, functioning according to many as a front for Turkish IHH activists, asking the Bensouda to open a full criminal investigation against IDF personnel and potentially security cabinet decision-makers.

The charges: alleged war crimes related to the IDF’s killing of 10 passengers (it has maintained in self-defense) aboard the Mavi Marmara ship which was part of a flotilla which tried to break the Gaza blockade.

Who are these three judges and what might have brought them to bring the ICC closer and deeper into the Israeli-Arab conflict than at any prior point?

There are not a ton of experts on the ICC judges themselves, few of those who are want to discuss their views and the ICC itself is still so new and has so rarely ventured outside of cases related to Africa, that it is not easy trying to explain why Aluoch and Tarfusser’s opinion appeared to be on a different planet from Kovacs’ opinion.

Kovacs, unlike the majority, said that 10 dead passengers was not grave enough and went beyond Bensouda in adding that since the incident appeared to be an altercation between the IDF and IHH activists that there was little to go from a war crimes perspective.

Aluoch, the presiding judge on the panel, has spent over 20 years as a judge mostly on non-international issues and is a trailblazer in Kenya, the first woman to be appointed to Kenya’s highest court.

In a questionnaire she filled out applying to be an ICC judge noted that she thinks a challenge for the ICC is “being proactive in defining what constitutes war crimes so as to look out for them,” suggesting an aggressive approach to going after crimes not conventionally viewed as major war crimes.

Her international law perspective could likely be heavily impacted by her later service on the UN Committee on the Rights of the Child and the African Union Committee on the same issue, leading her to involvement in UN human rights country reviews in Geneva.

She also served as a judge for the International Tribunal for War Affected Children encountering evidence from conflicts in Ireland and Bosnia-Herzegovina.

Aside from clearly expanding into the international law arena in a serious way later in her career, this could place Aluoch in the sphere of UN experts who view war more from a more pristine and philosophical human rights law perspective than from a law of war perspective which focuses more on battlefield realities.

Also, the conflicts she has reviewed have not pitted a Western-style military against an adversary purposely using asymmetric abuse of the laws of war, such as fighting systematically from civilian locations, so she is not necessarily, with all of her experience, familiar with the kind of conflict now standard in Israeli-Arab battles.

Tarfusser comes from a very different background.

In his career in Italy he spent decades as a prosecutor, not as a judge.

Some have said that Tarfusser’s readiness to second-guess Bensouda stems from his wish that he was the ICC Prosecutor and that he in general is less ready to defer to the prosecution the way judges in many systems do.

A side point to this issue is that different countries run on different civil and common law legal systems with different ideas about how much to defer to a prosecutor and in Tarfusser’s Italy, the system is less deferential to prosecutors.

But it is unclear that this would explain the judges’ views since Kenya’s system generally respects prosecutorial discretion (but Aluoch voted against the prosecutor) and Hungary respects it less (though Kovacs voted for the prosecutor.)

Tarfusser also had very little experience with international law or the laws of war with any familiarity with battlefields before joining the ICC, though he had prosecuted terrorism cases and other criminal cases with some international dimensions.

In contrast, Kovacs, while he has spent years as an academic and served in Hungary’s constitutional court later in his career, he has spent nearly his entire career practicing international law and more specifically focused on the laws of war.

Early in his career he published a paper on the Second Additional Geneva Protocol, a cornerstone of the laws of war.

He has worked with and lectured to the International Committee of the Red Cross, one of preeminent organizations dealing with the laws of war, has written for a major publication on the laws of war and maybe, most crucially served in Hungary’s foreign ministry.

Kovacs also had involvement in denying a 2006 attempt to bring the Hungarian acting prime minister before the ICC, rejecting the complaints on various legal grounds despite finding that the prime minister had broken up demonstrations using some disproportionate force.

This could explain a perspective more geared toward battlefield realities and the complexities that armed conflict can present to an executive.

Possibly this could even explain why he viewed 10 deaths on a ship as a non-battlefield and non-major incident and possibly why he seemed to analyze the details of the conflict on the Mavi Marmara with more of a microscope.

Some have added that ICC judges are still institutionally somewhat distrusting of the ICC prosecutor’s office, following a period in which they criticized the original prosecutor Luis Moreno-O’Campo for poor judgment in rushing cases before them without full evidence.

After all of the above, some experts say that the decision may be an anomaly, with only one prior ICC decision on similar issues regarding British soldiers in Iraq, and may be appealed or ignored by Bensouda.