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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

E-Offprint:

Ali Emrah Bozbayındır, "The Venture of the Comoros Referral at the Preliminary Examination Stage", in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book)). This publication was first published on 6 September 2018. TOAEP publications may be openly accessed and downloaded through the web site www.toaep.org which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers –* Arte dei Maestri di Pietra e Legname *– was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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The Venture of the Comoros Referral at the Preliminary Examination Stage

Ali Emrah Bozbayındır*

17.1. Introduction

As of September 2017, the situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the United Kingdom of Cambodia (hereinafter the 'Gaza flotilla situation') was still on the list of ongoing preliminary examinations of the Office of the Prosecutor (hereinafter the 'OTP'). The Gaza flotilla situation goes back to a referral by the Union of the Comoros, which was submitted to the International Criminal Court ('ICC') on 14 May 2013 "with respect to the 31 May 2010 Israeli raid on a humanitarian aid flotilla bound for the Gaza Strip".[1] The referral proved both legally and politically significant. The Comoros referral is the first referral of a State concerning the alleged crimes committed by another State that is also a non-State Party of the Rome Statute of the ICC.[2] Moreover, the referral by Comoros has a symbolic significance – especial-

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1 Union of the Comoros, "Referral of the Union of Comoros with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip", 14 May 2013, ICC-01/13-1-Anx1 (http://www.legal-tools.org/doc/d5e455/).

2 See Antonio Marchesi and Eleni Chaitidou, "Article 14: Referral of a situation by a State Party", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Hart, Nomos, Munich, 2016, margin no. 17; Rod Rastan, "Jurisdiction", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 141, 165.

ly if one considers the Court's activities in its first decade – namely, it is a situation where an African State is referring a situation involving a non-African State to the ICC, and for this reason and others, such as due to the fact the situation in question involves a powerful Western State *vis-à-vis* a small African State, a commentator has dubbed the Comoros Referral as the "Nicaragua Moment for the ICC".[3]

Following her receipt of the referral, the Prosecutor of the ICC has commenced a preliminary examination[4] into the Gaza flotilla situation; and in her analysis dated 6 November 2014, she concluded that there was "a reasonable basis to believe that the killing of passengers of the *Mavi Marmara* amounted to the war crime of wilful killing pursuant to Article 8 (2) (a) (i) of the Statute". Nonetheless, she decided not to initiate an investigation into the situation by invoking the Court's gravity requirement. Up until the situation in question, the Prosecutor has not declined to proceed when a State Party has referred a situation. Comoros successfully exercised its right under Article 53 by filing a request for review of the Prosecutor's decision not to investigate and raised two complaints, that is, the contextualization of the gravity analysis and analytical errors in the Prosecutor's assessment of gravity. After reviewing the Prosecutor's decision, Pre-Trial Chamber ('PTC') I requested her to reconsider. The Prosecutor's vigorous opposition to PTC I's decision is one of the remarkable procedural aspects with respect to the Gaza flotilla situation. Unsurprisingly, the Appeals Chamber dismissed a request for appeal against the Pre-Trial Chamber I's decision by the Prosecutor *in limine*, as the normative framework of the Rome Statute does not contain such an appeal mechanism. As stated in the 2016 report on preliminary examination activities by the OTP, the Prosecutor has reconsidered her decision, which has not been made public so far, however.

The Comoros referral has probably been the most significant step in the pursuit of justice of the victims of the Gaza flotilla situation, which is

[3] Dapo Akande, "Court Between A Rock and Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC", in *EJIL: Talk!*, 15 May 2013.

[4] For an overview of drafting history and current structure of the preliminary examinations of the Office of the Prosecutor see Guiliano Turone, "Powers and Duties of the Prosecutor", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1137, 1146 ff.; Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, Oxford, 2016, pp. 335 ff.

at times called the '*Mavi Marmara* incident'. Prior to the initiation of proceedings by the ICC, the *Mavi Marmara* incident attracted considerable international attention, and a United Nations Fact Finding Mission was dispatched under the aegis of the Human Rights Council, which has produced the most reliable and objective report ('HRC Report') with regard to the incident so far.[5] Apart from the HRC Report, Turkey[6] and Israel[7] have published their own inquiry reports concerning the incident, both of which contain factual and legal analyses pertaining to the events that took place aboard *Mavi Marmara*; and finally, the Palmer Report was published in September 2011, at the behest of the UN Secretary-General.[8] The mandate of the panel was to review the reports of the Israeli and Turkish inquiries and try to reconcile the parties involved.

In this chapter, I shall try to focus my attention towards the most contentious substantive and procedural issues that have arisen from the situation in question, which, in turn, also has a significant bearing on the issues in respect of the quality of preliminary examinations conducted by the OTP and the quality of review by PTC I in the preceding four years. To be sure, these issues will incontestably have lasting repercussions on the proceedings of the Court, especially with respect to the scope and nature of review of the Prosecutor's decision not to initiate an investigation upon a Security Council or a State Party referral, and the limits of the Prosecutor's discretion at the preliminary examination stage.[9]

Yet, before embarking upon my analysis, I would like to first elucidate the factual basis on which I wish to proceed. I will be basing my legal analysis on the facts that have been determined and outlined by the

5 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 (hereinafter the 'HRC Report') (http://www.legal-tools.org/doc/32f94d/).

6 The Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, 11 February 2011 (http://www.legal-tools.org/doc/022ff6/) (hereinafter the 'Turkish Report').

7 The Public Commission to Examine the Maritime Incident of 31 May 2010, *The Turkel Commission Report*, 21*: Part One*, 23 January 2011 (hereinafter the 'Israeli Commission Report') (http://www.legal-tools.org/doc/f2aae4/).

8 *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, 2 September 2011 (http://www.legal-tools.org/doc/f2de32/) (hereinafter 'Palmer Report').

9 Cf. Chantal Meloni, "The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity", in *Questions of International Law*, 2016, vol. 33, p. 3.

HRC Report. It has been indeed a remarkable deficit with regard to the quality of the preliminary examination of the Gaza flotilla situation that when the accounts in the four reports differed, the Prosecutor preferred the version of contested event that was contained in the Israeli Commission Report (for instance, regarding the use of live ammunition from helicopters). Likewise, Judge Kovacs heavily relied on the Israeli Commission Report's factual and legal analysis in his dissenting opinion. Without a doubt, this choice is by no means limited to the appreciation of the facts but also pertains to the legal analysis of the most pertinent issues like that of the legality of blockade imposed by Israel on Gaza at that time or the nature of the armed conflict in the present situation. The four reports, therefore, exhibit the greatest divergence with respect to the interpretation and application of international humanitarian law, especially with respect to two out of the six requirements for the legality of blockade, namely that: the blockade must be in response to an international armed conflict and in all cases it must be proportionate.[10]

Moreover, in the scholarly treatments of the *Mavi Marmara* incident, one can easily discover whether the respective author has chosen to proceed upon the HRC Report or the Israeli Commission Report version of the events. This state of affairs reveals itself in the utmost difference between the conclusions arrived at.[11]

For these reasons, I shall commence my analysis with a factual overview of the incident based on the accounts provided in the HRC Report (Section 17.3.), following a brief procedural history of the proceedings before the Court (Section 17.2.). Then, in order to pave the way for further discussion, I will first provide an analysis of the most significant preliminary legal issues concerning the situation in question (Section

[10] For a comparative analysis of these reports' legal analysis respecting these issues see Russell Buchan, "The *Mavi Marmara* Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies", in Darek Jinks, Jackson N. Maogoto and Solon Solomon (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, T.M.C. Asser Press, The Hague, 2014, p. 479; Victor Kattan, "The ICC and the Saga of the *Mavi Marmara*", in Ardi Imseis (ed.), *The Palestine Yearbook of International Law*, vol. 18, no. 1, 2016, pp. 53, 57 ff.

[11] Compare only Russell Buchan, "The *Mavi Marmara* Incident and the International Criminal Court", in *Criminal Law Forum*, 2014, vol. 25, nos. 3–4, p. 466; Geert-Jan Alexander Knoops and Tom Zwart, "The *Flotilla* Case before the ICC: The Need to Do Justice While Keeping Heaven Intact", in *International Criminal Law Review*, 2015, vol. 15, no. 6, p. 1069.

17.4.). In this vein, I will address the legal characterization of the Israeli-Palestinian conflict (Section 17.4.1.), as well as the legality of Israeli blockade on Gaza and that of the Israeli attack on the Gaza flotilla (Section 17.4.2.) respectively. Subsequently, I shall conclude my preliminary analysis with the characterization of the crimes that have allegedly been committed by the Israeli Defence Forces during and in the aftermath of their raid on the Gaza flotilla (Section 17.5.). This analysis will hopefully elucidate the pitfalls and merits of the preliminary examination stage of the Gaza flotilla situation. In doing so, I have made an effort to combine the chronological and thematic orders in treating the issues to be analysed.[12]

In my analysis, I have singled out the following main issues: (1) the Prosecutor's relationship with other fact-finders (Section 17.6.1.), the interpretation of the notion of gravity by the OTP, Comoros and PTC I (Section 17.6.2.), and the issues of limits of prosecutorial discretion and the nature of judicial review contained in Article 53(1)(a) of the Statute. More concretely, I will be dealing with the issue of the tension between the Prosecutor's discretion and judicial review (Section 17.6.3.).

In that respect, I will first deal with the question of gravity. I shall analyse, in turn, the assessment of gravity advanced by the OTP in its 6 November 2014 decision not to initiate an investigation, and PTC I's findings in its decision of 16 July 2015, which found material errors in the Prosecutor's determination of the gravity of the potential cases. The stark contrast between the OTP and PTC I with respect to the assessment of scale, manner of commission, impact and nature of crimes merits further analysis. I will finally question the function of gravity as a leeway for prosecutorial discretion since the Prosecutor has too often resorted to it, especially when she is confronted with a politically sensitive situation. Thus, at times even when a situation would be of sufficient gravity to justify the initiation of an investigation, such an investigation may not be initiated based on a determination of lack of sufficient gravity as a proxy for political considerations.

Secondly, I will address the questions of the nature of review exercised by the PTC and internal institutional accountability of discretionary powers of the Prosecutor and its proper limits. These questions inevitably

[12] For a thorough chronological analysis of the proceedings before the ICC, see Kattan, 2016, pp. 60 ff., see *supra* note 10.

require an analysis of the general issues of prosecutorial discretion and role of the PTC, which, in turn, was created as an institutional response to the establishment of an independent prosecutor. Indeed, the proper nature of judicial review and its advantages in preserving the legitimacy, integrity, consistency and transparency of the Court must be readdressed.

Finally, I will assess the possible actions that may be taken by the Prosecutor concerning the present situation, that is, inaction, initiation of an investigation or not initiating an investigation on the ground of either gravity or the interests of justice. Accordingly, the possible impact of the Turkish-Israeli Agreement of 28 June 2016 on the preliminary examination of the situation in question shall be addressed (Section 17.7.). After the conclusion (Section 17.8.), a postscript written after the submission of the manuscript is included (Section 17.9.)

17.2. Procedural History

On 14 May 2013, the authorities of the Union of the Comoros referred to the Prosecutor the situation "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza Strip". Comoros, by letters to the Prosecutor dated 29 May and 21 June 2013, specified that the situation relates to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip.

In November 2013, the OTP published its Report on Preliminary Examination Activities 2013. In this report, the OTP notes that the situation has been examined by four separate commissions, and states that:

> The Office has analysed the supporting documentation accompanying the referral along with the reports published by each commission, and has identified a number of significant discrepancies in the factual and legal characterization of the incidents by these commissions. Accordingly, the Office is seeking additional information from relevant reliable sources in order to resolve these discrepancies.[13]

[13] Office of the Prosecutor ('OTP'), Annex A: Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, 4 February 2015, ICC-01/13-6-AnxA, para. 101 (hereinafter the 'OTP Report' or 'Decision Not to Investigate') (http://www.legal-tools.org/doc/6b833a/).

