

Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Mavi Marmara Incident)

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Keywords

International Criminal Court – Article 53, Rome Statute – situation – admissibility – gravity – prosecutorial discretion – judicial review

Main Text

A. Background

The proceedings at the International Criminal Court (ICC) in *Registered Vessels of The Comoros, Greece and Cambodia* ('Mavi Marmara' or 'Gaza Flotilla' incident) arose in the context of Israel's naval blockade of Gaza. On 31 May 2010, six of eight vessels comprising the 'Gaza Freedom Flotilla' were intercepted by Israeli Defence Forces (IDF) beyond the perimeter of the blockade. With the objective of 'draw[ing] international attention to the situation in Gaza and the effects of the blockade', the aim of those on board the vessels was to deliver humanitarian aid to Gaza. (Art. 53(1) report para 11). On 5 June 2010, the IDF intercepted a seventh vessel that had departed at a later date. The violence that followed the interception of the vessels resulted in the deaths of ten passengers, all of whom were Turkish nationals and one of whom held dual US nationality. There is some disagreement as to the numbers of passengers, of diverse nationalities, who suffered varying degrees of injury during the events aboard the vessels and later, during their arrest and detention in Israel.

Following the incident, the United Nations (UN) Human Rights Council commissioned an independent international fact-finding mission, which published the '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' in 2010. National commissions of inquiry with mandates from Turkey and Israel respectively also published reports in the same year. Finally, a Panel of Inquiry was also established by the UN Secretary General, whose mandate was not to attribute international responsibility but to recommend 'ways of avoiding similar incidents in the future' (Panel Report p. 3). Considering the findings in the Turkish and Israeli reports, the Panel submitted its recommendations in the 'Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident' in 2011. The reports all assisted in establishing relevant facts during the proceedings that followed at the ICC.

Three of the seven vessels, namely the Mavi Marmara, the Eleftheri Mesogios/Sofia and the Rachel Corrie were registered to The Comoros, Greece and Cambodia respectively, all of which were at the time and are at the time of writing States Parties to the Rome Statute (RS). On 14 May 2013, The Comoros referred the situation, which it defined to include potential crimes committed on board the three vessels, to the Prosecutor of the ICC. The Prosecutor initiated a preliminary examination into the situation on the same day as the referral. This entry will discuss the proceedings that followed at the Court.

B. Procedural History

1. The Prosecutor's Article 53(1) Report

Upon the completion of her preliminary examination, the Prosecutor in 2014 published a report under Art. 53(1) RS declining to initiate an investigation into the situation on the basis that there was, by reference to the criteria specified in Art. 53(1)(a)-(c) RS, no 'reasonable basis to proceed under [the] Statute.'

Under Art. 53(1)(a) RS, the Prosecutor affirmed that there was a reasonable basis to believe that certain war crimes within the jurisdiction of the Court had been committed. On the basis that Israel continued to be in occupation of Gaza even after 2005, she considered that the law of international armed conflict was applicable to its conduct in relation to the blockade, while leaving open the possible characterisation of the situation as a non-international armed conflict between Israel and Hamas (Art. 53(1) Report paras 16-17). Accordingly, the Prosecutor considered that there was a reasonable basis to believe that the war crimes of wilful killing (Art. 8(2)(a)(i) RS), inhuman treatment (Art. 8(2)(a)(ii) RS), wilfully causing great suffering or serious injury to body or health (Art. 8(2)(a)(iii) RS) and outrages upon personal dignity (Art. 8(2)(b)(xxv) RS) had been committed. Conditional upon the unlawfulness of the blockade, she also found a reasonable basis to believe that the war crime of intentionally directing attacks against civilian objects had been committed (Art. 8(2)(b)(ii) RS). The conduct in question did not, in the Prosecutor's assessment, amount to crimes against humanity, as no widespread or systematic attack could be discerned from IDF conduct on board the vessels (Art. 7(1) RS). As the territorial jurisdiction of the Court extends to crimes committed 'on board a vessel or aircraft' registered to a State Party (Art. 12(2)(a) RS), jurisdiction *ratione loci* was also satisfied in respect of crimes committed on board the vessels. The Comoros having acceded to the Rome Statute on 18 August 2006, the Court's jurisdiction *ratione temporae* extended from 1 November 2006 onwards (Art. 11(2) RS); with respect to Greece and Cambodia, the Court possessed jurisdiction from 1 July 2002, the date on which the Statute came into force (Art. 11(1) RS).

