Third Time Lucky? ICC Appeals Chamber Directs Prosecutor to Consider Mavi Marmara Incident for a Third Time

October 29, 2019

By Jeremie Bracka

Opinio Juris

<http://opiniojuris.org/2019/10/29/third-time-lucky-icc-appeals-chamber-directs-prosecutor-to-consider-mavi-marmara-incident-for-a-third-time/>

**Background**

On [2 September 2019](https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF), the Appeals Chamber of the International Criminal Court (ICC) rejected the Prosecutor’s appeal against the decision of the Pre-Trial Chamber (PTC) I on the “Application for Judicial Review by the Government of the Union of the Comoros” of 15 November 2018. In a 3:2 decision, the majority ruled that the Prosecutor must reconsider her decision for a third time not to proceed with the investigation of the Situation on the Registered Vessels of the Union of The Comoros, The Hellenic Republic of Greece and Cambodia (‘Mavi Marmara Incident’). This decision marks the latest round of procedural power jockeying at the ICC since The Comoros first referred the situation to the court in May 2013.

By way of background, on[6 November 2014,](https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-06-11-2014)the Prosecutor first announced her decision not to investigate the incident on the grounds of insufficient gravity. The Comoros sought review under Article 53(3)(a) of the Rome Statute.On [16 July 2015](https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF), in another split 2-1 decision, PTC 1 ruled that the Prosecutor made material errors in her assessment of the gravity and requested her to reconsider the decision not to open an investigation (PTC 2015). The Prosecutor appealed the decision, arguing that the PTC had exceeded its mandate by applying ‘a strict and mistaken standard’ to review the decision. On[6 November 2015](https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF), in a 3-2 majority ruling, the ICC Appeals Chamber determined that for procedural reasons, it was not possible for the Prosecutor to appeal the PTC’s request for reconsideration, thus requiring the Prosecutor to re-examine the matter for a second time.

On [29 November 2017](https://www.icc-cpi.int/CourtRecords/CR2017_07020.PDF), after two years of re-consideration, the Prosecutor filed her ‘final decision’ reaffirming the previous decision not to investigate the situation. The Comoros sought a second review under Article 53(3)(a). Many other requests and appeals were filed by both sides, arguing about jurisdiction and timetables, until [15 November 2018](https://www.icc-cpi.int/CourtRecords/CR2018_05367.PDF), whenPTC 1 ruled that the Prosecutor’s ‘final decision’ ‘cannot be considered final’ and ordered her to consider the case fora third time. This recent Appeals Chamber Judgment confirms that the Prosecutor must reconsider her decision on the Comoros’ referral, by 2 December 2019. These proceedings have exposed some troubling internal fault-lines within the ICC system, and tested the very rationale of the Rome-Statute as well as the limits of judicial over-reach.It is in this context that this post identifies three problematic aspects of the Appeal Chamber’s recent decision.

**1. Internal Tug of War?**

Despite the questionable basis for enabling repeated re-litigation of the matter in light of the terms of the Rome Statute, this recent decision seems to reflect an ongoing power struggle between the Office of the Prosecutor (OTP) and Chambers. The [Appeals Chamber](https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF) concluded that the Prosecutor must consider ‘the specific directions’provided by the PTC in its [16 July 2015](https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF) decision, and by the Appeals Chamber’s decision itself (para 96). It is worth noting that the Appeals Chamber is not reviewing the PTC’s legal conclusions themselves because of a procedural quirk in the Appeal. To this end, the Court affirmed that the PTC did not err when it decided to direct the Prosecutor to carry out a new reconsideration of her decision not to investigate for a third time. One of the key findings is that neither article 53(3)(a) of the Rome Statute nor rule 108(3) of the Rules precluded the PTC from reviewing an OTP decision that it considers to be ‘final’  (para 1).

In the circumstances, this is a curious ruling. Nothing in the Rome Statue compels the ICC bench to engage in such micromanagement of the Prosecutor’s decision-making or its ‘gravity’ analysis. Indeed, Judge Kovacs’ partial dissent from the [PTC 2015 Appeal](https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF) argued that not only did the Court not need to address the merits of Comoros’ application for review (para 2-5), but that the majority adopted an inappropriately restrictive standard of review (para 7-8). It was certainly open to the Appeals Chamber to end more second (or potentially triple) guessing of the OTP. But, the Appeals Chamber did not conclude that two thorough considerations of the situation were enough to satisfy Rule 108(3) to render the Prosecutor’s decision ‘final’.

Rather, the Majority sought to re-assert its own judicial authority at the expense of the very purpose for which the ICC was created, namely to be a court of last resort for the gravest crimes. On two occasions, the [Appeals Chamber](https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF) refers to the ‘unfortunate language and tone’ of the Prosecutor daring to challenge the Court’s judicial review. According to the judgment, the Prosecutor was under an “incorrect assumption that it was open for her to disagree with the Pre-Trial Chamber’s legal interpretation of the standard to be applied by the Prosecutor” (para 90). The Appeals Chamber goes so far as to chastise the Prosecutor’s Appeal as ‘disrespectful’, adding that “…the Prosecutor should in the future exercise more restraint when addressing Chambers of the Court.” (para 95). Me thinks the Court doth protest too much.

