

Comoros referral: The Appeals Chamber of the International Criminal Court gives guidance to the Prosecutor

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By: James Hendry

On September 2, the Appeals Chamber of the International Criminal Court (ICC) ordered the Prosecutor (OTP) to review the decision not to proceed with an investigation of a situation referred to it by the Union of Comoros concerning the May 31, 2010 Israeli raid on a humanitarian aid flotilla bound for the Gaza Strip on the grounds of 'insufficient gravity' (here) with a partial dissent (here). The

decision is interesting as it follows the earlier decision of the Pre-trial Chamber that refused to allow the OTP to pursue an investigation into the situation in Afghanistan (here) there providing guidance on the grounds that the interests of justice did not permit authorization (see the article in this Journal (here)). In the Comoros matter, the Appeals Chamber agreed with the Pre-Trial Chambers' decision of July 16, 2015 (upheld by the Appeals Chamber on November 6, 2015) holding that the OTP had failed to properly consider evidence relating to the issue of whether the matter was of sufficient gravity to merit an investigation under article 53(1)(c) of the Rome Statute, the same provision in issue in the Afghanistan case.

The referral

The Union of the Comoros, a State Party, made a referral to the Prosecutor about the attack by Israeli Defence Forces (IDF) on the *MV Mavi Marmara* in the seven ship humanitarian flotilla on May 31, 2010 in which nine passengers were killed, 55 injured and many others mistreated while the ships were in international waters. The *Mavi Marmara* was registered in the Comoros and therefore within the territorial jurisdiction of the ICC by article 12(2)(a).

The OTP reported on November 4, 2014 that there was a reasonable basis for belief that the IDF committed the war crimes of wilful killing, wilfully causing serious injury to body and health and committing outrages on personal dignity, and, if the blockade of Gaza by Israel were illegal (on which the OTP took no position), also for intentionally directing an attack against civilian objects, all committed in the forcible boarding of the *Mavi Marmara* (paras. 132, 139, 141). Under the heading of 'Admissibility,' the OTP wrote that article 17(1)(d) requires an assessment of 'sufficient gravity' based on the likely set of cases that would arise from an investigation, including whether those most responsible for the crimes would be the part of the investigation, as well as the gravity of the crimes themselves, assessed in terms of their scale, nature, manner of commission and impact (paras. 134-6). Also, article 8(1) adds the consideration of whether a war crime 'was committed as part of plan or policy or as part of a large-scale commission of such crimes', which was not the case here where the ICC's jurisdiction did not extend to the conflict between Israel and Hamas (paras. 135-7). The OTP wrote that the scale of casualties on the Mavi Marmara was 'relatively limited' (para. 138), that there was no evidence of torture (para. 139), that the crimes were not 'systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty' (para. 140) and that the interception of the flotilla did not have a significant impact on peoples of Gaza (para. 141). The OTP noted the limited nature of the potential cases that would arise from an investigation, because only three of the seven ships were registered to States Party and the ICC crimes were limited to one ship (para. 143). The OTP did not believe the flotilla was engaged in a humanitarian mission - a consideration that would increase the gravity accorded to such attacks by article 8(2)(b)(iii) - because the flotilla was not neutral but aimed at challenging the Israeli blockade (para. 146). The OTP concluded that the potential cases that would arise from an investigation were not of sufficient gravity to justify action by the ICC and thus 'inadmissible' under articles 17(1(d) and 53(1)(b) (para. 150). The

OTP closed its file.

Reviewing the OTP decision before the Pre-Trial Chamber (PTC)

On judicial review brought by the Comoros pursuant to article 53(3)(a), the Chamber stated that its role was 'to test the validity' of the OTP decision only on the issues the referring entity disagreed with (para. 9): (a) the failure to consider facts that did not occur on the three ships registered with States Party and (b) the failure to properly assess the gravity factors under article 17(1)(d). The Chamber noted that under article 53(1)(c), the OTP's discretion is limited to deciding whether an investigation would not serve the interests of justice, but (a) and (b) 'require the application of exacting legal requirements' (para. 14). The Chamber also noted that it owed no deference to the decision of the OTP (para. 15).

First, the Chamber held that the OTP erred in principle when it said it could consider only facts occurring within the territorial jurisdiction of the ICC that establish potential crimes within its jurisdiction, that is, on the three ships registered with States Parties. The Chamber ruled that the OTP was entitled to consider facts outside ICC jurisdiction that were relevant to establishing crimes within its jurisdiction (para. 17-18). Ironically, the OTP did consider such facts when it decided the crimes were committed only on the Mavi Marmara and that the crimes had no significant impact in Gaza (para. 18). However, though the OTP stated an erroneous principle, it did not apply it so as to invalidate the assessment of gravity (para. 19).