Having established under Art. 53(1)(a) RS a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, the Prosecutor turned to considerations of admissibility under Art. 53(1)(b) RS. She deemed the situation to be inadmissible on the basis that it did not satisfy the threshold of 'sufficient gravity' specified in Art. 17(1)(d) RS. The limited jurisdictional scope of the situation, which excluded the ongoing conflict in Gaza, contributed in large part to the outcome of the gravity assessment (Art. 53(1) Report para. 147). Accordingly, the Prosecutor's assessment of the scale (Art. 53(1) Report para. 138), nature (Art. 53(1) Report para. 139), manner of commission (Art. 53(1) Report para. 140) and impact of the crimes (Art. 53(1) Report para. 141) all suggested to her that the situation was insufficiently grave. Referring to the policy indication relating to war crimes in Art. 8(1) RS, the Prosecutor also concluded that the alleged crimes had not been committed 'as part of a plan or policy or as part of a large-scale commission of such crimes' (Art. 53(1) Report para. 137). For these reasons, the Prosecutor concluded (without undertaking any assessment of complementarity, *ne bis in idem* or of the interests of justice) that there was no reasonable basis to proceed with an investigation.

2. Pre-Trial Chamber Review in 2015

In 2015, The Comoros as the referring State Party requested the Pre-Trial Chamber under Art. 53(3)(a) RS to review the Prosecutor's decision declining to initiate an investigation into the situation. Pre-Trial Chamber I sought to restrict its review to the extent of the 'disagreement between the Prosecutor (who decides not to open an investigation) and the referring entity (which

wishes that such an investigation be opened)’ (2015 decision para. 9). Accordingly, it limited itself to the following issues raised by The Comoros: the Prosecutor’s failure to consider, as part of her gravity assessment, facts that occurred beyond the jurisdictional scope of the situation (ie the three vessels) and her failure to properly apply the various indicators that comprise the criterion of ‘sufficient gravity’ in Art. 17(1)(d) RS (2015 decision paras 11-12). Having limited the scope of its review to these issues, the Pre-Trial Chamber purported to determine whether the Prosecutor’s decision had been ‘materially affected by an error’ of procedure, law or fact (2015 decision para. 12).

When addressing the first issue, the Pre-Trial Chamber clarified that the Prosecutor was not restricted in her gravity assessment to facts within the jurisdictional scope of the situation, while ultimately concluding that she had anyway not limited her assessment in that way. As to the second issue, the Chamber found that the Prosecutor had wrongly applied the indicators of the scale (2015 decision para. 26), nature (2015 decision para. 30), manner of commission (2015 decision paras 34, 38) and impact of the crimes (2015 decision para. 47). It also found that the Prosecutor had omitted to consider a fifth indicator of gravity: whether the potential perpetrators were those who ‘b[ore] the greatest responsibility for the identified crimes’ (2015 decision para. 23). In the application of these indicators, moreover, the Pre-Trial Chamber suggested that difficulty in establishing relevant facts militated in favour of an investigation, the objective of which is ‘to provide clarity’ (2015 decision para. 13). Concluding on this basis that the application of all five indicators favoured the initiation of an investigation into the situation, the majority of the Pre-Trial Chamber (Judge Kovács dissenting) requested the Prosecutor to reconsider her initial decision as soon as possible (2015 decision para. 50).