On 6 November 2014, the OTP concluded this preliminary examination with regard to the situation and issued a report entitled "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", in which she announced her determination that there was no reasonable basis to proceed with an investigation into the situation. The Prosecutor concluded that there "is a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed in the context of interception and takeover of the *Mavi Marmara* by IDF [Israel Defense Forces] soldiers on 31 May 2010". The Prosecutor determined that there was reasonable basis to believe that the war crimes of wilful killing under Article 8(2)(a)(i), wilfully causing serious injury to body and health under Article 8(2)(a)(iii), committing outrages upon personal dignity under Article 8(2)(b)(xxi), and, if the blockade of Gaza by Israel is to be deemed unlawful, also intentionally directing an attack against civilian objects under Article 8(2)(b)(ii) of the Rome Statute were committed. However, according to the Prosecutor, "the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to Articles 17(1)(d) and 53(1)(b) of the Statute". The Prosecutor, based on this determination, decided that: "there is no reasonable basis to proceed with an investigation and […] decided to close this preliminary examination".

On 29 January 2015, Comoros submitted an "Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation" to PTC I.[14] The request for review made three arguments:

1. The Prosecutor failed to take into account facts which did not occur on the three vessels over which the Court has territorial jurisdiction;[15]
2. The Prosecutor committed errors in addressing the factors relevant to the determination of gravity under Article 17(1)(d) of the Rome Statute;[16] and

[14] International Criminal Court ('ICC'), Public Redacted Version of Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015, ICC-01/13-3-Red (http://www.legal-tools.org/doc/b60981/).

[15] *Ibid*., paras. 62–81.

[16] *Ibid*., paras. 82–135.

3. The Prosecutor should reconsider her decision in light of the attainment by the Court of broader jurisdiction over Gaza.[17]

On 30 March 2015, with the authorization of the Chamber, the Prosecutor responded to the Request for Review.[18]

On 24 April 2015, PTC I issued its Decision on Victims' Participation and appointed the Principal Counsel of the Office of Public Counsel for Victims as legal representative of unrepresented victims.[19]

On 23 June 2015, the Principal Counsel for Victims submitted their "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation".[20]

On 16 July 2015, upon review, PTC I decided by majority (Judge Kovacs dissenting) in favour of Comoros by granting the request on the grounds that her gravity analysis was mistaken and insufficiently took into account facts concerning the situation, and the decision to investigate occupies the lowest evidentiary threshold of a "reasonable basis to proceed". Accordingly, the Chamber requested the Prosecutor to "reconsider her decision not to initiate an investigation".[21]

On 27 July 2015, the Prosecutor appealed against PTC I's decision claiming that the decision of the Chamber constituted a decision with re-

17 *Ibid*., paras. 136–38.

18 OTP, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, 30 March 2015, ICC-01/13-14-Red (http://www.legal-tools.org/doc/0e4e4c/).

19 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber I, Decision on the Victims' Participation, 24 April 2015, ICC-01/13-18 (http://www.legal-tools.org/doc/118fc5/).

20 Office of Public Counsel for Victims, ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation, 23 June 2015, ICC-01/13-27-Red (http://www.legal-tools.org/doc/3b60b4/).

21 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 50 (http://www.legal-tools.org/doc/2f876c/).

spect to admissibility, which may be directly appealed under Article 82(1)(a) of the Statute.[22]

On 6 November 2015, the Appeals Chamber decided by majority to dismiss, *in limine*, and without discussing its merits, the Prosecutor's appeal against PTC I's request on the ground that it was not a decision "with respect to […] admissibility" within the meaning of Article 82(1)(a) of the Rome Statute.[23] The Appeals Chamber reasoned that allowing the Prosecutor's appeal to be heard would rupture the scheme for judicial review of the Prosecutor's decisions as explicitly set out in Article 53 of the Statute and would amount to introducing an additional layer of review that lacks any statutory basis. Besides, the Appeals Chamber opined that the nature of PTC I's decision was not "a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation". In this regard, as provided in Article 53, the final decision remained with the Prosecutor.

On 14 November 2016, the Prosecutor announced her Report on Preliminary Examination Activities 2016,[24] in which she makes the following remarks with regard to the Comoros referral:

> Over the reporting period, the Office conducted a *de novo* review of all the information available to it prior to 6 November 2014, upon which the 6 November 2014 report was based. This included analysis of information from multiple sources, including, inter alia, the reports of the four commissions that previously examined the flotilla incident and the supporting materials and documentation accompanying the referral by the Comoros as well as additional materials provided by it later in the course of the preliminary examination.
>
> This review was conducted in light of the reasoning of Pre-Trial Chamber I in its request to the Prosecutor to review

22 OTP, Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34), 27 July 2015, ICC-01/13-35 (http://www.legal-tools.org/doc/50ca53/).

23 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, 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", 6 November 2015, ICC-01/13-51 (http://www.legal-tools.org/doc/a43856/).

24 OTP, *Report on the Preliminary Examination Activities 2016*, 14 November 2016 (http://www.legal-tools.org/doc/f30a53/).

> her prior decision, as well as the arguments presented by the Comoros and the participating victims.
>
> In addition, the Prosecutor exercised her independent discretion under Article 53 (4) to consider the significance, if any, of information newly made available to the Office since 6 November 2014. The volume of this new information was significant, encompassing further information from the legal representatives of the Comoros and the participating victims, and such submissions as they chose to make.
>
> The Office is nearing completion of its review of all information gathered prior to and since its initial report of 6 November 2014 and is preparing to issue the Prosecutor's final decision under rule 108 (3) in the near future.[25]

As of September 2017, the Comoros situation was on the list of ongoing preliminary examinations.[26]

17.3. Factual Basis

17.3.1. The Importance of the Human Rights Council Report

Determination of facts is a vital aspect of any legal process. In the context of the flotilla incident, the report of the Fact Finding Mission established by the Human Rights Council has been the most reliable and accurate source of establishing facts of the incident so far. Indeed, bearing in mind the fact that there are four reports addressing the incident, each of which includes significant irreconcilable discrepancies, one should employ the following criteria in order to make a determination with respect to the reliability of the information at hand:

- The nature of the commission and, more specifically, whether it was a fact-finding commission (like the United Nations Fact Finding Mission), which has investigated the facts of the situation (witness hearing, visiting the vessels and taking note of other evidence etc.), or a politically mandated commission established to resolve conflicts between the States (the Palmer-Ulribe Report, for instance);
- The impartiality of the commissions, for instance, a commission established by the defence forces of a State to which the potential per-

[25] *Ibid*., paras. 328–31.

[26] OTP, "Preliminary Examinations", available on the ICC web site.

petrators of the alleged crimes belong would not be deemed, by many, as impartial and independent; and

- The recognition given to the reports under consideration.

Comparing and contrasting the existing four reports in light of the above criteria will soon reveal the fact that the HRC Report is the sole report that has such qualities, by virtue of being a product of an independent international fact-finding mission. It is also noteworthy that the HRC Report has been approved by the Human Rights Council of the General Assembly of the United Nations, and is thereby recognized by the international community.[27] I will, therefore, in this study rely on the facts that have been determined and outlined by the HRC Report, but I will also compare the conflicting accounts among the reports when they pertain to a significant issue.

17.3.2. Interception of the Gaza Flotilla by the Israeli Navy and Its Aftermath: Factual Overview and a Summary of the Cases

On 3 January 2009, Israel gave notice of a naval blockade from the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. As noted in the OTP Report: "The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip […]".[28] It was the purpose of the Gaza flotilla, which was organized by the Free Gaza Movement, a human rights organization registered as charity in Cyprus, to break this blockade and to deliver humanitarian assistance and supplies to Gaza.[29]

The Gaza flotilla was composed of eight vessels and a total of 748 persons:

1. *M.V. Mavi Marmara* (registered in Comoros), a passenger ship carrying 577 passengers;
2. *M.V. Defne Y* (registered in Kiribati), a cargo ship with 20 passengers;

[27] Follow-up to the report of the independent international fact-finding mission on the incident of the humanitarian flotilla, UN Doc. A/HRC/RES/15/1, 29 September 2010 (http://www.legal-tools.org/doc/aa1c5f/).

[28] OTP, *Report on Preliminary Examination Activities 2013*, 25 November 2013, para. 90 (http://www.legal-tools.org/doc/dbf75e/).

[29] The HRC Report, paras. 75–79, see *supra* note 5.

3. *M.V. Gazze 1* (registered in Turkey), a cargo both carrying 18 passengers;
4. *M.V. Eleftheri Mesogios* (Greece), a cargo boat carrying 30 passengers;
5. *M.V. Sfendoni* (Togo), a passenger boat carrying 43 passengers;
6. *Challenger 1* (USA), a passenger boat carrying 20 passengers;
7. *Challenger 2* (USA), a passenger boat carrying 20 passengers, which withdrew from after developing engine problems; and
8. *Rachel Corrie* (Cambodia), a cargo ship carrying 20 passengers, which was delayed and thus unable to join the flotilla. The Israeli Navy seized the ship in international waters on 6 June.[30]

The present factual overview and jurisdictional analysis shall confine itself to events which took place on three vessels: *Mavi Marmara*, on which the most serious alleged crimes have been committed, *Eleftheri Mesogios* and *Rachel Corrie*. This is also in line with the Prosecutor's determination with regard to the jurisdiction *ratione loci*. In this regard, the OTP Report states that:

> The Union of the Comoros ratified the Rome Statute on 18 August 2006. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its nationals from 1 November 2006 onwards. Cambodia ratified the Rome Statute 11 April 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Cambodia or by its nationals from 1st July onwards. Greece ratified the Rome Statute on 15 May 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Greece by its nationals from 1st July 2002 onwards.[31]

17.3.2.1. Events aboard the *Mavi Marmara*

On 31 May 2010 at approximately 04:30, the Israeli Defence Force made an initial attempt to board the *Mavi Marmara* from zodiac boats. The Israeli forces fired non-lethal weaponry onto the ship, including smoke and stun grenades, tear-gas and paintballs. Due to the strong sea breeze and later due to the downdraft from the helicopters, the smoke and tear gas

30 *Ibid*., paras. 81–82.

31 OTP, *Report on Preliminary Examination Activities 2013*, para. 89, see *supra* note 28.

were not effective.[32] These initial attempts of the Israeli forces to board *Mavi Marmara* proved unsuccessful.

Just minutes after soldiers from the zodiac boats had made an initial attempt to board, the first helicopter appeared and the Israeli forces used smoke and stun grenades in an attempt to clear an area for the landing of soldiers. The Israeli forces boarded the *Mavi Marmara* lowering a rope, which was let down from the helicopter and from which the first group of soldiers descended.[33]

There are different accounts about the use of live ammunition from the helicopters. The Israeli Commission Report claims that no firing from helicopters took place. The Turkish Commission Report states that from 04:32 onwards, live ammunition was fired from the zodiacs and the helicopter. Even though the OTP's initial report states that the HRC Report "found that live ammunition had been used from at least one of the helicopters and also admitted it was very difficult to establish the exact chain of events due to the conflicting accounts and available evidence".[34] By contrast, the HRC Report is in fact quite clear about the use and time of live fire from the helicopter:

> The Mission does not find it plausible that soldiers were holding their weapons and firing as they descended on the rope. However, it has concluded *that live ammunition was used from the helicopter on the top deck prior to the descent of the soldiers.*[35]

Indeed, this finding is supported by the witness testimony. As an example, a witness who was on board the *Mavi Marmara* while the Israeli attack took place, stated that:

> […] without landing on the ship they [the Israeli soldiers] started to shoot with guns using real bullets. Several friends were shot and fell down [wounded]. While gunfire was continuing, they released ropes and began to land to the ship.[36]

Although the HRC Report states that: "it is difficult the exact course of events on the top deck between the time first soldier descending and

32 The HRC Report, para. 112, see *supra* note 5.

33 *Ibid*., para. 114.