Though the Chamber agreed with the gravity factors examined by the OTP, it held that they were applied erroneously. The OTP erroneously considered the issue about whether there was a reasonable basis for believing that senior IDF commanders and Israeli leaders planned the crimes, rather than considering its ability to investigate and prosecute those most responsible, an inquiry that the Chamber thought seemed possible in an investigation (paras. 23-24). The OTP materially erred in finding the scope of the crimes was too small: the number of victims on the Mavi Marmara should have been treated as a compelling indicator of sufficient gravity (para. 26). The OTP erred in considering the maltreatment of the victims only as a matter of whether the crime against humanity of committing outrages against dignity was committed as opposed to assessing whether the seriousness of the nature of the IDF's treatment amounted to the crime of torture which an investigation might have revealed (paras. 28, 30). The Chamber also found that the OTP erred in assessing the manner of commission of the crimes because it focused on the necessity of evidence of a high-level plan to meet the threshold of gravity (para. 31). The OTP erred by failing to properly consider the evidence the IDF had used live fire which was relevant to the issue of whether there was prior intent and a plan to attack civilians (para. 34). The OTP's claim of lack of clarity about this grave issue militated in favour of an investigation (para. 36). The Chamber also held that the OTP's treating evidence of the cruel and abusive treatment of passengers in Israel was erroneously attributed only to individual IDF soldiers when its systematic nature reasonably suggested tacit superior acquiescence (para. 38). Evidence

that the IDF tried to cover up their brutal violence could also suggest a plan (para. 41). The Chamber also found that the OTP improperly assessed the fact that only the Mavi Marmara of seven ships was subject to the attack as a matter of gravity when an investigation might provide evidence relevant to the issue of a plan of attack, or some other reason for the focus of the attack (para. 43). The Chamber also held that the OTP erred by failing to accord weight to the suffering of the victims and their families; the concern about the impact on Gaza, though not necessary to meet the threshold of gravity, might also have revealed the clear strong message to Gaza of the control of humanitarian aid by Israel, which was of concern to the UN Human Rights Council and the UN Secretary General (paras. 47-8). The Chamber requested the OTP to reconsider its decision.

The first appeal

The Appeals Chamber on November 6, 2015 dismissed the OTP's appeal on the ground that the Pre-Trial Chamber's decision was not a free-standing ruling on admissibility that would oblige the OTP to initiate an investigation (para. 64) as required by article 82(1) (paras. 49-50).

The Prosecutor's reconsideration

The OTP filed its 'final' decision purportedly rendered under article 108(3) confirming that it reviewed the material before the Pre-Trial Chamber as well as new information acquired between 2015-17 and that there was no need to change its decision not to investigate.

A second judicial review

The Comoros then sought judicial review of the refusal of the OTP to investigate under articles 53(3)(a) and 53(4) in respect of the record before the Pre-Trial Chamber and in respect of the new evidence it provided to the OTP.

The Pre-Trial Chamber decision of November 15, 2018 ordered the OTP to comply with its July 15, 2015 decision on reconsideration within six months. First, the Chamber rejected the Comoros's argument that it could review the new evidence provided by the Comoros because article 53(4) allowed the OTP to reconsider a decision based on new evidence, but there was no jurisdiction in the Statute allowing the Chamber to review it (para. 55). Second, the Chamber held that the OTP was obliged to reconsider its initial decision not to investigate according to the reasons given by the first Pre-Trial Chamber on July 16, 2015 and not to 'wilfully refrain' from complying with them (para. 119) because it disagreed with the first Chamber's reasoning (paras. 30, 83) and carried out the reconsideration based on the earlier submissions and issues raised by the parties before the first Chamber (paras. 32-3, 85, 111). The Chamber noted that the OTP had not properly sought to review the standards applied by the first Chamber in an appeal with leave pursuant to article 82(1)(d) (para. 84). The Chamber held that the Rome Statute made the first Chamber's judicial decision pursuant to

article 53(3)(a) binding on the OTP, which became final after the OTP's appeal (premised on its being a judicial decision) was dismissed (paras. 93-4).

The consequences flowing from the judicial decision were that the OTP was obliged to comply with it. The object and purpose of article 53(3)(a) was to ensure the Chamber provided oversight of the OTP's discretionary powers in the early phase of proceedings and this obliged the OTP to use the decision as the basis of the reconsideration ordered. It ensured the Chamber retained jurisdiction over the order's implementation because the OTP decision was not 'final' for the purposes of Rule 108(3) until it complied with the earlier decision (paras. 95, 114). However, the Chamber made it clear that compliance with the earlier reasons did not entail a specific result (para. 109).