Although the majority of the Pre-Trial Chamber had claimed to exclude *de novo* review of the Prosecutor’s gravity assessment under Art. 53(3)(a) RS, Judge Kovács disagreed with what he considered to be the majority’s application in substance of *de novo* review. In his view, Pre-Trial Chamber review under Art. 53(3)(a) RS ‘d[id] not mean that because the Chamber may have arrived at a different conclusion on the basis of the facts presented that the Prosecutor’s decision was erroneous and should be accordingly reconsidered’ (Kovács para. 2). Thus, the Pre-Trial Chamber should have limited itself to a determination of whether the Prosecutor had abused her discretion, deferring in all other instances to the exercise of her discretion in the initiation of investigations under Art. 53(1) RS (Kovács paras 7-8).

3. The Appeals Chamber’s Decision of 2015

In the absence of a specific provision for appeals under Art. 53 RS, the Prosecutor sought to appeal the Pre-Trial Chamber’s decision under Art. 82(1)(a) RS, the provision permitting appeals in relation to decisions ‘with respect to’ admissibility. The grounds she raised before the Appeals Chamber included the *de novo* standard of review effectively applied by the Pre-Trial Chamber under Art. 53(3)(a) RS and its interpretation of Art. 53(1) RS, which she claimed ‘alter[ed] the Prosecution’s mandate under the Statute and dramatically expand[ed] the scope of the Court’s operations’ (notice of appeal paras 3-4).

The Appeals Chamber dismissed the appeal *in limine*, rejecting the Prosecutor’s characterisation of the Pre-Trial Chamber’s decision as one pertaining to admissibility for the purpose of an appeal under Art. 82(1)(a) RS. Its decision relied on the fact that the Pre-Trial Chamber had only requested the Prosecutor to ‘reconsider’ her initial decision and had not itself pronounced on the admissibility of the situation (Appeals Chamber paras 50, 58). As such, the Pre-Trial Chamber had left the Prosecutor ‘ultimate discretion over how to proceed’, precluding any need for an appeal (Appeals Chamber para. 59). Notably, the Appeals Chamber offered no clarification as to the applicable standard of review under Art. 53(3)(a) RS.

Judges Fernández de Gurmendi and van den Wyngaert dissented from the majority's dismissal of the appeal on the basis that the Pre-Trial Chamber's decision should have been considered as a decision pertaining to admissibility for the purpose of Art. 82(1)(a) RS. Since the Pre-Trial Chamber in its application *de novo* of the same criteria as those that had been applied by the Prosecutor under Art. 53(1) RS had 'clearly found fault with all of the main reasons that the Prosecutor had advanced' and had 'provided reasons to indicate that the contrary conclusion would be true', the dissenting judges were of the opinion that the Prosecutor's reconsideration of her initial decision would necessarily be based on the Pre-Trial Chamber's decision (Appeals Chamber dissent para 20). As a result, the Prosecutor should have been entitled to appeal the decision.

4. The Prosecutor's 'Final Decision' of 2017

In any event, upon reconsideration, the Prosecutor published in 2017 a 'Final Decision' in which she declined, for the second time, to initiate an investigation into the situation. The extensive document drew a distinction between her reconsideration at the request of the Pre-Trial Chamber, under Art. 53(3)(a) RS, and of her own initiative, 'based on new facts or information' that had been brought to her attention under Art. 53(4) RS. The former was rendered as a 'final decision' by reference to Rule 108(3) of the Rules of Procedure and Evidence (RPE).