34 The OTP Report, para. 95, see *supra* note 13.

35 The HRC Report, para. 114, see *supra* note 5 (emphasis added).

36 The Comoros Referral, para. 13, see *supra* note 1.

the Israeli forces securing control of the deck",[37] the report is clear and unambiguous about the use of live ammunition from the helicopters prior to the descending of the Israeli forces.[38] This fact is fairly important in terms of the both parties' claims and in particular is relevant to the recourse to self-defence.

On the use of live ammunition, the Israeli Commission Report claims that the Israeli soldiers came under live fire themselves. However, the HRC Report has found that:

> The Mission has found no evidence to suggest that any of the passengers used firearms or that any firearms [was] taken on board the ship. Despite requests, the Mission has not received any medical records or other substantiated information from the Israeli authorities regarding any firearm injuries sustained by soldiers participating in the raid. Doctors examined the three soldiers taken below decks and no firearm injuries were noted. Further, the Mission finds that the Israeli accounts so inconsistent and contradictory with regard to evidence of alleged firearms injuries to Israeli soldiers that it has to reject it.[39]

After the descending of the Israeli soldiers, a fight ensued between passengers and the first soldiers. Several passengers on the top deck fought with soldiers using their fists, sticks, metal rods and kitchen knives in order to defend themselves or others. During this initial fighting on the top deck three Israeli soldiers were taken under control and brought inside the ship. The soldiers received their rudimentary medical treatment from doctors, who were passengers of the *Mavi Marmara*.[40] On this point, the HRC Report's findings read as follows:

> Two of the soldiers received had received wounds to the abdomen. One of the soldiers had a superficial wound to the abdomen, caused by a sharp object, which penetrated to the subcutaneous tissue. None of the three soldiers had received gunshot injuries, according to doctors examined them. All three soldiers were in a state of shock and were suffering from cuts, bruises and blunt force trauma[41] […] It was de-

37 The HRC Report, para. 115, see *supra* note 5.

38 *Ibid*., para. 114.

39 *Ibid*., para. 116.

40 *Ibid*.

41 *Ibid*., para. 125.

> cided that [by the passengers] the soldiers should be released and they were taken to the bow of the lower deck. Once the bow deck two of the soldiers jumped into the sea and were picked up by Israeli boats. The third soldier did not jump and was rapidly joined by Israeli soldiers who came down from the top deck.[42]

During the operation the Israeli soldiers landed from three helicopters over a 15-minute period. The soldiers used paintballs, plastic bullets and live ammunition, fired by soldiers from the helicopters above and the soldiers who had landed on the top deck. It was not easy to escape from the fire, for the escape points to the bridge deck from the top deck were narrow and restricted, as a result of which it was very difficult for passengers in this area to avoid being hit by live rounds. The Israeli soldiers killed a passenger, for instance, who was using a video camera and not involved in any of the fighting.[43]

It also needs to be highlighted that the majority of wounds suffered by passengers were to their upper torsos in the head, thorax, abdomen and back. Furthermore, the Israeli soldiers continued shooting at passengers who had already been wounded with live ammunition, soft baton charges, and plastic bullets. Several wounded passengers were subjected to further violence, including "being hit with the butt of a weapon, being kicked in the head, chest and back and being verbally abused".[44]

After securing the control of the top deck, the Israeli soldiers moved down to the bridge deck below in order to take control of the ship. During this part of the operation, the Israeli soldiers fired live ammunition both from the top deck at passengers on the bridge deck below and after they had moved down to the bridge deck. As a result of live fire during this period of time, at least four passengers died, and at least nine were injured. Furthermore, none of these passengers posed any threat to the Israeli forces as those passengers were defenceless and more importantly the Israeli soldiers were firing from the top deck above.[45] The HRC Report states that:

> There was considerable live fire from Israeli soldiers on the top deck and a number of passengers were injured or killed

[42] *Ibid*., para. 126.

[43] *Ibid*., para. 117.

[44] *Ibid*., para. 118.

[45] *Ibid*., paras. 119–20.

> whilst trying to take refuge inside the door or assisting other to do so.[46]

One witness described such a case in which one passenger was killed in the following manner:

> There were two guys hidden underneath a walkway of the ship to the right hand side and I was screaming at them not to move. The two passengers were below the soldiers. They could not see the soldiers and the soldiers could not see them while they were hidden under the walkway. Then the guys moved out, making themselves visible as they tried to run towards the metal door. One man made it to open the door and got inside. The other man must have been shot. I think he was shot in the head from the way he looked, he wasn't moving at all.[47]

During the shootings on the bridge deck, Bulent Yildirim, the President of IHH [a Turkish NGO] and one of principal organizers of the flotilla, removed his white shirt in order to use it as a white flag to indicate surrender. Yet, the live firing continued.[48]

As the operation of the Israeli forces concluded at 05:17, during the 45–50-minute period, nine passengers were killed, more than 24 passengers received serious injuries caused by live ammunition and a large number of other passengers had received injuries by other means (plastic rounds, soft baton chargers, beatings etc.).[49]

17.3.2.1.1. Death of Nine Passengers

During the operation nine passengers were killed by the Israeli soldiers: Furkan Doğan, İbrahim Bilgen, Fahri Yıldız, Ali Heyder Bengi, Cevdet Kılıçlar, Cengiz Akyüz, Cengiz Songür, Çetin Topçuğlu, and Necdet Yıldırım. These deaths occurred on the top deck (roof) and on the bridge deck, portside.

> *Deaths occurring on the top deck (roof)*
>
> *Furkan Dogan*, a 19-year-old with dual Turkish and United States citizenship, was on the central area central are of the

[46] *Ibid*., para. 120.

[47] *Ibid*., para. 121.

[48] *Ibid*., para. 123.

[49] *Ibid*., para. 128.

top deck filming with a small video camera when he was first hit with live fire […] *In total Furkan received five bullet wounds, to the face, head, back thorax, left leg and foot*. All the entry wounds were on the back of his body, except for the face wound which entered to the right of his nose. According to forensic analysis, tattooing around the wound in his face indicates that the shot was delivered at point blank range. Furthermore, the trajectory of the wound, from bottom to top, together with a vital abrasion to the shoulder that could be consistent with the bullet exit point, *is compatible with shot being received while he was lying on the ground on his back* […] The wounds to the leg and foot were most likely received in a standing position.

Ibrahim Bilgen, a 60-year-old Turkish citizen, from Siirt in Turkey, was on the top deck and was one of the first passengers to be shot. He received a bullet wound to the chest, the trajectory of which was from above and not at close range […] *The wounds are consistent with the deceased being shot from soldiers on board the helicopter above and receiving a further wound to the head while lying on the ground, already wounded.*

Fahri Yildiz, a 42-year-old Turkish citizen from Adiyaman, received five bullet wounds, one to the chest, one to the left leg and three to the right leg. The chest wound was caused by a bullet that *entered near the left nipple and hit the heart* and lungs before exiting from the shoulder.

Ali Haydar Bengi, a 38-year-old Turkish citizen from Diyarbakir, received six bullet wounds (one in the chest, one in the abdomen, one in the right arm, one in the right thigh and two in the left hand) […] *There are several witness accounts which suggest that Israeli soldiers shot the deceased in the back and chest at close range while he was lying on the deck as a consequence of initial bullet wounds*.

Deaths occurring on the bridge deck, portside

Cevat Kiliclar, a 38-year-old Turkish citizen from Istanbul, was on the *Mavi Marmara*, in his capacity as a photographer employed by IHH. At the moment he was shot he was standing on the bridge deck on the port side of the ship near to the door leading to the main stairwell and was attempting to photograph Israeli soldiers on the top deck. *Ac-*

> *cording to the pathology reports, he received a single bullet to his forehead between the eyes*. The bullet followed a horizontal trajectory which crossed the middle of the brain from front to back. He would have died instantly.
>
> *Cengiz Akyüz* and *Cengiz Songür*, were injured on the bridge deck in close succession by live fire from above. They had been sheltering and were shot as they attempted to move inside the door leading to the stairwell. *Cengiz Akyüz received a shot to the head and it is probable that he died instantly* […] *Cengiz Songür received a single bullet to the upper central thorax below the neck, shot from a high angle*, which lodged in the right thoracic cavity injuring the heart and aorta. *Cetin Topcuoglu*, a 54-year-old Turkish citizen from Adana had been involved in helping to bring injured passengers inside the ship to be treated. He was also shot close to the on the bridge deck […] He was shot by three bullets. One bullet entered from the top soft tissues of the right side of the back of the head, exited from the neck and then re-entered into the thorax. Another bullet entered the left buttock and lodged in the right pelvis. The third entered the right groin and exited from the lower back. There are indications that the victim may has been in a *crouching or bending* position when this would be sustained.
>
> *Necdet Yildirim*, the location and circumstances of the shooting and death of him remain unclear. He was shot twice in the thorax, once from the front and once from the back. The trajectory of both bullets was from to bottom. He also received bruises consistent with plastic bullet impact.[50]

This information shows that five of the victims were shot either in the back of the head or in the back. As pointed out by Guilfoyle, the HRC Report raises several disturbing categories of deaths:

> Civilians on the top deck attempting to obstruct the boarding who were either shot once in the chest or lower limbs and then shot again in the head or who were shot from above and not at close range (the inference being that at least one live round was fired from the boarding helicopter); Civilians on lower decks who were shot and killed from above with live

[50] Emphasis added. See for a full account of deaths occurred on the *Mavi Marmara*, *ibid*., Table deaths of flotilla participants at pp. 29–30.

fire (i.e. from the top deck where the boarding party landed).[51]

17.3.2.1.2. Injuries and Subsequent Treatment of Injured and Other Passengers

Forensic reports confirm that at least 54 passengers suffered injuries. During the operation to secure control of the top deck, the Israeli forces wounded at least 19 passengers, 14 with gunshot wounds.[52]

Likewise, forensic reports confirm some disturbing categories of injuries. For instance, the serious nature of wounds to a passenger (Uğur Süleyman Söylemez), which include at least on bullet wound to the head, have left the victim in a coma in an Ankara hospital. He passed away after four years in coma on 24 May 2014.[53]

Subsequent treatment of injured and other passengers on the *Mavi Marmara* by the Israeli forces included the following:

- The wounded were required to leave the cabins themselves, or taken outside in a rough manner, without apparent concern for the nature of their injuries and the discomfort that this would cause.[54]
- The wounded passengers were taken to the front of the top deck where they joined other passengers injured during the operation on the top deck and where the bodies of persons killed during the operation had been left.[55]
- Wounded passengers, including persons seriously injured with live fire wounds, were handcuffed with plastic cord handcuffs, which were often tied very tightly causing some of the injured to lose sensitivity in their hands. The plastic handcuffs could not be loosened without being cut off, but could be tightened.[56] A number of passengers were still experiencing medical problems related to handcuffing three months later and forensic reports confirm that least 54

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51 Douglas Guilfoyle, "The *Mavi Marmara* Incident and Blockade in Armed Conflict", in James Crawford and Vaughan Lowe (eds.), *The British Yearbook of International Law 2010*, vol. 81, no. 1, Oxford University Press, Oxford, 2011, pp. 171–223, at p. 212.

52 The HRC Report, para. 117, see *supra* note 5.

53 *Ibid*., see table: deaths of flotilla participants at p. 30.

54 *Ibid*., para. 130.

55 *Ibid*., para. 131.