After all, this ICC judgment is delivered at a time of extreme dissatisfaction among many in the international community, including the Court’s strongest supporters, regarding the Court’s poor performance in the successful prosecution of cases in mass atrocity situations and the misuse of limited resources. It is not the first time this year the ICC Chambers has sought to flex its judicial muscles. As recently as April, the [PTC unanimously](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) rejected the Prosecutor’s request to formally open its case into Afghanistan by deciding that an official investigation would not be ‘in the interests of justice.’

**2. A Sea of Confusion:**Neither Fish nor Fowl**?**

Notably, the [Appeals Chamber](https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF) does conclude that the ‘ultimate decision’ about initiating an investigation rests with the Prosecutor (para 58). The Majority, Judge Eboe-Osuji and Judge Ibáñez dissenting, acknowledges that aspects of the PTC 2015 decision went too far in directing “..the Prosecutor as to what factual findings she should reach and what weight she should assign to certain factors in her gravity assessment” (paras 91-93). For example, the majority of the PTC 2015 concluded: “…the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed’ (para 30). The PTC 2015 had directed the Prosecutor to assign specific weight to the ‘impact of the identified crimes on the lives of the people in Gaza…the victims and their families as an indicator of sufficient gravity’ (par 47).  Accordingly, the Appeals Chamber determined the Prosecutor is not bound by those ‘factual’ determinations (paragraph 94).

On the one hand, reigning in the PTC 2015 judgment is welcome. On the other, the Appeals Chamber’s reasoning does more to cloud than to clarify.In assessing gravity, the Majority directs the Prosecutor to follow the ‘legal interpretations’ of the PTC, but not the manner in which it assesses this information nor the factual conclusions she should reach (para 80). In [dissent](https://www.icc-cpi.int/RelatedRecords/CR2019_04887.PDF), Judge Eboe-Osuji makes a scathing critique of this fact vs law distinction as ‘…unsustainable—if not meretricious. It is in the nature of the proverbial judicial error of cutting the baby in half. It is unhelpful in the long run, because the law does not operate in a factual vacuum” (para 36). Often, factual and legal conclusions are Siamese twins in the preliminary investigation phase. This is particularly true of the ‘gravity’ criterion. For example, when assessing the scale of alleged crimes, is the OTP considering a matter of legal or factual sufficiency to meet the gravity threshold?

**3. Assessing Gravity: Docking at the Wrong Port**

Overall, it seems the ICC Chambers undervalues the role of the OTP in the gravity assessment at the ‘gate-keeping’ phase. The Prosecutor is more familiar with the evidence and can make an overall evaluation based on all the other cases sitting on her desk. This is why the Prosecutor’s determination is granted so much deference under the Rome Statute at the investigation-opening stage. This is not to say that the Prosecutor always gets it right (far from it!), but it does mean that the PTC  2015 should have given more weight to the Prosecutor’s considered judgment over its own speculative analysis based on limited pieces of information. In this regard, the Appeals decision seeks to remedy that judicial over-reach.

It is worth recalling that the scale of the alleged war crimes in the Mavi Marmara Incident is relatively limited, both in terms of numbers, character and duration. The event resulted in 10 deaths and differs from most ICC cases that involve many thousands of killed or injured in situations of mass impunity. On two occasions, the OTP found no qualitative considerations to satisfy the gravity requirement. In making this determination, she considered the reports of four separate commissions that investigated the incident at the behest of the UN Human Rights Council, the UN Secretary-General, and the governments of Turkey and Israel, as well as information provided by the Comoros. Given the clear purposes for which the ICC was established to deal with grave situations of mass atrocities accompanied by impunity, it is of concern that the ICC system has facilitated 6 years of repeated litigation regarding the matter.

The recent Appeal judgment is particularly perplexing when considered alongside the ICC decision in Afghanistan. As recently as April this year, the [PTC](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) expressed concern that any official investigation into Afghanistan would ultimately be unsuccessful due to the passage of time, political changes on the ground and the Court’s limited resources (paras 91-96). It is notable that the PTC reached this decision even though the Court concluded that there was a reasonable basis that the ‘most serious crimes’ occurred, and that any case concerning those crimes would be admissible (para 96). Whilst the Mavi Marmara case turns on ‘gravity’, it is difficult to reconcile the judicial logic of closing one case given those conclusions, yet insisting on the reconsideration of another which pales in comparative magnitude.

**Conclusion**

Ultimately, this recent appeal ruling is likely to be idiosyncratic. It is only the second time that the OTP declined to open an investigation on the basis of gravity (the first was Iraq), and the first time that the Prosecutor’s decision not to investigate has been challenged by a State Party. To ensure that the decision does not have far-reaching impact, the Prosecutorshould announce that she has reconsidered her decision based on the legal stipulations and again concluded that the gravity test has not been satisfied.This decision gives her more than enough wiggle room to do so. Article 53(3) includes a role for the Court to conduct a review and give its views, but it leaves the final decision with the Prosecutor. The Appeals Chamber recognises this legal reality, notwithstanding all the judicial chest-beating.