When reconsidering her initial decision at the request of the Pre-Trial Chamber under Art. 53(3)(a) RS, the Prosecutor offered three justifications for straying from its reasoning. First, she disagreed with the Pre-Trial Chamber's interpretation of the 'reasonable basis to proceed' standard in Art. 53(1) RS, which in her view required 'more than a possible, conceivable, or hypothetical inference' (Final Decision para. 22). In her view, the Pre-Trial Chamber's approach of initiating an investigation in order to clarify uncertain facts would almost always favour the opening of an investigation, rendering Art. 53(1) RS meaningless (Final Decision para. 25). Secondly, the Prosecutor contended that the effective exercise of *de novo* review by the Pre-Trial Chamber under Art. 53(3)(a) RS was 'neither permitted by the Statute nor indeed feasible without scrutinizing the primary information gathered in the preliminary examination' (Final Decision para. 36). She preferred, as Judge Kovács had, a review for abuse of discretion (Final Decision paras 41-42, 58). Finally, the Prosecutor considered that the Pre-Trial Chamber had, while conducting its *de novo* review of the Prosecutor's assessment of gravity, explained insufficiently 'why the Prosecution was incorrect in law or unreasonable in its factual examination.' (Final Decision para. 70). Considering that she was in any event not bound by the Pre-Trial Chamber's decision under Art. 53(3)(a) RS, the Prosecutor concluded that there was, upon reconsideration, no reasonable basis on which to proceed. Her assessment of new facts and information under Art. 53(4) RS led to the same conclusion.

5. Pre-Trial Chamber Review in 2018

In 2018, The Comoros sought a second review under Art. 53(3)(a) RS, this time in relation to the Prosecutor's Final Decision. The referring entity drew, as the Prosecutor had, a distinction between the Prosecutor's reconsideration at the request of the Pre-Trial Chamber, under Art. 53(3)(a) RS, and her decision on new facts and information, under Art. 53(4) RS. What was by no means clear in the initiation of the proceedings was whether the decisions taken by the Prosecutor under Arts 53(3)(a) and 53(4) RS respectively were susceptible to review. With respect to the Prosecutor's decision under Art. 53(3)(a) RS, the Pre-Trial Chamber did not consider The Comoros' request as a request for a second review under Art. 53(3)(a) RS. Instead, the Chamber held the view that it 'retain[ed] jurisdiction to ensure that the Prosecutor compl[y] with the 16 July 2015 decision' and that its 'oversight role under article 53(3)(a) of the Statute continue[d] to be in effect' (2018 decision paras 95, 116). Conversely, when it came to the Prosecutor's reconsideration

under Art. 53(4), the Pre-Trial Chamber conceded that the Rome Statute made no provision for review of that decision (2018 decision paras 53-54).

Having justified its review under Art. 53(3)(a) RS in this way, and in light of the Appeals Chamber's dismissal of the Prosecutor's appeal, the Pre-Trial Chamber concluded that its initial decision of 2015 had 'acquired the authority of a final decision' (2018 decision para. 94). From this the Chamber drew three consequences: that the Prosecutor had been obliged to comply with its 2015 decision, that its 2015 decision constituted 'the basis for' the Prosecutor's reconsideration, and that since the Prosecutor had 'willfully refrain[ed] from complying' with its 2015 decision in her Final Decision, the Pre-Trial Chamber retained jurisdiction to secure compliance (2018 decision paras 83, 95). Consequently, the Chamber instructed the Prosecutor to reconsider, once again, her initial decision not to proceed.

6. The Appeals Chamber's Decision of 2019

Once again, the Prosecutor sought leave to appeal the decision of the Pre-Trial Chamber, this time relying on Art. 82(1)(d) RS, the residual provision for appealing a decision that involves *inter alia* 'an issue that would significantly affect the fair and expeditious conduct of the proceedings'. The issues raised in her request illuminate the points of disagreement between the Prosecutor and the Pre-Trial Chamber during the course of the proceedings:

Whether the Pre-Trial Chamber may entertain and rule upon the merits of further requests for reconsideration under article 53(3)(a) of the Statute, once the Prosecutor has formally notified the Pre-Trial Chamber of her final decision not to initiate an investigation under rule 108(3).