56 *Ibid*.

passengers had received injuries, transversal abrasions and bruises, as a result of handcuffing on board the *Mavi Marmara*.[57]

- Many passengers were also stripped naked and then had to wait some time, possibly as long as two to three hours, before receiving medical treatment.[58]
- Some of the wounded remained on board of the *Mavi Marmara*, at least one of whom had injuries caused by live ammunition and did not receive appropriate medical treatment until after the ship's arrival at the port of Ashdod in Israel many hours later.[59]
- In the process of being detained, or while kneeling on the outer decks for several hours, there was physical abuse of passengers by the Israeli forces, including kicking and punching and being hit with the butts of rifles.[60]
- One foreign correspondent, on board in his professional capacity, was thrown on the ground and kicked and beaten before being handcuffed.[61]
- The passengers were not allowed to speak or to move and there were frequent instances of verbal abuse, including derogatory sexual remarks about the female passengers.[62]
- The Israeli forces also used dogs and some passengers received dog-bite wounds.[63]

17.3.2.1.3. Confiscation of Property

The HRC Report also provides facts with respect to confiscation of property on the *Mavi Marmara* by Israeli authorities and includes, among others, the following:

- The Israeli authorities confiscated cash and a wide variety of personal belongings, including passports, identification cards, driving licenses, mobile telephones, laptop computers, audio equipment in-

[57] *Ibid*., para. 135.
[58] *Ibid*., para. 131.
[59] *Ibid*., para. 132.
[60] *Ibid*., para. 134.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.

cluding MP3 players, photographic and video recording equipment, credit cards, documents, books and clothing. These items were taken at a number of stages, primarily while on board of vessels including *Mavi Marmara*.[64]

- The passengers were carrying tens of thousands of dollars cash donations, and some of cash confiscated by the Israeli authorities.[65]

The Fact Finding Mission of the UN reported cases of misuse of items confiscated by the Israeli authorities, including laptop computers, credit cards, and mobile telephones. Furthermore, there were allegations regard the use of credit card that belong to the passengers, and stealing and selling laptops belonging to passengers that were on board the flotilla.[66]

The confiscation of property that belonged to the passengers, according to the HRC Report, shows that the soldiers and authorities intended to and did supress and destroy relevant evidence:

> Amongst the items confiscated and not returned by the Israeli authorities is a large amount of video and photographic footage that was recorded on electronic and other media by passengers, including many professional journalists, on board the vessels of the flotilla. This includes a large number of photographic and video materials of the Israeli assault and interception on the *Mavi Marmara* and other vessels. The Israeli authorities have subsequently released a very limited amount of this for public access, in an edited form, but the vast majority has remained in the private control of the Israeli authorities.[67]
>
> This mission is satisfied this represents a deliberate attempt by the Israeli authorities to suppress or destroy evidence and other information related to the events of 31 May on the *Mavi Marmara* and other vessels of the flotilla.[68]

64 *Ibid*., para. 235.

65 *Ibid*.

66 *Ibid*., para. 239.

67 *Ibid*., para. 240.

68 *Ibid*., para. 241.

17.3.2.2. Events aboard the *Eleftheri Mesogios* and the *Rachel Corrie*

Israeli forces boarded the *Eleftheri Mesogios* after 04:30, concurrently with the assault on the *Mavi Marmara* and the *Sfendoni*. On the *Eleftheri* too, Israeli soldiers used physical force, electroshock weapons, plastic bullets and paint balls to clear the area. A number of passengers were injured as a result, including one passenger whose leg was fractured.[69]

Like the assault on the *Mavi Marmara*, all passengers and crew were handcuffed. Two further passengers were also subjected to physical assault. Furthermore, the passengers were almost continuously filmed on video cameras by the Israeli forces. The UN Fact Finding Mission reported that: "One passenger said that he felt this was being done deliberately to humiliate the passengers and that this contributed directly to an elderly passenger experiencing an anxiety attack".[70]

Events aboard the M.V. *Rachel Corrie* took place on 5 June 2010. The ship was captured through same method and the boarding proceeded peacefully. Yet, the lead passenger, who had control of the ship just prior to the boarding, was handcuffed and made to kneel at the back of the ship for approximately 45 minutes after that was placed with the crew. One aspect with regard to capture of the M.V. *Rachel Corrie* needs to be emphasized. The Israeli Chief of Staff cited *Rachel Corrie* as an example of a humanitarian ship which had accepted to be diverted to Ashdod. Yet, this contradicts the passengers' assertions.[71] The passengers as indicated in the HRC Report stated that: "the ship was boarded after protest and was taken to Ashdod against their will".[72]

17.4. Preliminary Legal Issues

The legal analysis in this section will initially focus on the preliminary legal issues such as the law of naval blockade in armed conflict and the legal characterization of the Israeli-Palestinian conflict. In this regard, the following questions need to be addressed:

1. Was the deployment of a naval blockade on Gaza lawful?
2. If the blockade was actually lawful, was the enforcement thereof, on the Gaza flotilla, both legal and proportionate?

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69 *Ibid*., para. 148.

70 *Ibid*., paras. 149–51.

71 *Ibid*., paras. 154–60.

72 *Ibid*., para. 161.

3. Could the Israeli violation on the vessels be justified on the basis that Israel was enforcing a blockade under international humanitarian law?
4. If not, did Israeli forces commit international crimes within the jurisdiction of the ICC?

In this regard, I will address first the issue of legal characterization of the Israeli-Palestinian conflict and then the issue of legality of the Israeli blockade.

17.4.1. Legal Characterization of the Israeli-Palestinian Conflict

Legal characterization of the Israel-Palestinian conflict, namely determining whether it is an international or non-international armed conflict, is of twofold importance. First, it will be the basis for determining the applicability of the norms of international humanitarian law (for example, the Fourth Geneva Convention) and of the Rome Statute. Second, it shall determine the applicability of the law of blockade to the present situation (for under customary international humanitarian law, blockades are only permitted in international armed conflicts).[73] Classifying the Israeli-Palestinian conflict is complex. Clearly, Gaza is not a State and the status of Palestine was on 31 May 2010 still unclear. Therefore, this situation begs the question whether the conflict between Israel and Palestine could be classified as an international or non-international armed conflict.

Israel, Palestine and the international community generally characterize the Israel-Palestinian conflict as an international armed conflict, albeit for different reasons. However, the Israeli approach on this matter is ambiguous.[74] Before Israel's implementation of the Revised Disengage-

[73] See Russell Buchan, "The International Law of Naval Blockade and Israel's Interception of the *Mavi Marmara*", in *Netherlands International Law Review*, 2011, vol. 58, no. 2, pp. 209–41, p. 215; Wolff Heintschel von Heinegg, "Blockade", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford University of Press, Oxford, 2008, para. 25; for further references see Iain Scobbie, "Gaza", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 280–315, p. 301 endnote 115; Wolff Heintschel von Heinegg, "The Law of Armed Conflict at Sea", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 463–547, pp. 464–65; see however the Israeli Commission Report, para. 39, which cites solely two episodes of supporting state practice, see *supra* note 7.

[74] Dieter Fleck, "The Law of Non-International Armed Conflict", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 581–609, pp. 584–85.

ment Plan in August 2005, the jurisprudence of Israel's High Court, as well as the arrangements made for Israel's disengagement, made it plain that Israel considered Gaza as an occupied territory.[75] Nonetheless, especially after putting the Disengagement Plan into force in 2005, Israel has been claiming that they relinquished control over Gaza and its population, thus Gaza is no longer an occupied territory of Israel.[76] In the *al Bassiouni* case, in which the petitioners challenged Israel's restrictions on the supply of electricity, Israel's High Court held that, according to the disengagement in 2005, Israel does not have 'effective control' over Gaza, and thus no longer occupied the territory. The relevant part of the judgment reads as follows:

> […] since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.[77]

[75] See, *Matar and others v. The Commander of the Israeli Defence Force in Gaza*, 1 August 2005, ILDC 73 (IL 2005), para. 7; see further Scobbie, 2012, pp. 284 ff., see *supra* note 73.

[76] See, for such a view, the Supreme Court of Israel sitting as the High Court of Justice, *Al-Bassiouni v. Prime Minister*, 30 January 2008, HCJ 9132/07.

[77] *Ibid*., para. 12.

The Israeli Commission Report has also aligned itself to this view.[78] Nonetheless, the very same report (after stating that "there is a consensus that the conflict between the State of Israel and the Hamas is an international armed conflict, although the reasons that have led various parties to this conclusion vary"[79]) arrived at the conclusion that Israel and Hamas were in an international armed conflict:

> […] The Commission has examined the conditions for imposing and enforcing the naval blockade on the Gaza Strip on the basis of the assumption that the conflict between Israel and Hamas is international in character.[80]

Yet, the Commission's grounds for such a classification are rather unconvincing. While not recognizing Palestine as a State nor as an occupied territory, the Commission considers that the present conflict is 'international' based on a geographical criterion, which has been adopted by the Israeli Supreme Court in the *Targeted Killings* case.[81] The Court held that according to customary international law, where an armed conflict crosses the borders of the State, it is regarded then as international armed conflict from the humanitarian law perspective.[82] However, the Court's reasoning has been sharply criticized. First, there is no State practice which supports the claim that customary international law recognized an armed conflict to be international in character only based on geographical criteria, that is, "a conflict that crosses the border of a state".[83] As Guilfoyle rightly puts:

> […] The fact that a conflict [is] 'external' is not enough to make it 'international' as a matter of law […] the question is not one of the geography of a conflict but the identity of the parties to it […] The fundamental definition of an IAC [international armed conflict] under the four 1949 Geneva Conventions is that it is a conflict involving 'High Contracting Parties': states. The *Tadić* case expands this definition to include as an IAC a conflict involving state-sponsored forces. This, however, remains a test of identity, not geography […]

78 The Israeli Commission Report, para. 47, see *supra* note 7.

79 *Ibid*., para. 41.

80 *Ibid*., para. 44.

81 See the Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment, 11 December 2006, HCJ 769/02.

82 *Ibid*., para. 18.

83 Buchan, 2011, p. 224, see *supra* note 73.

> it is difficult to accept, therefore, the Israeli Supreme Court's position that cross-border violence between Israel and organized armed groups must be governed by the law of IAC.[84]

Whether the State of Israel was an occupying power in Gaza on 31 May 2010 shall be determined by the effective control test which is prescribed by Article 42 of the Hague Regulations, regarded as customary international law,[85] which reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army". Accordingly, a State shall be regarded as an occupying power or an occupation continues to the extent that the occupying power retains effective control – in other words, whether there is exercise of authority by the occupying State in the occupied territory during the period under investigation. To assume that Israel's withdrawal of ground troops from Gaza *per se* is sufficient in determining the termination of the occupation would be incorrect. This is because an effective test based on factual control should not ignore Israel's continued control of Gaza's airspace and other means of control employed by Israel such as satellites.[86] Thus, an analysis of the existence of an occupation should apply the test of effective control that contains the capacity to assert control that is a view supported in the *List* case of the US Military Tribunal at Nuremberg[87] as well as by the ICTY in *Prosecutor v. Naletilić and Martinović*.[88] Indeed, Israeli land forces have re-entered Gaza on numerous occasions since the disengagement and satisfied the test of "capacity to send troops within a reasonable time" or, in the terms of the *List* case, showed that it "could anytime they desired assume physical control of any part of the country".[89]

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84 Guilfoyle, 2011, pp. 185 ff., see *supra* note 51; see further, *ibid*.

85 The International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 172 (http://www.legal-tools.org/doc/8f7fa3/).

86 On Israel's continuing control on Gaza see Scobbie, 2012, pp. 298 ff., see *supra* note 73.

87 The United States Military Tribunal, Nuremberg, "Trial of Wilhelm List and others (the Hostages trial)", in United Nations War Crimes Commission (ed.), *Law Reports of Trial of War Criminals*, vol. VIII, His Majesty's Stationery Office, London, 1949, pp. 34–92.

88 International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Naletilić and Martinović*, Trial Chamber, Judgment, 31 March 2003, IT-98-34-T (http://www.legal-tools.org/doc/f2cfeb/).