The Chamber granted the OTP request for leave to appeal on January 18, 2019 on the grounds that the determination of whether a reconsideration decision can be considered final for Rule 108(3) and unchallengeable until the OTP applied the reasoning of the Pre-Trial Chamber making the request was a matter involving the 'fair and expeditious conduct of the proceedings' under article 82(1)(d) (para. 41). It made the same finding on the issue of whether the OTP must accept the Pre-Trial Chamber's conclusions of fact and law in a requested reconsideration (paras. 46-9).

The Appeals Chamber majority

The majority held that the Pre-Trial Chamber could review and set aside a 'final decision' of the OTP made pursuant to a judicially ordered request for reconsideration, but only to ensure it was carried out in accordance with the Chamber's request at which point it became a 'proper final decision' (paras. 59, 61).

The majority also held that if the OTP had decided not to prosecute based on the interests of justice pursuant to article 53(1)(c), the Pre-Trial Chamber's powers of review under article 53(3) were 'robust' and it could carry out a review on its own motion: the OTP's decision would be effective only if confirmed by the Chamber, effectively allowing the Chamber to override the OTP decision (para. 75). However, the power to review a decision of the OTP based on article 53(1)(a) and (b) is more limited: the review must be requested by the referring State, and the Chamber may only 'request' a reconsideration, leaving the OTP a margin of appreciation (para. 76). The OTP must consider issues of fact and law under article 53(1)(a) and (b). Questions of substantive and procedural law, such as the standards of evaluating evidence are solely for the Chamber and must be applied by the OTP in a reconsideration (para. 78). However, even if a legal error is corrected, the OTP might still come to the same conclusion: the Chamber does not dictate the result (para. 79). Factual questions are different. The OTP cannot ignore a request from the Chamber to take certain information into account when determining whether there is a sufficient factual basis to initiate an investigation, but the Chamber cannot direct the OTP how to assess this information and what factual findings to make (para. 80). In assessing 'gravity' as in this case, the OTP enjoys a margin of appreciation. The Chamber may oblige

the OTP to consider certain relevant factors and information when reconsidering its decision, but it cannot direct the OTP on how to analyze the information, the factual findings, how to apply the law to the information, the weight to be attached to the factors or the result of the gravity assessment (paras. 81-2).

The majority held that the OTP did not reconsider the decision according to the Chamber's decision, which was final after the appeal failed. It was not open for the OTP to disagree with the Chamber's legal interpretation of the standard to be applied by the OTP or the judicial decision it made (para. 90). On the other hand, the Appeals Chamber found it inappropriate for the Chamber to have directed the OTP to apply a specific interpretation of the 'reasonable basis to proceed' standard to the facts, certain factual findings and the weight to be assigned to certain factors in the gravity assessment (paras. 91-4). Accordingly, the OTP was not bound to follow these determinations though they affected the OTP's decision. However, in the end, the Chamber had not erred when it requested a reconsideration (para. 94). The majority directed the OTP to reconsider and set a time limit for its reply.

One partial dissent (with reasons from the other dissenter to follow) concurred in the disposition of the appeal. First, it held that the Prosecutor could have appealed the reasons of the Pre-Trial Chamber as a matter of jurisdiction without leave under article 82(1)(a) because without the Chamber's decision under article 53(3) to proceed or not to proceed to investigation determined whether there would be proceedings in which the ICC could exercise its jurisdiction under article 13 (paras. 16, 19). Thus, leave to appeal was not needed under article 82(1)(d). Second, the OTP decision, even if 'final' under Rule 108(3) could always be reviewed fully by the Pre-Trial Chamber (para. 33). Third, it held that the OTP should be bound by the Chambers findings of both law and fact because, for example, 'gravity' is a legal characterization of the facts and the OTP's view should not take precedence (para. 37). The OTP could always appeal the Chamber's interpretation of such a legal characterization in the more vigorous judicial review scheme he proposed.

Conclusion

The ICC provided considerable guidance in this case to parties before the Court at the pre-investigation stage of a case referred to the Prosecutor by a State Party, not just on the basics of how the law and evidence should be analyzed but on the role of the Pre-Trial Chamber in the process. In this case, the Court examined the assessment of the 'gravity' of a situation as part of the OTP's decision about whether to request an investigation in the same provision of the Statute as another Pre-Trial Chamber refused to allow the OTP to investigate as a matter of 'the interests of justice'. The decisions show the Court attempting to provide considerable guidance to the Prosecutor.

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