Whether and under what circumstances the Pre-Trial Chamber may set aside the conclusion and reasons of the Prosecutor – her final decision not to initiate an investigation – once it has been formally notified to the Pre-Trial Chamber under rule 108(3).

Whether the Prosecutor, in carrying out a reconsideration under article 53(3)(a) of the Statute and rule 108, is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues (leave to appeal 2018 paras 9, 11, 13).

The Pre-Trial Chamber certified two of the three issues for appeal. Finding the first issue to be too broad to justify an appeal, and as based solely on the Prosecutor's disagreement with its analysis, the Chamber rejected it as not appealable (2019 decision para. 35). Considering that the second issue '[struck] at the core of the balance between the supervisory role of the Pre-Trial Chamber and the discretionary power of the Prosecutor during the early stages of proceedings' (2019 decision para. 43), and that the need for legal certainty warranted resolution of the third issue, both issues were certified for appeal under Art. 82(1)(d) RS.

The Appeals Chamber issued its decision on 2 September 2019. First, agreeing with the Pre-Trial Chamber, it clarified that neither Art. 53(3)(a) RS nor Rule 108(3) RPE prevented the Pre-Trial Chamber from reviewing whether the Prosecutor's Final Decision 'actually amount[ed] to a proper "final decision"' (2019 appellate decision para. 1). Turning to the second issue of whether the Prosecutor had been bound to accept the Pre-Trial Chamber's conclusions, the Appeals Chamber drew a distinction between questions of law, on the one hand, and questions of fact, on the other. With respect to questions of law, the Chamber clarified that it had not been 'open to the Prosecutor, despite the margin of appreciation that she enjoy[ed] in deciding whether to initiate an investigation or not, to disagree' with the Pre-Trial Chamber's conclusions, including as to the applicable standard of review (2019 appellate decision para. 78). In contrast, the Appeals Chamber was of the opinion that the Pre-Trial Chamber enjoyed a more limited role when it came to

questions of fact. In the Chamber's words, 'it is primarily for the Prosecutor to evaluate the information made available to her and apply the law ... to the facts found' (2019 appellate decision para. 80). In the application of the gravity criterion, this prevented the Pre-Trial Chamber from 'direct[ing] the Prosecutor as to what result she should reach' and 'what weight she should assign' to the various indicators of gravity (2019 appellate decision para. 81). It was consequently impermissible for the Pre-Trial Chamber to 'direct the Prosecutor as to the *result* of her reconsideration' (2019 appellate decision para. 76). Notwithstanding the Pre-Trial Chamber's erroneous approach to questions of fact, the Appeals Chamber ultimately concluded that the Prosecutor had not carried out her reconsideration in accordance with the Pre-Trial Chamber's decision of 2015 and obliged her to do so (2019 appellate decision para. 85).

7. The Prosecutor's Revised 'Final Decision' of 2019

In compliance with the Appeals Chamber's decision, the Prosecutor announced for the third time her decision, upon reconsideration, not to proceed with an investigation into the situation. This 'revised' Final Decision, while taking note of the Pre-Trial Chamber's interpretation on five key questions of law (revised Final Decision, para. 14), relied heavily on the reiteration by the Appeals Chamber of the broad scope of prosecutorial discretion when it came to questions of fact. In the application of the gravity criterion, this discretion included the weight to be assigned to the various indicators of gravity, a point that was mentioned more than once in the Prosecutor's decision. By assigning particular weight to the insufficient scale and impact of the crimes, the Prosecutor sought again to justify the conclusion that the situation was insufficiently grave.

Assessment

The Mavi Marmara incident is the only situation to date referred by a State Party in respect of which the Prosecutor has declined under Art. 53(1) RS to initiate an investigation. It is also the only situation in relation to which the review procedure in Art. 53(3)(a) RS has been utilised, in this instance at the initiative of a State Party. The lengthy string of proceedings before the Pre-Trial Chamber and Appeals Chamber thus affords a unique opportunity to examine a number of issues that arise out of a prosecutorial decision not to initiate an investigation into a situation referred by a State Party or the Security Council.