89 See Scobbie, 2012, p. 298, see *supra* note 73.

These arguments, as explained by Scobbie, have been neglected or ostensibly manipulated by Israeli authorities in order to achieve pragmatic objectives in particular cases:

> The attempt to classify this conflict was complicated both by the unique nature of Gaza and by Israel's manipulation, and probably conscious manipulation, of legal categories. 'Disengagement' arguably did not terminate occupation as it retained existing structures of control, but was portrayed as such simply because of the absence of boots on the ground. Given the high-tech means of surveillance and attack employed by Israel, this was an attempt to deny responsibility for the territory while reaping the benefits of effective, albeit remote, control.[90]

Indeed, the overwhelming majority of UN Member States, as reflected in the several UN General Assembly[91] and Security Council resolutions,[92] still considered Gaza occupied. This represents the view of the majority of States, and is shared by the International Court of Justice in the *Wall Advisory Opinion*.[93] Likewise, the Goldstone Report[94] affirms that Gaza is a territory occupied by Israel, and as occupier of Gaza, Israel is bound by the provisions of the Fourth Geneva Convention. As the Goldstone Report has found, Israel maintains effective control over Gaza:

> 276. Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention

90 *Ibid*., p. 314.

91 Resolution adopted by the General Assembly on 10 December 2009, UN Doc. A/RES/64/92, 10 December 2009 (http://www.legal-tools.org/doc/4b9ca5/); Resolution adopted by the General Assembly on 10 December 2009, UN Doc. A/RES/64/94, 10 December 2009 (http://www.legal-tools.org/doc/ad9d98/); see further Guilfoyle, 2011, p. 181, see *supra* note 51.

92 Resolution 1860 (2009), UN Doc. S/RES/1860(2009), 8 January 2009 (http://www.legal-tools.org/doc/01f14b/).

93 ICJ, Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 101 (http://www.legal-tools.org/doc/e5231b/).

94 Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, paras. 276–78 (hereinafter 'Goldstone Report') (http://www.legal-tools.org/doc/ca9992/).

> therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.
>
> 277. Despite Israel's declared intention to relinquish its position as an occupying Power by evacuating troops and settlers from the Gaza Strip during its 2005 "disengagement", the international community continues to regard it as the occupying Power.
>
> 278. Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.

Moreover, the HRC Report also concludes that the conflict between Israel and Hamas was of an international character. According to the HRC Report, the occupation exception applies here, which means that the conflict is an international armed conflict to which the law of international armed conflict applies, because Gaza was occupied by Israel on 31 May 2010.[95]

Indeed, the Fact Finding Mission was also satisfied that these circumstances continued to prevail on 31 May 2010.[96] Furthermore, the Comoros referral states that the law of international armed conflicts must be applied to the incident at stake based upon the argument of occupa-

[95] See the HRC Report, paras. 62–64, see *supra* note 5.

[96] *Ibid*., paras. 64.

tion.[97] As an occupying power, the State of Israel had certain obligations imposed on it by international law, such as combatant status, prisoner of war status, right to war booty, and release of those deprived of their liberty.[98] The Palmer Report also classifies the conflict as an international one by noting the inconsistencies of the Israeli approach:

> The Panel now turns to consider whether the other components of a lawful blockade under international law are met. Traditionally, naval blockades have most commonly been imposed in situations where there is an international armed conflict. While it is uncontested that there has been protracted violence taking the form of an armed conflict between Israel and armed groups in Hamas-controlled Gaza, the characterization of this conflict as international is disputed. The conclusion of the Panel in this regard rests upon the facts as they exist on the ground. The specific circumstances of Gaza are unique and are not replicated anywhere in the world. Nor are they likely to be. Gaza and Israel are both distinct territorial and political areas. Hamas is the de facto political and administrative authority in Gaza and to a large extent has control over events on the ground there. It is Hamas that is firing the projectiles into Israel or is permitting others to do so. The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel's right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza's status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict. This conclusion goes no further than is necessary for the Panel to carry out its mandate. *What other implications may or may not flow from it are not before us, even though the Panel is mindful that under the law of armed conflict a State can hardly rely on some of its provisions but not pay heed to others.*[99]

97 The Comoros Referral, paras. 51–52, see *supra* note 1.

98 See Fleck, 2013, p. 604, see *supra* note 74.

99 The Palmer Report, para. 73, see *supra* note 8 (emphasis added).

Yet, there are views in the legal literature that classify the present conflict as a non-international conflict, and as a consequence of this assumption the legality of the Israeli blockade is denied. As emphasized above, a blockade according to customary international law is only available in an international armed conflict, which is a majority view solely contested by the Israeli Commission Report and then based only on two episodes of supporting State practice.[100] Accordingly, as a consequence of views according to which the Israeli-Hamas conflict was on 31 May 2010 of non-international character, the blockade on Gaza was, from the very beginning, unlawful. As put by Guilfoyle:

> There is […] no consistent state practice and *opinio juris* suggesting blockade is available outside an IAC. It follows from this that Israel had no right to impose a blockade on the Gaza Strip and its enforcement of that unlawful blockade against the flotilla including the *Mavi Marmara* was an act incurring state responsibility.[101]

However, given the effective control Israel has exercised over Gaza's borders, airspace and territorial waters, it appears that Israel continues to occupy the territory. The 'internationalization' of the conflict based on the arguments of occupation means the present conflict should be characterized as an international armed conflict. The argument that Israel no longer maintains a permanent military presence in Gaza and thus, it is no longer the belligerent occupant of Gaza is disputed, and it has not been accepted by UN bodies and most States.

Accordingly, the following analysis of the remaining legal issues, such as the legality of the blockade on Gaza and the alleged war crimes, shall be based on the assumption that the Israel and Hamas were engaged in an international armed conflict on 31 May 2010.

17.4.2. The International Law of Naval Blockade and the Question of the Legality of the Israeli Blockade on Gaza and the Legality of Israeli Attack on the Gaza Flotilla

The modern law of the high seas is based on the principle of freedom of the high seas, that is, free use by all.[102] Accordingly, a vessel on the high

[100] The Israeli Commission Report, para. 39, see *supra* note 7.

[101] Guilfoyle, 2011, p. 217, see *supra note* 51; Buchan, 2011, pp. 240 ff., see *supra* note 73.

[102] See, Malcolm Evans, "The Law of the Sea", in Malcolm Evans (ed.), *International Law*, third edition, Oxford University Press, Oxford, 2010, pp. 651–86, at p. 665.

seas is subject to the exclusive jurisdiction of its flag State in time of war or armed conflict as well as in time of peace.[103] The UN Convention on the Law of the Sea, which can for most purposes be taken to reflect customary international law on the subject, renders the principle of freedom of the high seas in its Article 87 as follows:

> 1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the condition laid down by this Convention and by other rules of international law. It comprises, inter alia, for both coastal and land-locked States:
>
> (a) freedom of navigation;
>
> (b) freedom of over flight;
>
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
>
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
>
> (e) freedom of fishing, subject to the conditions laid down in section 2;
>
> (f) freedom of scientific research, subject to Parts VI and XIII.
>
> 2. These freedoms be exercised by all States with due regard to the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities [on the sea bed and ocean floor and subsoil thereof.]

Naturally, the result flows from the basic principle of the freedom of the high seas that one State cannot interfere with vessels sailing under the flag of another without consent.[104] Furthermore, the flag State has jurisdiction over the ship. The flag State will enforce rules and regulations not only of its own national law but of international law as well.[105] Ac-

[103] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, pp. 296–98.

[104] *Ibid*., p. 301.

[105] Malcolm N. Shaw, *International Law*, 8th ed., Cambridge University Press, Cambridge, 2017, p. 455.

cordingly, only military vessels or other specially authorized ships of the flag State may exercise authority over civilian ships of this flag on the high seas.

The international law of the sea, however, provides exceptions to the principle of freedom of the high seas, which are usually limited to suspicion of certain activities such as piracy, slave trade, unauthorized high seas broadcasting, stateless vessels, and acts of self-defence under Article 51 of the United Nations Charter. Where such an exception applies, a warship of a State may stop, search and even seize foreign vessels as an exercise of its jurisdiction.[106]

The law of naval warfare, which is potentially applicable on the high seas, also contains exceptions to the freedom of the high seas such as the practice of blockade. A blockade, as a form of economic warfare, is "a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering and exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of enemy nation".[107] Although there were attempts to codify the international law of blockade, this area of law is regulated by customary international law. Yet, there are declarations and manuals (national and international) on which the interpreters rely as expressions of customary international law. Hence, it would suggest that blockades were initially regulated under the 1856 Paris Declaration Respecting Maritime Law[108] and the 1909 London Declaration.[109] The most recent attempt to codify the law of armed conflict at sea is the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea which is prepared by international and naval experts as a consequence of series of meetings under the auspices of the

[106] United Nations Convention on the Law of the Sea, article10 December 1982, Article 110 (http://www.legal-tools.org/doc/c7b2bf/); The HRC Report, para. 49, see *supra* note 5; Shaw, 2008, pp. 614–28, see *supra* note 105; Douglas Guilfoyle, *Shipping Interdiction and the Law of Sea*, Cambridge University Press, Cambridge, 2009, pp. 21 ff.; Crawford, 2012, p. 301, see *supra* note 103.

[107] Article 7.71 of the U.S. Naval Handbook, US Naval War College Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Newport, 2007.

[108] Paris Declaration Respecting Maritime Law, 16 April 1856, Martens, Nouveau Receuil General 1re ser, vol. XV, UK, HC, c. in *Sessional Papers*, vol. 66 (1856) (http://www.legal-tools.org/doc/a06141/).

[109] London Declaration Concerning the Laws of Naval War, 26 February 1909, 208 Consol TS 338 (1909) (http://www.legal-tools.org/doc/3181d5/); see further Heintschel von Heinegg, pp. 463–547, p. 533, see *supra* note 73.

International Institute of Humanitarian Law in San Remo, Italy. The San Remo Manual contains provisions on blockades that regulates, among other things, the conditions of lawfulness of a blockade. The Manual is not a binding document. Yet, its codification effort has had a significant impact on the formulation of military manuals including the UK manual, the Canadian manual and to a certain extent the German manual.[110] As stated in the introduction of the Manual, it is an attempt to "provide a contemporary restatement of international applicable to armed conflicts at sea"[111] and can therefore be regarded as part of customary international law.

Israel has expressly relied upon the San Remo Manual in justifying its boarding and capture of the Gaza flotilla.[112] The Israeli authorities, basically, claimed that the attack on the flotilla was a part or a deployment of a lawful blockade imposed on Gaza.[113] For instance, one day after the interception of the *Mavi Marmara*, the spokesman for the Israeli Prime Minister stated that:

> We were acting totally within our legal rights. The international law is very clear on this issue […] if you have a declared blockade, publicly declared, legally declared, publicized as international law requires, and someone is trying to break that blockade and though you have warned them […] you are entitled to intercept even on the high seas.[114]

Further, the Israeli Commission Report concludes that: "The naval blockade was imposed on the Gaza Strip lawfully, with Israel complying with the conditions for imposing it".[115]

The question of legality of the Israeli blockade must be addressed at the outset. Further, the introduction to war crimes in the Elements of Crimes of the Rome Statute provides that: "The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the

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[110] See, Guilfoyle, 2011, p. 195, see *supra* note 51.

[111] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Introduction (http://www.legal-tools.org/doc/118957/).

[112] See the Israeli Commission Report, paras. 29 ff., *supra* note 7; the HRC Report, para. 50, see *supra* note 5; Guilfoyle, 2011, p. 195., see *supra* note 51.

[113] See *ibid*.

[114] Mark Regev, spokesman for Israeli Prime Minister Binyamin Netanyahu, quoted in the *Washington Post*, 1 June 2010.

[115] The Israeli Commission Report, para. 112, see *supra* note 7.

established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea".

