

The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity

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1. *Introduction*

The ‘Situation on the registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia’ (hereinafter ‘Flotilla situation’) is particularly important among the current proceedings before the International Criminal Court (ICC) because it raises crucial issues which will greatly impact the future action of the Court.

Despite her conclusion that ‘the information available provides a reasonable basis to believe that war crimes under the Court’s jurisdiction have been committed in the context of the interception and takeover of the Mavi Marmara by IDF [Israel Defence Forces] soldiers on 31 May 2010’ – including: wilful killing; wilfully causing serious injury to body and health; outrages upon personal dignity; and possibly intentionally directing an attack against civilian objects – the Prosecutor, Fatou Bensouda, decided not to proceed with an investigation due to an alleged lack of sufficient gravity, thereby closing the preliminary examination on the Flotilla situation.¹ Such a decision was reviewed by the Pre-trial Chamber, which arrived at the opposite conclusion with regard to the gravity assessment, thus it requested the Prosecutor to reconsider the decision not to initiate the investigation.²

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¹ Office of the Prosecutor (OTP), ‘Article 53(1) Report’ (6 November 2014) paras 149-152.

² Pre-trial Chamber I (PTC I), ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’ ICC-01/03 (16 July 2015).



Among the many relevant aspects of the situation at question, this brief comment will focus in particular on three, namely: the limits of the Prosecutor's discretion in selecting the investigations and cases to pursue (under section 2); the tension between the Prosecutor's discretion and judicial review (under section 2.1); and the assessment of the gravity threshold for the sake of the jurisdiction of the Court (under section 3). Notably, it is in the context of the preliminary examination of this situation that a Pre-trial Chamber exercised for the first time its review power, under Article 53(3) of the Statute, of a Prosecutor's decision *not to open* an investigation.

The assessment of the Pre-trial Chamber was firmly opposed by the Prosecutor, who filed an appeal against the Chamber's review decision, lamenting an invasion of her sphere of discretion.³ The Appeals Chamber dismissed *in limine* the Prosecutor's appeal, declaring it inadmissible on the ground that the impugned decision was not one 'with respect to ... admissibility' within the meaning of Article 82(1)(a) of the Statute.⁴ Significantly the Appeals Chamber judges considered that:

'to allow the present appeal to be heard on the grounds that the Impugned Decision is a decision with respect to admissibility would rupture the scheme for judicial review of decisions of the Prosecutor as explicitly set out in article 53, introducing an additional layer of review by the Appeals Chamber that lacks any statutory basis'.⁵

The following paragraphs will deal with each of the above-mentioned points distinctly, starting with some remarks on the Prosecutor's exercise of discretion in general, and in the context of this specific case.

³ Office of the Prosecutor, 'Notice of Appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (27 July 2015) and 'Further submission concerning admissibility' (14 August 2015).

⁴ Appeals Chamber, 'Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"' ICC-01/03 OA (6 November 2015) para 66.

⁵ *ibid* para 60.



2. *The limits of the Prosecutor's discretion*

As anticipated, the ICC proceedings related to the Flotilla situation are particularly important as they represent the first case where a Pre-trial Chamber exercised its review power over a Prosecutor's decision *not to open* an investigation. Significantly, this was the first time the ICC Prosecutor decided *not to open* an investigation after having received a referral by a State party, thus giving the opportunity to the judges to review the decision. Notably, this also appears to be the only case, so far, where the referral by the State was not a pure 'self-referral' – concerning crimes committed by nationals on its own territory – but it did concern alleged crimes committed by foreigners (members of the Israeli army) on the territory of the referring State (the vessel flying the Comoros' flag) and on third States' territory (the vessels flying the Cambodian and the Greek flags). It is an open question whether the latter element played a role in the assessment of the situation by the Prosecutor, who could have applied particular self-restraint given the critical circumstances. Surely, what did play a role in the whole picture of statutory check and balances vis-à-vis the prosecutorial discretion is the unprecedented situation represented by a frustrated referral by a State party.

Indeed, the way the ICC Prosecutor selects which investigation to pursue, or not to pursue is one of the most debated issues in recent international criminal law commentaries. Undoubtedly the improper exercise of the discretionary power in this regard can have tremendous consequences for an institution, such as the ICC, which is to a certain extent still in seek of legitimation.