The first is the extent of the Prosecutor's discretion in her decision whether to initiate an investigation into a situation under Art. 53(1) RS, in particular in the application of the open-textured criterion of 'sufficient gravity' as part of her assessment of the admissibility of the situation under Art. 53(1)(b) RS. The Appeals Chamber's decision of 2019 offered necessary guidance as to the application of the gravity criterion, in particular by clarifying that the Prosecutor enjoys the discretion to apply the various indicators of gravity and to weigh them against one another. Even so, outstanding issues in the application of the gravity criterion remain. In particular, the Pre-Trial Chamber's requirement that the Prosecutor initiate an investigation if 'at least one crime within the jurisdiction of the Court has been committed and ... the case would be admissible' (2015 decision para. 13) remains open to question (Heller 2015). The Chamber's approach is at odds with that most recently taken by the Prosecutor in her revised Final Decision, ie that no potential case arising out of the situation would 'encompass *all* the victimization which ha[d] been identified in the situation as a whole' (revised Final Decision, paras 34, 93).

A second, related issue is the appropriate standard of judicial review of the Prosecutor's decision under Art. 53(3)(a) RS. The question of the intensity of Pre-Trial Chamber review was not discussed on appeal in 2015 and was addressed only obliquely by the Appeals Chamber in 2019. On the one hand, the standard of review being a question of law, the Appeals Chamber suggested that the Prosecutor had been bound by the Pre-Trial Chamber's articulation under Art. 53(3)(a)

RS, which in the event was an error-based standard of review. At the same time, however, the Appeals Chamber sought to clarify that the Pre-Trial Chamber could not, in the exercise of its review under Art. 53(3)(a) RS, direct the Prosecutor as to the application of the law to the facts and as to the outcome of her gravity assessment. Presumably, this excludes *de novo* review. Identifying the suitable standard of review under Art. 53(3)(a) RS requires further consideration not only of the respective roles of the Prosecutor and Pre-Trial Chamber but also of broader issues ranging from the allocation of limited resources (Stahn 2009 pp 271-272) to potential difficulties in securing evidence and the cooperation of States (Cross 2018 p. 236).

A third issue is the permissibility of appealing a Pre-Trial Chamber decision under Art. 53(3)(a) RS, whether as a decision pertaining to admissibility under Art. 82(1)(a) RS or under the residual Art. 82(1)(d) RS. The Appeals Chamber made clear in 2015 that a decision requesting the Prosecutor to reconsider her initial decision not to proceed with an investigation under Art. 53(3)(a) RS is not subject to appeal under Art. 82(1)(a) RS. It is less clear whether such a decision may nevertheless be appealed under Art. 82(1)(d) RS on the basis that it ‘involves an issue that would significantly affect the fair and expeditious conduct of the proceedings’. The Pre-Trial Chamber that permitted the appeal on this basis believed the provision to be restrictive but noted that ‘[g]ranteeing the request would allow the Appeals Chamber to clarify the applicable statutory regime for the present case but also for any future cases’ (2019 decision para. 43). In light of the authoritative decision of the Appeals Chamber in 2019, it is not clear whether this requirement would likewise be met in future requests for appeal under the provision.

The proceedings relating to the Mavi Marmara incident have been lengthy, but they nevertheless present the first opportunity to explore the boundaries of prosecutorial discretion in the decision whether to initiate an investigation into a situation under Art. 53(1) RS. While the proceedings turned on considerations of gravity, which the Prosecutor is obliged to apply as part of her admissibility assessment under Art. 53(1)(b) RS, the underlying question of the balance between prosecutorial discretion and judicial oversight is also relevant in respect of the remaining requirements under Art. 53(1) RS, namely the satisfaction of the Court’s jurisdictional requirements and of the interests of justice under Art. 53(1)(a) and (c) RS respectively.

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