According to the rules set out in Part IV, Section II of the San Remo Manual and in a number of military manuals of civilized nations, a blockade must satisfy the following requirements to be lawful:

1. Notification (publication): the details relating to the naval blockade need to be publicly announced;
2. Effective enforcement: the line on which the blockade is established needs to be enforced and effective;
3. Impartial enforcement: the blockade must be applied to the vessels of all States;
4. The blockade must not prevent access to ports and coasts of neutral states;
5. The blockade must be in response to an international armed conflict; and
6. The blockade must be in accordance with the principle of humanity or proportionality.

The first requirement means that a State which intends to impose a blockade must publicly declare it and notify both belligerents and all neutral States.[116] The notification must specify the commencement and duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.[117] Generally, a Notice to Marines (as known as 'NOTMAR') is regarded as a sufficient means of notification.[118]

In the present case, Israel declared its blockade by issuing a Notice to Marines on 3 January 2009: "the Gaza maritime area is closed to all maritime traffic and is under blockade imposed by [the] Israeli Navy until further notice".[119] In addition, the establishment and existence of this

[116] The San Remo Manual, Rule 93, see *supra* note 111.

[117] *Ibid*., para. 94.

[118] The Palmer Report, Appendix 1: The Applicable International Principles, para. 28, p. 86, see *supra* note 8.

[119] Israel Ministry of Transport, "NO. 1/2009 Blockade of the Gaza strip".

blockade was transmitted by other means of communication (the Internet, for instance).[120]

The contested issue concerning this requirement is whether the term "until further notice" in the Israeli Notice to Marines satisfied the specification of the notification duration of the blockade. There are, at least, two views with regard to the duration requirement.

The Israeli Commission Report argues that the San Remo Manual in this regard does not reflect customary international law and it states that:

> Even if we regard the 'duration' as an emerging rule of customary international law, great weight is not attached to establishing a specific term during which the blockade is required to run. Therefore, it appears that the notice that the naval blockade would continue "until further notice" satisfies the legal requirements.[121]

The Palmer Report echoes the other argument in the Israeli Commission Report, namely "restricting the blockade to a specific duration was regarded as impossible, in view of the open ended nature of the conflict with Hamas"[122] and arrives at the conclusion that the Israeli notification has met the requirement of duration.[123]

The Turkish Report, on the other hand, rejects the open-endedness of the conflict argument and concludes that the blockade on Gaza did not meet the notification requirement:

> It is the duty on the blockading state to establish a clear time period and to extend it if necessary. This customary rule of international law as restated in Rule 94 of the San Remo Manual employs the conjunctive and not disjunctive where all elements are required for a lawful blockade and not simply those chosen as convenient. The vague formulation of until further notice is not acceptable. The purpose for requiring an express time limit is to allow for periodic reviews to assess the impact of the blockade. For example, whether the military advantage is being achieved or not, or assess the impact on the civilian population. An open-ended time frame

120 See further, the Israeli Commission Report, para. 58, see *supra* note 7.

121 *Ibid*., para. 59.

122 *Ibid*.

123 The Palmer Report, para. 75, see *supra* note 8.

> left to the discretion of the blockading authorities risks arbitrariness which is not consistent with international law.[124]

It is, indeed, evident that the term "until further notice" is not a kind of expression that would clearly specify duration under any set of circumstances, let alone a practice like blockade, which would have detrimental effect on the civilian population. Although it has been presumed that this formal defect cannot *per se* invalidate a blockade, the idea of indefinite blockade has its own difficulties, especially with regard to the principle of proportionality.[125]

From the vantage point of legal methodology, a teleological interpretation is possible only when the wording of the given legal norm is obscure. The San Remo Manual in Rule 94 clearly states that: "The declaration shall specify the commencement, duration, location, and extent of the blockade". These conditions regarding the declaration are required to be met cumulatively. Otherwise, a declaration may not be qualified as a declaration of the blockade within the meaning of the San Remo Manual. Furthermore, the Manual does not make a distinction between formal and substantive requirements of the naval blockade. To overcome this obstacle, the Palmer Report states that: "The notice does specify a duration. Given the uncertainties of a continuing conflict, nothing more was required."[126] Although this would not be seen as a convincing argument, it is not possible to conclude solely based on such a formal defect that the Israeli blockade on Gaza had not met the requirement of notification as of 31 May 2010.

The second requirement is that a blockade must be effective, which means effective enforcement of the blockade.[127] On the determination of the effectiveness, the San Remo Manual states that: "A blockade must be effective. The question whether a blockade is effective is a question of fact".[128] This rule seeks to rule out the historic practice of fictitious or

[124] The Turkish Report, pp. 63–64, see *supra* note 6. The Turkish Report, furthermore, asserted that the "extent" requirement did not meet as well. See *ibid*., p. 65.

[125] Guilfoyle, 2011, p. 197 footnote 145, see *supra* note 51; The Israeli Commission Report, paras. 60, 95, see *supra* note 7.

[126] The Palmer Report, para. 75, see *supra* note 8.

[127] The San Remo Manual, Rule 95, see *supra* note 111; The Paris Declaration Respecting Maritime Law, para. 4, see *supra* note 108; The London Declaration Concerning the Laws of Naval War, Article 2, see *supra* note 109; UK Manual, para. 13.67; US Manual, para. 7.7.2.3.

[128] The San Remo Manual, Rule 95, see *supra* note 111.

paper blockades.[129] Whether a blockade is effective, therefore, must be decided on a case-by-case basis, and a determination concerning the effectiveness of a blockade depends on facts and geographical circumstances. Since 3 February 2009 until 31 May 2010 including the flotilla raid, Israeli forces have stopped any vessel attempting to enter the blockaded area.[130] Based on this practice, it could be concluded that the second requirement is satisfied.

The third requirement means that the blockade must be applied impartially to vessels of all States.[131] The blockading power may only authorize all neutral and belligerent shipping only in exceptional cases. There is nothing to indicate that the Israeli blockade was being enforced in a discriminatory manner.[132]

The fourth requirement bars the blockading party from extending its blockade to neutral ports and coasts.[133] In this regard, the Israeli blockade was imposed on the coast of Gaza and there is no suggestion that Israel had deployed the blockade to the coasts and ports of other countries neutral to the conflict.

In relation to the fifth requirement, we have already provided an analysis on the legal characterization of the Israeli-Palestinian armed conflict. We have concluded that it was an international armed conflict based on occupation. Thus, the Israeli blockade had met the fifth requirement. The OTP has also classified the present conflict as an international one.

The most contentious and crucial issue with regard to the Israeli blockade was the assessment and analysis of the sixth requirement, namely the principle of proportionality or humanity. This principle provides that a blockade will be unlawful where:

1. it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or

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[129] Guilfoyle, 2011, p. 197, fn. 146, see *supra note* 51; Heintschel von Heinegg, 2008, para. 33, see *supra* note 73.

[130] The Israeli Commission Report, paras. 26–27, see *supra note* 7; The Palmer Report, para. 76, see *supra* note 8.

[131] London Declaration Concerning the Laws of Naval War, Article 4, see *supra* note 109; The San Remo Manual, Rule 100, see *supra* note 111.

[132] The Palmer Report, para. 76, see *supra* note 8; The Israeli Commission Report, para. 27, see *supra* note 7; The Turkish Report, p. 75, see *supra* note 6.

[133] The London Declaration Concerning the Laws of Naval War, Article 18, see *supra* note 109; The San Remo Manual, Rule 99, see *supra* note 111.

2. the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.[134]

There are two disjunctively formulated criteria here: (1) starvation or hunger as a weapon of war and (2) excessive civilian damage. Starvation is only a form of excessive damage; hence starvation is not the only basis for judging proportionality of a blockade. The specific norm on starvation derives from the wider prohibition on excessive damage, which is one of the core principles of law of armed conflict.[135]

A judgment on the principle of proportionality must initially establish whether it is the naval blockade alone that needs to be subjected to this test of proportionality or whether Israel's closure policy needs to be assessed generally, including the naval blockade and the land crossings.[136] The Palmer Report, for instance, adopts the former approach and presumably this led the Panel to conclude that the Israeli blockade was proportionate and legal, since it subjected the naval blockade to the test of proportionality separate from the land crossings. The Palmer Report separates these two practices based, in essence, on the argument that the naval blockade and land crossings are in pursuit of different objectives by emphasizing that they were deployed at different times, that they differed in intensity, and lastly, that the naval blockade was deployed in order to provide Israel with a sound legal basis to prevent war materials from reaching Gaza by sea.[137] The objective of naval blockade was, according to the Palmer Report, the security of Israel ("to prevent weapons, ammunition, military supplies and people from entering Gaza"[138]), but the Report fails to identify what objectives the land crossings pursued.[139]

This distinction based on the presumed different objectives of these measures, and ultimately treating them separately, is rather unconvincing

[134] *Ibid*., para. 102.

[135] Guilfoyle, 2011, p. 198, see *supra* note 51.

[136] Cf. Douglas Guilfoyle, "The Palmer Report on the *Mavi Marmara* Incident and the Legality of Israel's Blockade of the Gaza Strip", in *EJIL: Talk!*, 6 September 2011.

[137] The Palmer Report, para. 70, see *supra* note 8.

[138] *Ibid*., para. 77.

[139] Cf. Russell Buchan, "II. The Palmer Report and the Legality of Israel's Naval Blockade of Gaza", in *International and Comparative Law Quarterly*, 2012, vol. 61, no. 1, pp. 264, 270 ff.

and this approach of the Panel has been criticised.[140] The two regimes serve a single objective, that is, preventing war materials and dual-use goods from entering or leaving Gaza. Israel has stated on numerous occasions that the land crossings served a security objective, that is, the prevention of weapons reaching Gaza.[141] The Israeli Commission Report, on this matter, states that: "Both the naval blockade and the land crossings policy were imposed and implemented because of the prolonged international armed conflict between Israel and the Hamas […] The Naval blockade is also connected to the land crossings policy on a tactical level".[142] Indeed, when cast in this light, it is difficult to follow such salami-slicing approach in this context; in other words, it is difficult to argue that the naval blockade and the land crossings can be separated.[143] As Buchan convincingly put it:

> The effective working of one [the naval blockade] is dependent upon the effective working of the other [the land crossings]. Indeed, this is evidenced by the fact that the naval blockade was deployed after the establishment of the land crossings, insurgent had sought to bypass the land crossings by ferrying goods to Gaza (and to Hamas fighters) via the sea. Consequently, the naval blockade was needed in order to buttress the land crossings and ensure that they effectively served their purpose: preventing war material from entering or leaving Gaza. Thus, on a tactical level the naval blockade and the land crossings are intimately linked. To this end, I would disagree with the Palmer Report and argue that the naval blockade and the land crossings should be regarded as on single unified closure policy. Consequently, it is this general closure policy that must be subjected to the test of humanity, not just the naval blockade.[144]

All three previous reports on Israel's interception of the Gaza flotilla – the HRC Report, the Israeli Commission Report and the Turkish Commission Report – conclude that the naval blockade and land crossings

[140] Cf. *ibid*., pp. 271–73; Guilfoyle, "The Palmer Report on the *Mavi Marmara* Incident and the Legality of Israel's Blockade of the Gaza Strip", see *supra* note 136.

[141] The Israeli Commission Report, para. 63, see *supra* note 7.

[142] *Ibid*.

[143] See Buchan, 2012, p. 272, see *supra* note 139.