As it was noted, discretion entails both risks and benefits. In fact,

'discretion sits uneasily between the twin demands of the individualization of prosecutorial decisions and protection from arbitrary state action. Prosecutorial discretion can also provide important efficiency benefits. Since crime in virtually every country exceeds the ability of the criminal justice system to adjudicate it, prosecutors must be able to exercise their discretion to pursue or decline particular cases in order to maintain a functioning criminal justice system.'⁶

⁶ A Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 518.



Similar to the domestic systems, the ‘international criminal justice system’ which currently revolves around the ICC, must also take into consideration efficiency in order to ensure its proper functioning. Clearly, one of the most effective ways to ensure efficiency is to carefully select the investigations and, eventually, the cases to pursue. Consequently, the not-unlimited resources, and thus necessary selectivity that characterizes the ICC, requires that the Prosecutor carefully choose among the myriad of communications alleging the commission of crimes within the Court’s jurisdiction and victims’ complaints.

At Rome in 1998, the debate over the ICC Prosecutor’s powers was essentially a fight over the proper scope of the Prosecutor’s discretion: in particular, whether it should extend to the decision to initiate an investigation.⁷ In fact, as the preparatory works and negotiating history of the Rome Statute show, when it comes to prosecutorial discretion, most of the attention back then was focused on (limiting) the powers of the ICC Prosecutor when deciding *to open an investigation*.

Maybe not so much attention was devoted to the opposite scenario, ie to the limits of discretion permitted with regard to a decision of the Prosecutor *not to open an investigation* (or to prosecute a case). However during these first years of activity of the Court, the issue has already surfaced several times and it appears to be one of the most controversial ones.⁸ The question that can be asked is: to what extent is it possible to push the Prosecutor to pursue an investigation into a situation or into a specific case? As will be further elaborated below, the ICC Prosecutor’s answer to this is that her power to decline the opening of an investigation – including upon reception of a State or UN Security Council referral – is almost absolute and extends even to situations where the Office of the Prosecutor (OTP) believes that crimes within the jurisdiction of the Court have occurred: This would indeed be the case with regard to the Flotilla preliminary examination, where the OTP explicitly admitted that there was a reasonable basis to believe that war crimes had

⁷ The initial draft prepared by the ILC in fact did not include the *proprio motu* power of the Prosecutor to initiate an investigation; for the negotiating history of the provision: see *ibid* 513 ff.

⁸ For the sake of clarity: we are dealing in the following solely with the Prosecutor’s decision to investigate or not to investigate specific *situations*. For the issues regarding ‘case selection’, which are of fundamental importance but cannot be included in this short commentary, let us refer to Marston Danner (n 6).



been committed, but that they would not be grave enough to justify the intervention of the Court. However, as will be further elaborated, the Pre-trial Chamber took quite a different view.

2.1. *State referral, Prosecutor's discretion and judicial review in the Flotilla situation*

The pre-trial procedure of the Rome Statute vests a Prosecutor with a very significant degree of autonomy and discretion, which is however limited by a set of checks and balances. In the first instance, complex admissibility procedures establish a series of limits on the Prosecutor's autonomy in investigating or prosecuting a case. Moreover, while the Prosecutor is certainly independent and enjoys discretion over the investigation selection process, there is a fundamental tension between Prosecutor's autonomy and Judges' oversight in this early phase of the proceedings, from the very opening of the investigation till their close: thus, a decision of the Pre-trial Chamber is needed – *inter alia* – in order to issue a warrant of arrest or a summons to appear ex Article 58 of the Statute, as well as to commit someone to trial, through the confirmation of charges hearing ex Article 61 of the Statute, at the end of the investigative phase.

Most notably, a decision of the Pre-trial Chamber is needed in order for the Prosecutor to initiate an investigation into those cases where no referral – either by the UN Security Council or by a State party – has been received. The judicial authorization to open *proprio motu* investigations was introduced to provide a check on the Prosecutor's discretion at a very early stage, in the absence of other 'legitimation tools' (ie a State or a UN Security Council referral).⁹ The requirement to get the authorization by the Chamber puts an additional burden on the OTP's shoulders, in order to establish before the judges in a very early phase of the proceedings that there is a 'reasonable basis to proceed with an investigation' pursuant to Article 15 of the Statute.¹⁰ So far, each time the Prosecutor has requested the authorization to open an investigation, the

⁹ Thoroughly on this point, Marston Danner (n 6) 515.