[144] *Ibid*.

should be considered as one single policy. The HRC Report, for instance, states that:

> The Mission finds that the policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage. The Mission considers that the naval blockade was implemented in support of the overall closure regime. As such it was part of a single disproportionate measure of armed conflict and as such cannot itself be found proportionate.[145]

In the following analysis, therefore, the impact of the entire blockade on the Gaza population, that is, cumulative effects of the naval blockade and the land crossings, shall be subjected to the test of proportionality. As the land and sea blockades mutually reinforce each other and they are components of a general closure policy imposed on the Gaza policy, their legality must be judged as a whole. As Guilfoyle points out: "Proportionality must be a contextual assessment; where an objectively related package of measures with a single military aim creates disproportionate damage in toto, it should not be judged through the device of considering its components piecemeal".[146]

According to the first test of proportionality (humanity) set out in Rule 102(a) of the Manual, the imposition of a naval blockade would be illegal if its imposition is intended to starve or to deny it other objects essential for its survival. The term 'starvation' is under the law of armed conflict is simply to cause hunger.[147] The second alterative objective requirement is depriving the population in the blockaded area of objects essential to their survival. There is no exhaustive list of essential objects, but it includes not just food, water and medical supplies but also housing, clothing, electricity and means of shelter.[148] Yet, the San Remo Manual provision contains the adjective 'sole' that requires that the starvation be the sole purpose of the blockade.[149]

By May 2010, it was evident that Israel's blockade of Gaza was having devastating impact upon the population in Gaza, which is a well-

[145] The HRC Report, para. 59, see *supra* note 5.

[146] Guilfoyle, 2011, p. 217, see *supra* note 51.

[147] See *ibid*., p. 200; the HRC Report, para. 52, see *supra* note 5.

[148] See Protocol I Additional to the Geneva Conventions, 8 June 1977, Articles 54(2), 69 (http://www.legal-tools.org/doc/d9328a/); Buchan, 2011, p. 233, see *supra* note 73.

[149] See Guilfoyle, 2011, p. 200, see *supra* note 51.

documented fact by reliable sources, such as the UN Office for Coordination of Humanitarian Affairs ('UNOCHA'), UN Relief and Works Agency ('UNRWA'), and the International Committee of Red Cross ('ICRC'). In April 2010, the UNOCHA reported that:

> The deterioration of living conditions in the Gaza Strip, mainly as a result of the Israeli blockade continued to be of concern. A new poverty survey conducted by UNRWA showed that the number of Palestine refugees completely unable to secure access to food and lacking the means to purchase even the most basic items, such as soap, school stationary and safe drinking water ('abject poverty') has tripled since the imposition of the blockade in 2007 […] The UN's ability to meet the current level of need in Gaza continues to be significantly impeded by the blockade, which has either prevented the implementation of planned humanitarian projects or resulted in significant delays.[150]

Further, on 25 May 2010, only several days before Israel's interception of the Gaza flotilla, the UNOCHA informed that 61% of the population suffered from food insecurity,[151] and the UNOCHA opined that:

> Restrictions imposed on the civilian population by the continuing blockade of the Gaza Strip amount to collective punishment, a violation of international humanitarian law. The blockade of Gaza also prevents or greatly hampers the exercise by the children, women and men living there of many human rights, including the right to food, the right to an adequate standard of living, the right to work, and the right the highest attainable standard of health.[152]

Indeed, Article 33 of the Fourth Geneva Convention of 1949 prohibits collective punishment of civilians under occupation, which provides:

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

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[150] The UN Office for the Coordination of Humanitarian Affairs, "The Humanitarian Monitor: April 2010", p. 2.

[151] The Food and Agriculture Organization of the UN, UN Office for the Coordination of Humanitarian Affairs, "Farming Without Land, Fishing Without Water: Gaza Agriculture Sector Struggles to Survive", Factsheet.

[152] *Ibid*.

Strikingly, reports of the UN as well as the ICRC have reached the conclusion that the closure regime of Israel constitutes a collective punishment.[153] The Goldstone Report, produced on behalf of the UN Human Rights Council, states that:

> […] From the facts ascertained by it, the Mission believes that Israel has violated its obligation to allow free passage of all consignments of medical and hospital objects, food and clothing (Article 23 of the Fourth Geneva Convention). The Mission also finds that Israel violated specific obligations it has as Occupying Power spelled out in the Fourth Geneva Convention, such as the duty to maintain medical and hospital establishments and services and to agree to relief schemes if the occupied territory is not well supplied.[154]
>
> […] The Mission finds that Israel violated its duty to respect the right of the Gaza population to an adequate standard of living, including access to adequate food, water and housing.[155]
>
> The Conditions of life in Gaza, resulting from deliberate actions of the Israeli forces and the declared policies of the Government of Israel – as they were presented by its authorized and legitimate representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively *indicate the intention to inflict collective punishment on the people of the Gaza* Strip in violation of international humanitarian law.[156]

Likewise, the HRC Report places special emphasis on the intention to inflict collective punishment in making its assessment with regard to the proportionality in accordance with Rule 102 of the San Remo Manual. The mission considered that: "one of the principle motives behind the imposition of blockade was a desire to punish the people of the Gaza Strip for having elected the Hamas. The combination of this motive and the

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153 The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip: report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution S-9/1, A/HRC/12/37, 10 August 2009, para. 3030 (http://www.legal-tools.org/doc/edc0db/); "Gaza closure: not another year!", International Committee of the Red Cross, 14 June 2010, News Release no. 10/103.

154 The Goldstone Report, para. 72, see *supra* note 94.

155 *Ibid*., para. 73.

156 *Ibid*., para. 74 (emphasis added).

effect of the restrictions on the Gaza Strip leave no doubt Israel's actions and policies amount to collective punishment as defined by international".[157] Relying on these reports, it could be suggested that by 31 May 2010, Israel's blockade of Gaza was preventing essential objects from reaching the civilian population, and indeed, the claim that intention of Israel was to inflict collective punishment on the people of the Gaza supported by the evidence and legal assessment provided by the reports cited above.

This said, it would be difficult to prove that the 'sole purpose' of the Israeli blockade is to deny civilian population objects essential for its survival. It would, therefore, be more plausible to claim that the damage to the civilian population constitutes a disproportionate effect as indicated in Rule 102(b).[158] This provision subjects naval blockades to a proportionality test, which means that if the damage to the civilian population is excessive in relation to the anticipated military advantage, then the blockade is or will become unlawful. The military objective of Israel is to protect its people from mortar and rocket attacks. On the other hand, there is strong evidence that civilian damage involved is excessive in Gaza. As Buchan rightly writes: "[…] even though the military advantage anticipated from the closure regime is considerable (protection of civilian population of Israel), the fact that the closure regime is causing a devastating humanitarian crisis in Gaza would indicate that the damage to the civilian population is excessive".[159] As the naval blockade was implemented as part of comprehensive denial of commerce and supplies essential for living, these measures inflict disproportionate civilian damage within the meaning of Rule 102(b).[160] Accordingly, the intentional infliction of starvation is not the only test of a blockade's lawfulness. As explained above, it is "also possible that where the civilian population is inadequately supplied with food so as to cause hunger ('starvation' in an ordinary sense) this may constitute a disproportionate effect rendering a blockade illegal irrespective of whether this effect was intentional ('starvation' as a prohibited

[157] The HRC Report, para. 54, see *supra* note 5.

[158] Cf. Guilfoyle, 2011, p. 200, see *supra note* 51; See Buchan, 2012, pp. 272 ff., see *supra* note 139.

[159] See *ibid*., p. 273.

[160] See Guilfoyle, 2011, pp. 203 ff., 217, see *supra* note 51; Buchan, 2011, pp. 235 ff., see *supra* note 73.

measure of war)".[161] Consequently, the naval blockade imposed on Gaza on 31 May 2010 by the Israel was unlawful, which was the conclusion of the HRC Report as well, which strongly expresses that:

> The Mission has come to the firm conclusion that a humanitarian crisis existed on the 31 May 2010 in Gaza. The preponderance of evidence from impeccable sources is too overwhelming to come to a contrary opinion. Any denial of this cannot be supported on any rational grounds. One of the consequences flowing from this is that for this alone the blockade is unlawful and cannot sustained in law. This is so regardless of the grounds on which one seeks to justify the legality of the blockade.[162]

The most significant legal consequence that flows from this conclusion is the action of the Israel Defence Force in intercepting the *Mavi Marmara* and other vessels of the flotilla were unlawful. It was, therefore, an unlawful exercise of jurisdiction over neutral vessels on the high seas and a wrongful act for which the State of Israel bears responsibility and compensation would have to be paid.[163] Further, the defensive measures by the crew of the *Mavi Marmara* were within their right of self-defence against the unlawful attack committed by the Israeli Defence Forces.[164]

Despite the conclusion that there was no legal basis for the blockade, for the sake of argument, we shall now provide a brief analysis of enforcement action against the *Mavi Marmara* within the legal framework of law of naval blockade and international humanitarian law. Where there is a lawfully deployed blockade, under the San Remo Manual: "merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked".[165] Rule 146(f) of the San Remo Manual further provides that: "neutral merchant vessels are subject to outside waters if they […] are breaching or attempting to breach a blockade". As the *Mavi Marmara* had expressed its intention to breach the naval blockade, Israel

[161] Guilfoyle, 2011, p. 220, see *supra* note 51.

[162] The HRC Report, para. 261, see *supra* note 5.

[163] *Ibid*., para. 61; Guilfoyle, 2011, p. 207, see *supra* note 51.

[164] See further Andrew Sanger, "The Contemporary Law of Blockade and the Gaza Freedom Flotilla", in *Yearbook of International Humanitarian Law*, 2010, vol. 13, pp. 397, 441; Buchan, 2011, pp. 241 ff., see *supra* note 73.

[165] The San Remo Manual, rule 98, see *supra* note 111.

sought to capture it and such capture is permitted in international law if the underlying blockade was lawful. Any armed attack that involves civilians is subject to certain restrictions.[166] The use of force, for instance, is limited by a strict principle of necessity and only such force is permissible which is indispensable to enforce the right and the principle of distinction. Besides, civilians should not be the direct targets of the attack, the use of force against civilians is only permitted in self-defence and this use of force must be exercised in a proportionate manner.[167] Israel's use of force on the *Mavi Marmara* went beyond what was necessary in the circumstance to capture it. On this matter, the Palmer Report, for instance, states that:

> Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:
>
> 1. Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;
> 2. The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent so as to minimize causalities.[168]

It is highly regrettable that the operation continued under the evident circumstances and the Israeli forces employed excessive force in capturing the *Mavi Marmara*.

The HRC Report describes the conduct of the Israeli soldiers during the course of operation as follows:

> […] throughout the operation to seize control of the *Mavi Marmara*, including before the live fire restriction was eased, lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner which caused an unnecessarily large number of persons to be killed or seriously injured. Less extreme means could have been employed in nearly all instances of the Israeli operation, since there was no immi-

166 *Ibid*., paras. 38–46; Sanger, 2010, pp. 440 ff., see *supra* note 164.

167 Cf. Buchan, 2011, pp. 238 ff., see *supra* note 73.

168 The Palmer Report, para. 117, see *supra* note 8.

> nent threat to soldiers; for example in relation to the operation to move down to the bridge deck and seize control of the ship and the firing of live ammunition at passengers on the bow deck of the ship […] In such circumstances the use of less extreme means, such as available less-lethal weaponry, would have been sufficient to achieve the required objective […] A well-trained force such as the Israeli Defence Force should have been able to successfully contain a relatively small group of passengers armed with sticks and knives and secure control of the ship without the loss of life or serious injury to either passengers or soldiers.[169]
>
> The conduct of the Israeli military and other personnel towards flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds […][170]

The HRC Report in its overall assessment on the Israeli action on board of the *Mavi Marmara* makes the following assessment: "The Mission is satisfied that much of the use force used by the Israeli soldiers on board the *Mavi Marmara* and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers. On the basis of the forensic and firearm evidence, at least six of the killings can be characterized as extra-legal, arbitrary and summary execution".[171] Likewise, the Palmer Report expresses criticism with regard to the excessive and arbitrary violence of the Israeli soldiers during the capture of the *Mavi Marmara*: "Nine passengers were killed and many others seriously wounded by Israeli forces. No satisfactory explanation has been provided to the Panel by Israel for any of the nine deaths. Forensic evidence showing that most of the deceased were shot multiple times, including in the back, or at close range has not been adequately accounted for in the material presented by Israel".[172] As these facts clearly show, even if the Israeli blockade on Gaza was lawful, its enforcement went far beyond the limits of the law.