¹⁰ The majority of the situations under investigation before the ICC so far were triggered either by a State referral or by the UN Security Council. In fact, only in three out of ten situations has the Prosecutor acted *proprio motu* and, therefore, had to request judicial authorization by the Pre-trial Chamber.



Pre-trial Chamber has always granted it. Similarly, each time the Prosecutor has received a referral by a State or the UN Security Council, an investigation has always been duly opened, with the Comoros referral of the Flotilla situation being the only exception. Whether this is somehow connected to a (real or perceived) lack of legitimation because of the specificity of the referral received by the Comoros, as already pointed out above (above, under section 2), is an open question.

Undoubtedly, the presence of a referral, either by a State or by the UN Security Council, does not automatically imply the opening of an investigation: the power to decline the opening of an investigation into a situation even when the Court has received a State or UN Security Council referral lies at the heart of the independence of the ICC Prosecutor and ultimately of the Court. In fact the Prosecutor is *always* tasked with the responsibility to determine whether a situation meets the legal criteria established by the Rome Statute to warrant an investigation by the Court. The OTP thus have to conduct a preliminary examination pursuant to Article 53(1) of the Rome Statute, which sets out the legal framework to determine whether there is a reasonable basis to proceed with an investigation. The Prosecutor shall consider: jurisdiction; admissibility (complementarity and gravity); and the interests of justice.¹¹

If, upon completion of the preliminary examination, the Prosecutor determines that there is no reasonable basis to proceed with an investigation, the Rome Statute provides for some limited possibility of judicial review. Interestingly, the mechanism of review differs depending on whether the Prosecutor acted *proprio motu* – in which case the Pre-trial Chamber may only review a decision not to open an investigation if based solely on the ‘interests of justice’ pursuant to Article 53(3)(b) – or upon referral. In the latter case Article 53(3)(a) of the Statute provides that the Pre-trial Chamber may review a decision of the Prosecutor ‘not to proceed’ at the request of the State making the referral or the UN Security Council. However the judges can *never oblige the Prosecutor to pursue a specific investigation*: at most they can ‘request the Prosecutor to reconsider that decision’ (not to open an investigation).¹²

¹¹ OTP Article 53(1) Report (n 1) para 1.

¹² However, it shall be noted that according to the wording of art 53(3)(b), when the Prosecutor’s decision not to investigate/prosecute is based solely on the interests of



Moreover, as the Pre-trial Chamber noted in the Flotilla situation,

‘the Chamber’s competence under Article 53(3)(a) of the Statute [...] is triggered only by the existence of a disagreement between the Prosecutor (who decides not to open an investigation) and the referring entity (which wishes that such an investigation be opened), and is limited by the parameters of this disagreement.’¹³

In the case at stake, therefore, the Chamber’s review was limited to the issues explicitly raised by the Comoros in their request, namely the Prosecutor’s determination that the potential cases arising from the Flotilla situation would not be of sufficient gravity. The Chamber, however, used the opportunity to include some general observations regarding the extent of the Prosecutor’s discretion in deciding whether to open an investigation. In our view, some of the most remarkable findings of the 16 July 2015 Decision are the preliminary ones, where the Judges actually provided their interpretation of Article 53(1) of the Statute.¹⁴

In this regard, the opinion of the Pre-trial Chamber is that the Prosecutor’s discretion on whether to open an investigation is much more limited than what was affirmed by the OTP itself. According to the Judges: ‘That discretion expresses itself only in paragraph (c) [of article 53(1)], *i.e.* in the Prosecutor’s evaluation of whether the opening of an investigation would not serve the interests of justice’.¹⁵ Otherwise, the Prosecutor’s assessment of the criteria listed in Article 53(1) provision ‘does not necessitate any complex or detailed process of analysis’.¹⁶ In the Chamber’s view,

‘the presumption of Article 53(1) of the Statute, as reflected by the use of the word “shall” in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts.’¹⁷

Moreover,

justice and the Pre-trial Chamber reviews it on its own initiative, ‘the decision of the Prosecutor shall be effective only if confirmed by the Pre-trial Chamber’.

¹³ PTC I Decision (n 2) para 9.

¹⁴ *ibid* paras 13-15.

¹⁵ *ibid* para 14.

¹⁶ *ibid* para 13.

¹⁷ *ibid*.



‘[m]aking the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal and not contradictory creates a short circuit and deprives the exercise of any purpose.’

In conclusion,

‘[i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor *shall* open an investigation, as only by investigating could doubts be overcome.’¹⁸

The ‘positivist approach’ of Pre-trial Chamber I – requesting the application of ‘exact legal requirements’ by the Prosecutor in the determination of the commencement of an investigation – appears to be even more interesting if one considers that, as already anticipated, pursuant to Article 53(3)(b) of the Statute, the Pre-trial Chamber, on its own initiative, may review a Prosecutor’s decision not to open an investigation if based solely on the ‘interests of justice’ according to Article 53(1)(c). Thus, according to the Pre-trial Chamber’s scenario, the discretion of the Prosecutor *not to open* an investigation is in fact restricted and virtually always subjected to potential review by the Chamber: upon request of the referring entity or, in the absence of a referral, on the Chamber’s own initiative. Interestingly, in the latter case the effectiveness of the Prosecutor’s decision not to initiate an investigation (or to prosecute) ultimately depends upon the Pre-trial Chamber determination (see above footnote 12), whereas in the presence of an *ad hoc* request to review by the State, the Prosecutor can only be requested by the Pre-trial Chamber to reconsider such a negative decision (see Article 53(3)(a) of the Statute). Such a different treatment appears to be coherent with the fact that in the first case the Prosecutor’s decision is only based on the interests of justice, which means that the requirements which would warrant a fully-fledged investigation (or prosecution) were in fact fulfilled (including the gravity threshold) and therefore the decision not to proceed assumes very discretionary, if not political implications.

¹⁸ *ibid* (emphasis added).



3. *Determining the gravity threshold*

As already anticipated, upon the request of the Comoros, the Pre-trial Chamber by majority (Judge Kovacs dissenting) requested the Prosecutor to reconsider her decision not to initiate an investigation into the Flotilla situation. At the heart of the disagreement between the Pre-trial Chamber and the Prosecutor lies the determination of the gravity threshold for the purpose of opening an investigation into an incident.

The Comoros' request to review was based in particular on two main grounds, namely:

- (i) The Prosecutor's failure to take into account facts that did not occur on the three vessels under the jurisdiction of the Court
- (ii) The Prosecutor's failure to properly address the factors relevant to the determination of gravity under Article 17(1)(d) of the Statute.

Therefore, the Pre-trial Chamber's analysis during the review process was limited to these aspects.¹⁹

As to the first aspect, the Chamber agreed with the Comoros representatives, finding that:

'The rules on jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes which were committed elsewhere than the three vessels falling into its jurisdiction [carrying the flag, respectively, of the Comoros, Greece and Cambodia, all State parties], but the Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence as well as their gravity.'²⁰

However, the judges also found that, while erroneously articulating the principle in the abstract, the Prosecutor in fact did take into account certain facts outside the jurisdictional scope of the Court – as for instance the injuries which occurred on other vessels, or the impact of the crimes on the Gaza population – and therefore the erroneous statement of an abstract principle did not affect as such the validity of the gravity assessment.²¹

¹⁹ *ibid* para 11.

²⁰ *ibid* para 17.

²¹ *ibid* para 19.

A more thorough analysis was conducted with regard to the second issue raised by the Comoros representatives. Indeed, the interpretation of the gravity threshold pursuant to Article 17(1)(d) of the Statute for the assessment of ‘admissibility’ within the meaning of Article 53(1)(b) at the stage of a preliminary examination is a highly controversial issue. Particularly confusing is the fact that the Statute requires the assessment of the gravity of *potential cases* already at the pre-investigation stage, when normally the alleged perpetrators have not been identified, and the factual elements are not yet clearly defined. In other words, there is an inherent confusion between what is called *situation gravity* and *case gravity*, as the former is made dependent on the latter. Moreover, *gravity* is a concept which was not defined by the drafters of the Statute, nor in the Rules of Procedure and Evidence.

The jurisprudence of the Court in these first years has struggled to interpret the statutory gravity threshold in a consistent way. Notably, the first judicial interpretation of the gravity threshold was given by Pre-trial Chamber I (but made up of a completely different composition than today’s one) back in 2006, in the context of the decision for the issuance of the warrant of arrest for Thomas Lubanga Dyilo (within the DRC situation).²² After having considered that the Statute is an international treaty by nature, the Chamber then chose to apply the interpretative criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (in particular the literal, the contextual and the teleological criteria) in order to determine the content of the gravity threshold set out in Article 17(1)(d) of the Statute.²³ In any case, the outcome of such a first interpretation was an overly restrictive one, requiring that: (i) the relevant conduct must be either systematic or large scale; (ii) due consideration must be given to the social alarm caused by such conduct in the international community; (iii) the perpetrator of the relevant conduct must be a senior leader and suspected to be the one most responsible for the alleged crimes.²⁴ These requirements were identified as necessary conditions to meet the gravity threshold both at the situation and (again) at the case level.

²² PTC I, ‘Decision on the Prosecutor’s Application for a warrant of arrest. Article 58’ ICC-01/04-520-Anx2 (10 February 2006) para 41 ff.

²³ *ibid* para 42.

²⁴ *ibid* para 63. See the analysis of S SáCouto, K Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2007) 23 *American U Intl L Rev* 811.



However, the above strict interpretation did not survive the review of the Appeals Chamber, which quashed the reasoning of the Pre-trial Chamber in favour of a more nuanced approach, which requires the Prosecutor to take into consideration also other factors.²⁵ The OTP in the meantime appears to have refined its methodology for assessing gravity. Among the several factors, which over the years have been considered relevant by the OTP for determining the gravity pursuant to Article 17(1)(d) of the Statute,²⁶ only the following ones are now mentioned in regulation 29(2) of the Regulations of the Office of the Prosecutor to guide the gravity assessment, namely:²⁷ the scale of crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes. At the preliminary examination stage, the ‘assessment is conducted bearing in mind the potential cases that would be likely to arise from an investigation of the situation’.²⁸

3.1. The Prosecutor’s misinterpretation of gravity in the Flotilla situation

The above-mentioned factors, however, are not exhaustive, since other circumstances and facts appear to be taken into consideration as well.²⁹ In particular, with regard to the Flotilla situation, the Prosecutor

²⁵ Appeals Chamber, ‘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’ ICC-01/04-169 (13 July 2006).

²⁶ ie: The number of people killed; the number of victims; the severity of the crimes; the scale of the crimes; how systematic the crimes; the nature of the crimes; the manner in which the crimes have been committed; and the impact of the crimes, see SáCouto, Cleary (n 24) 825, including references at fn 38.

²⁷ The Regulations of the Office of the Prosecutor entered into force on 23 April 2009. They have been adopted pursuant to art 42(2) of the Statute and Rule 9 of the Rules of Procedure and Evidence and aim to govern the operations of the OTP. As to their importance in the sources hierarchy of the ICC, it is clear that the Regulations are subordinated to the Statute, the Rules of Procedure and Evidence and the Regulations of the Court (see Regulation 1(2) of the Regulations of the OTP).

²⁸ OTP Article 53(1) Report (n 1) para 22.

²⁹ In the Abu Garda case, the PTC I shared the Prosecutor’s view that in assessing the gravity of a case, the nature, manner and impact of the alleged attack are critical, but it added that the gravity of a given case should not be assessed only from a quantitative perspective but rather also taking into consideration the qualitative dimension of the crime. See Pre-Trial Chamber I, ‘Prosecutor v Abu Garda’, Decision on the Confirmation of Charges ICC-02/05-02/09-243-Red (8 February 2010) para 31. In addition, the Chamber found that certain fac-

affirms that an evaluation of the gravity also includes ‘whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed’.³⁰ Such a factor regarding the *potential perpetrators*, though, was not mentioned as a distinct point in the analysis of the situation by the OTP; therefore the Comoros representatives lamented it as a ‘glaring omission’,³¹ which demonstrated that the Prosecutor had failed to apply the very criteria identified by herself in the Preliminary analysis assessment. In fact, as correctly noted by the Chamber,³² the Prosecutor misinterpreted the criteria at stake, when affirming that there was not a reasonable basis to believe that ‘senior IDF commanders and Israeli leaders’ were responsible for the crimes as perpetrators or planners.³³ In the opinion of the judges, this ‘does not answer the question at issue, which relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration, and not as such the seniority or hierarchical position of those who may be responsible for such crimes’.³⁴

tors which the Chamber shall consider in determining sentences pursuant to Rule 145(1)(c) of the Rules of Procedure and Evidence could also serve for the evaluation of the gravity threshold under art 17(1)(d) of the Statute. In particular, these factors included ‘the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime’. For additional case law, see M Ochi, ‘Gravity threshold before the International Criminal Court: An overview of the Court’s practice’ (*International Crimes Database*, 19 January 2016) <www.internationalcrimesdatabase.org/upload/documents/20160111T115040-Ochi%20ICD%20Format.pdf>.

³⁰ OTP 53(1) Report (n 1) para 135.

³¹ Union of the Comoros, ‘Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation into the Situation’ ICC-01/13-3-Red (29 January 2015) para 85.

³² PCT I Decision (n 2) para 23.

³³ Office of the Prosecutor, ‘Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Prosecution’s Response to the Government of the Union of the Comoros’ Application for Leave to Reply in Support of its Application under article 53(3) of the Rome Statute’ ICC-01/13-15 (17 April 2015) para 62.

³⁴ PCT I Decision (n 2) para 23. For a critical appraisal of, among others, this Chamber’s finding, see KJ Heller, ‘The Pre-Trial Chamber’s Dangerous Comoros Review Decision’ (*Opinio Juris*, 17 July 2015) <<http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/>>.



Some confusion appears in the Prosecutor's interpretation of this factor in order to assess the gravity threshold. If, on the one hand, it is true that one of the main purposes of international criminal justice is to bring to trial those in the position of command and control, the leaders, those who take the decisions and not only the direct perpetrators of the crimes,³⁵ on the other hand, there is no statutory requirement that the ICC's personal jurisdiction shall be limited to any particular 'level' of persons. Indeed, we have already noted that the strict interpretation of gravity given in 2006 by the then-Pre-trial Chamber I, requiring that the perpetrator be a senior leader *and* one of most responsible for the alleged crimes, has been quashed by the Appeals Chamber.³⁶

Not only did the OTP err in its interpretation of the potential perpetrators in order to determine the gravity of the situation; in the view of the Chamber, the OTP also committed errors in the interpretation of all other relevant factors, namely: the scale, nature, manner of commission and impact of the identified crimes. As to the *scale*, the judges found that ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity shall be considered a 'compelling indicator of sufficient, and not of insufficient gravity'.³⁷ It should be noted that the judges based their conclusion on objective circumstances and comparative analysis with other situations, where the number of casualties was even smaller and where nevertheless the Prosecutor not only decided to open an investigation but also to prosecute the case.³⁸ In this sense, it seems that the Chamber correctly interpreted and exercised its statutory power to review the Prosecutor's decision not to open the investigation on the basis of errors in the interpretation of the gravity threshold required. As to the *nature of the crimes*, the Prosecutor's conclusion that the many cases of mistreatment of passengers did not amount to torture or inhumane treatment, was contested by the Como-

³⁵ C Meloni, *Command Responsibility in International Criminal Law* (TMC Asser 2010) 1 ff.

³⁶ Moreover, as has been correctly noted: 'One can imagine situations where the objectives of the Rome Statute – including ending impunity, promoting deterrence, and giving voice to the victims of the world's most heinous crimes – would be served through the prosecution of an individual who might not be described as among the 'most senior leaders suspected of being most responsible', SáCouto, Cleary (n 24) 846.

³⁷ PCT I Decision (n 2) para 26.

³⁸ Reference can be done, for instance, to the cases of Abu Garda and Banda, within the Darfur situation; *ibid* para 26.

ros as ‘surprisingly premature’. The same opinion was held by the Chamber, which censured the OTP for not having taken into account, for the assessment of the gravity, the possibility that instances of torture or inhumane treatment were committed. Many errors were identified by the Chamber in the Prosecutor’s assessment of the *manner of commission* of the crimes. In particular, the judges found very significant the fact (which should have been take into account) that the IDF had already opened fire and killed some of the passengers of the Mavi Marmara prior to the boarding of the vessel. Moreover, the Chamber questioned the conclusion of the Prosecutor that the crimes were not planned or resulted from a deliberate plan or policy: on the contrary, the manner of the commission of the identified crimes leads the Chamber to the conclusion that the situation was of sufficient gravity to warrant an investigation.

One last important point of disagreement between the Pre-trial Chamber and the Prosecutor regarded the interpretation of the *impact* of the crimes. The Prosecutor considered that – while having ‘a significant impact on victims and their families and other passengers involved’ – the identified crimes did not have a significant impact on the civilian population of Gaza, and, therefore, overall the impact of the crimes constituted an indicator of insufficient gravity of the potential cases. In the view of the Pre-trial Chamber, on the contrary, the impact of the identified crimes on the direct and indirect victims would have been enough to militate in favour of a finding of sufficient gravity. Moreover, the judges found that the Prosecutor should have recognized the possibility that the crimes had an impact beyond the direct and indirect victims; the crimes, in fact, ‘would have sent a clear and strong message to the people of Gaza (and beyond) that the blockade of Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities’.³⁹ The conclusion of the Prosecutor, about the limited impact, and thus insufficient gravity of the situation, appears to be odd in the face of the concern and outrage the Flotilla attack triggered in the international community, as confirmed by the Prosecutor herself.⁴⁰ Equally indicative of the gravity are

³⁹ *ibid* para 48.

⁴⁰ OTP Article 53(1) Report (n 1) para 14.



indeed the UN statements condemning the Flotilla attack by the IDF,⁴¹ the fact-finding missions,⁴² panels of inquiry⁴³ and proceedings that were opened at the international level and in many countries, including criminal proceedings in Turkey against Israeli officials and soldiers.⁴⁴

4. *The Flotilla situation before the ICC: Palestine's entrance through the back door?*

The last findings of the Pre-trial Chamber, regarding the impact of the identified crimes on the people of Gaza, bring us to our last remarks on the importance of the Flotilla situation before the ICC. In fact, as correctly submitted by the Comoros representatives first, and eventually recognised by the Chamber,⁴⁵ the situation at stake is not only relevant for its immediate impact on the passengers of the vessels and their relatives, but also for the broader context which generated it, namely the blockade of the Gaza Strip by Israel and its consequences on the Palestinian population of Gaza. The Prosecutor was very clear that the 'parameters of the Office's assessment are determined by the limited scope of the situation referred' and that '... the Court does not have jurisdiction over other alleged crimes committed in this context [i.e. the "Israel-Hamas conflict"] nor in the broader context of any conflict between Israel and Palestine'.⁴⁶ While this was true at the time of the Comoros referral, this conclusion is not valid anymore, as the Court now does

⁴¹ See, for instance, the UNSC Presidential Statement UN Doc S/PRST/2010/9 (1 June 2010).

⁴² See UN HRC Fact Finding Mission, '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' UN Doc A/HRC/15/21 (27 September 2010).

⁴³ See the UN Secretary General Palmer-Uribe Report; the Israeli-Turkey Commission and the Turkish Commission.

⁴⁴ However it has been reported that as a consequence of the 2016 formal reconciliation between Israel and Turkey, 'Turkey agrees under the deal to bar its court system from hearing any claims against Israelis for the attack on the Mavi Marmara', see J Hammond, 'How Turkey's Reconciliation Deal with Israel Harms the Palestinians' (*Foreign Policy Journal*, 30 June 2016) <www.foreignpolicyjournal.com/2016/06/30/how-turkeys-reconciliation-deal-with-israel-harms-the-palestinians/>.

⁴⁵ PCT I Decision (n 2) para 48.

⁴⁶ OTP Article 53(1) Report (n 1) paras 25-26; see also para 137.



have jurisdiction over other alleged crimes committed in the context of the Israel-Hamas conflict and more broadly of any conflict between Israel and Palestine.⁴⁷

In her decision not to open the investigation the Prosecutor admitted that, since ‘the incident occurred in the context of, and was directly related to, Israel’s imposition of a naval blockade against the Gaza Strip’, the issue of the legality of the blockade was relevant for the Court’s assessment of the Flotilla interception and alleged commission of crimes by the IDF.⁴⁸ In fact: ‘if the blockade was unlawful, then Israel would not have been legally entitled to take measures to enforce the blockade...’.⁴⁹ The OTP, however, decided not to draw any conclusion as to the legality of Gaza’s blockade, maintaining that the issue only had an impact on the assessment of the alleged war crime of intentionally directing an attack against civilian objects, whereas it would not have any impact on the assessment of the other alleged war crimes under Article 8(2)(a) and 8(2)(b) of the Statute, as claimed by the Comoros and victims representatives, among which: wilful killing; inhumane treatment; wilfully causing serious injury to body and health; extensive destruction and appropriation of property; intentionally launching an attack against civilians; and outrages upon personal dignity.⁵⁰

That the blockade of Gaza is unlawful, has been clearly declared by the most authoritative international bodies, including the UN Secretary General⁵¹ the UN General Assembly,⁵² and the International Committee

⁴⁷ Indeed, when the Comoros referral was received by the Court, Palestine wasn’t a State-Party yet: the State of Palestine ratified the Rome Statute in January 2015, and, at the same time, accepted the jurisdiction of the Court from 13 June 2014 by means of an *ad hoc* declaration pursuant to art 12(3) of the Statute.

⁴⁸ OTP Article 53(1) Report (n 1) para 30 ff. Even more explicit in para 128: ‘The information available indicates that the alleged conduct of the IDF soldiers on board of the Mavi Marmara took place in the context of Israel’s occupation of the Gaza Strip and the naval blockade pertaining to it. Accordingly, the requisite nexus can be established between this context and the alleged conduct’.

⁴⁹ *ibid* para 32.

⁵⁰ For the detailed list of the alleged crimes committed by the IDF members, see *ibid* para 34.

⁵¹ UN Secretary-General, ‘Report of the Secretary-General on the Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem’ UN Doc A/HRC/31/44 (20 June 2016). See also ‘Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied



of the Red Cross (ICRC): in a statement of June 2010, right in the aftermath of the Flotilla attack, the ICRC strongly condemned the closure⁵³ of Gaza as a form of collective punishment that contravenes international humanitarian law, as its restrictions target the entire population of the Gaza Strip, effectively penalizing them for acts they have not committed.⁵⁴ As a result of this unlawful closure, which has been ongoing, continuously for over nine years, the situation of the Palestinian population of the Gaza Strip is disastrous.⁵⁵ The OTP noted that ‘the humanitarian crisis faced by the civilian population of Gaza resulting from the overall restrictions and blockade imposed by Israel ... is a matter of international concern’, but that ‘this issue must be distinguished from the Office’s assessment which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board of the vessels during the interception of the flotilla’.⁵⁶ Indeed, as was correctly noted, ‘the limited territorial jurisdiction in the situation [...] was a significant factor underlying the OTP’s analysis’.⁵⁷

The Prosecutor now has the opportunity to reconsider the decision and to open the investigation into the Flotilla situation; as indicated by the Pre-trial Chamber, the gravity threshold pursuant to Article 17(1)(d) is met if the relevant criteria are correctly interpreted. Moreover, even if the Flotilla attack happened before the beginning of the Court’s temporal jurisdiction over the alleged crimes committed in the

Palestinian Territory, including East Jerusalem’ UN Doc A/70/421 (14 October 2015) para 29.

⁵² UN Doc A/70/421 (n 51) para 29; UN Doc A/HRC/31/44 (n 51) para 40.

⁵³ The term closure appears to be more appropriate than blockade to describe the whole package of Israel’s restrictions imposed on the Gaza Strip; the naval blockade of the Strip, in fact, is just one component of a much more pervasive set of restrictions that include any kind of movement of people and goods via land, air or sea.

⁵⁴ ICRC, ‘Gaza closure: not another year!’ (14 June 2010) <www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>.

⁵⁵ See the declaration of the UN coordinator for humanitarian and development activities in the occupied Palestinian territory, Robert Piper, after visiting Gaza in February 2016: ‘Top UN official says war-hit Gaza on ‘disastrous trajectory’ (AFP News, 4 February 2016) <www.afp.com/en/news/top-un-official-says-war-hit-gaza-disastrous-trajectory+&cd=1&hl=en&ct=clnk&gl=de>.

⁵⁶ OTP Article 53(1) Report (n 1) para 147.

⁵⁷ M Longobardo, ‘Everything is Relative, Even Gravity. Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair’ (2016) 14 J Intl Criminal Justice 5.



Palestinian territory, the broader context of the Gaza situation – and in particular the ongoing (illegal) blockade imposed on the Gaza Strip – shall be taken into consideration by the OTP, not only for its inextricably link with the contextual element of the alleged war crimes committed during the Flotilla raid (ex Article 8 of the Statute), but also in terms of impact of the alleged crimes on the Palestinian population of Gaza, which is relevant for the overall assessment of the gravity threshold.

In conclusion, while Palestinian victims are waiting for the ICC to open its door and finally deal with their submissions,⁵⁸ Palestine, and in particular the situation of Gaza, could enter the ICC through the back door of a (much needed) investigation on the Flotilla situation.

⁵⁸ After the 2012 rejection, a new decision by the Prosecutor, whether to open the investigation on the situation in Palestine, whose preliminary examination was opened in January 2015 after Palestine's accession to the Rome Statute and filing of the ad hoc declaration ex art 12(3) of the Statute, is due in the near future.