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169 The HRC Report, paras. 167–68, see *supra* note 5.

170 *Ibid*., para. 264.

171 *Ibid*., para. 172 (emphasis added).

172 The Palmer Report, para. 134, see *supra* note 8.

Within the context of the Rome Statute, this attack would, among others, satisfy the elements of Article 8(2)(b)(iv), which provides that:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Evidently, the Israeli attack was in violation of basic principles of international humanitarian law, that is, principles of distinction, military necessity and proportionality. Indeed, the following remarks in the Palmer Report provide support for this assertion:

> The Panel concludes that the operation should have been better planned and differently executed. It was foreseeable that boarding in the manner that was done could have provoked physical resistance from those on board the vessels. In such a case there was a real risk of causalities resulting, as turned to be the case. Such a scenario should have been specifically addressed in the planning of the operation. The Panel also concurs with the comment in the Israeli report that the operation should have withdrawn and reassessed its options when the resistance to the initial boarding from the speedboats occurred. Having an alternative plan when clear resistance was first shown might have avoided the events that subsequently unfolded. Given the outcome, it is highly regrettable that the operation continued despite the evident circumstances.

Israel's decision to board the vessels with substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

> Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and a demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;
>
> The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent so as to minimize casualties.[173]

[173] *Ibid*., paras. 116–17.

We will now, relying on the factual and legal findings so far, proceed to discuss the question of whether crimes within the jurisdiction of the Court have been committed in the Gaza flotilla situation.

17.5. Crimes within the Jurisdiction of the Court

The reasonable basis that a crime within the jurisdiction of the Court exists is the first condition under Article 53(1) for initiating an investigation. The "reasonable basis" means that the Prosecutor must believe that a crime naturally exists, and as put by Bergsmo, Kruger and Bekou: "it is not required at this stage that the information conclusively proves all the elements of the crime".[174] The decision of the Prosecutor thus depends on an objective assessment of the *notitia criminis*.[175] In making an assessment with regard to the initiation of an investigation, the OTP shall make an objective assessment of whether the event constitutes criminal activity under Article 5 of the Rome Statute. At this stage it is not necessary to identify suspects, but there must be a reasonable basis that the event occurred and that it amounts to criminal activity under Article 5. What is required here is rather an initial suspicion regarding the possible commission of the Rome Statute crimes.[176]

The second condition under Article 53(1) is that the Court has to have jurisdiction over the situation. The jurisdiction assessment is threefold: (1) subject-matter jurisdiction, (2) territorial jurisdiction and (3) temporal jurisdiction. In an early decision, PTC I defined these parameters as follows:

> To fall within the Court's jurisdiction, a crime must meet the following conditions; it must be one of the crimes mentioned in Article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in Article 11 of the Statute; and the crime must meet one of

[174] Morten Bergsmo, Peter Kruger and Olympia Bekou, "Article 53: Initiation of an investigation", in Triffterer and Ambos (eds.), 2016, margin no. 15, see *supra* note 2; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot, Berlin, 2011, p. 270.

[175] *Ibid*.

[176] For the difference between the preliminary examinations and the actual formal investigations, see Ambos, 2016, p. 336, see *supra* note 4.

> the two alternative conditions described in Article 12 of the Statute.[177]

Article 5 lists four crimes over which the Court has subject-matter jurisdiction: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The crime of aggression was inserted in Article 8*bis* at the Kampala Conference in accordance with Articles 5(2), 121 and 123 of the Rome Statute.[178] However, the Court shall have jurisdiction on the crime of aggression no earlier than 1 January 2017 in accordance with Articles 15*bis* and 15*ter*.[179]

The Comoros referral alleged that the conduct of the Israeli Defence Forces on 31 May 2010 aboard *Mavi Marmara*, and in the aftermath of the capture of the flotilla subsequent conduct of soldiers against the crew members of *Mavi Marmara* when they were being ferried to Israel amount to war crimes and crimes against humanity.[180] Thus, this section will analyse and consider whether there is a reasonable basis to believe that either war crimes or crimes against humanity or both have been committed.

17.5.1. War Crimes

Unlike crimes against humanity, war crimes do not require, by definition, the same quantitative scale. Even a single isolated act can constitute a war crime.[181] Article 8 of the Rome Statute contains a non-exclusive threshold instead, which reads: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of crimes". The plan or policy or large-scale element is, rather, part of the admissibility determination. In other words,

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[177] ICC, Situation in the Democratic Republic of the Congo, PTC I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 85 (http://www.legal-tools.org/doc/2fe2fc/); see further Stegmiller, 2011, p. 273, see *supra* note 174.

[178] Assembly of States Parties, ICC, Resolution RC/Res.6 The Crime of Aggression, 11 June 2010., RC/Res.6 (http://www.legal-tools.org/doc/0d027b/).

[179] See further Kai Ambos, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe*, 3rd ed., Verlag C.H. Beck, Munich, 2011, Section 7, margin no. 268.

[180] The Comoros Referral, paras. 59 ff., see *supra* note 1.

[181] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, second edition, Cambridge University Press, Cambridge, 2010, p. 288.

isolated war crimes may fall within the Court's jurisdiction, but they may not satisfy the conditions of gravity or the interests of justice. That being said, the Court may choose to act with regard to an isolated incident which involves war crimes, where the war crimes are of sufficient gravity to warrant action.[182] Consequently, it could be said that war crimes that does not take place in a systematic or widespread manner, fall outside the subject-matter jurisdiction of the Court.[183] Furthermore, PTC II stated that: "the term 'in particular' makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court".[184] This threshold, however, has been employed, for it is part of the admissibility determination, which shall be discussed below.[185]

We may now proceed to the question of whether the acts committed by the Israeli soldiers on the vessels would satisfy the definitions contained in Article 8 of the Rome Statute. The preliminary issue to be determined in charges under Article 8 is the existence of an armed conflict. The existence of an armed conflict between Israel and Palestine on 31 May 2010 is generally accepted, albeit on different reasoning; whether it be on the argument of occupation or the imposition of the naval blockade on Gaza, which is a method regulated under law of armed conflict.[186] And the armed conflict between Israel and Palestine is, as discussed above, generally characterized as an international armed conflict to which Articles 8(2)(a) and 8(2)(b) of the Rome Statute apply.[187] The Comoros referral makes this point when it states that: "The rules of international law governing occupation are to be found in the Fourth Geneva Convention

[182] *Ibid*., p. 289.

[183] Stegmiller, 2011, p. 215, see *supra* note 174.

[184] ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, PTC II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 211 (http://www.legal-tools.org/doc/07965c/); see further William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, p. 226.

[185] We shall, therefore, deal with the interpretation of Article 8(1) by the Office of the Prosecutor below. *Ibid*., p. 229; Stegmiller, 2011, p. 275, see *supra* note 174.

[186] See generally Cryer, Friman, Robinson and Wilmshurst, 2010, p. 280, see *supra* note 181; Gerhard Werle, *Völkerstrafrecht*, 3rd edition, Mohr Siebeck, Tübingen, 2012, margin nos. 1070 ff.

[187] Buchan, 2014, pp. 475 ff., see *supra* note 11.

1949 (GC IV). The fact that Gaza is an occupied territory which falls within the ambit of the GC IV means that it is covered by rules governing international armed conflicts".[188] Nevertheless, if one argues, as Buchan does, that on 31 May 2010 Israel was no longer an occupying power, then the analysis should be focused on whether the elements of non-international offences have been satisfied.[189] Yet, as discussed above, I am of the view that based on the effective control argument, Israel was still an occupying power on 31 May 2010. I will therefore analyse whether the elements of the crimes that have been alleged in the Comoros referral have been committed. It should be at this point highlighted that the Prosecutor in her decision not to initiate concluded that:

> […] there is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement. The Office has therefore proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.[190]

That said, the existence of the armed conflict *per se* is insufficient; in addition to an armed conflict, there must be a nexus between conduct and conflict.[191] ICTY jurisprudence has held that:

> It is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue.[192]

Further, the Elements of Crimes of the Rome Statute also contain a similar condition, which states: "The conduct took place in the context of and was associated with an (international) armed conflict".[193] It is sufficient that the perpetrator acted in furtherance or under the guise of an armed conflict. Furthermore, the status of the perpetrator or whether the

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188 The Comoros Referral, para. 52, see *supra* note 1.

189 For such an analysis, see Buchan, 2014, pp. 479 ff., *supra* note 11.

190 The OTP Report, para. 29, see *supra* note 13.

191 Cryer, Friman, Robinson and Wilmshurst, 2010, p. 285, see *supra* note 181.

192 ICTY, *Prosecutor v. Aleksovski*, Trial Chamber, Judgment, 25 June 1999, IT-95-14/1-T, para. 45 (http://www.legal-tools.org/doc/52d982/).

193 See ICC, Elements of Crimes, Article 8(2)(a)(i) ("War crime of wilful killing"), pp. 13–14 (http://www.legal-tools.org/doc/3c0e2d/).

act serves a goal of a military campaign may be taken into account as well.[194]

With respect to the armed conflict in Gaza, there exists a nexus between the Israeli forces' conduct and the armed conflict, because the attack against the Gaza flotilla by the Israeli soldiers was in furtherance or part of the blockade policy imposed by Israel on Gaza.

The perpetrator of a war crime also must have been aware of the factual circumstances that made the conduct a war crime. The Elements of Crimes provide guidance with respect to this knowledge element, and provide that:

> With respect to the last two elements listed for each crime:
>
> 1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
> 2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
> 3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with.[195]

Accordingly, the Elements appear to require that sufficient factual awareness of the perpetrator satisfy the knowledge element of war crimes. In the present situation, it was evident that both the Israeli soldiers and their superiors were aware of the fact that their raid on the flotilla was part of blockade imposed on Gaza in the context of an armed conflict between Israel and Palestine. Indeed, this view is supported by the remarks of highly-ranked Israeli soldiers to national and international media and afterwards by the testimonies before the Israeli Commission.

Further, war crimes under the Rome Statute must be committed persons protected under the Geneva Conventions.[196] The HRC Report sug-

[194] Cryer, Friman, Robinson and Wilmshurst, 2010, p. 286, see *supra* note 181.

[195] Elements of Crimes, Article 8 ("War crimes"), Introduction, para. 3., p. 13, see *supra* note 193.

[196] See further Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 29.

gested that flotilla passengers were civilians and in the context of the interception of the vessels must be considered as protected persons in accordance with Article 4 of the Fourth Geneva Convention, which provides that protected persons: "are those who, at a given moment and in any manner whatsoever, find themselves […] in the hands of a Party to the conflict or Occupying Power of which they are not nationals". Indeed, according to the teleological interpretation of Article 4 adopted by the ICTY in the *Tadić* judgment, the flotilla passengers could be subsumed under Article 4 of the Fourth Geneva Convention:

> Article 4 of the Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible […] Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves.[197]

Furthermore, it could be argued that the flotilla passengers were protected persons under common Article 3 of the Geneva Conventions that are equally applicable in international armed conflicts.[198] In an armed conflict according to the principles of distinction, the principle of humanity, and the immunity of civilian population military force can only use against civilians only when they participate actively and directly in hostilities.[199]

Strikingly, the Israeli Commission Report claims that the passengers that were targeted by the Israeli soldiers on the *Mavi Marmara* were directly participating in hostilities (thus transforming them into combatants) and thereby sought to justify the killing of the nine passengers as targeted killings.[200] This classification implies significant consequences with regard to the classification of the acts of Israeli soldiers under international humanitarian law, for the direct participation in hostilities is the only ex-

[197] ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 166 (http://www.legal-tools.org/doc/8efc3a/).

[198] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, para. 218.218 (http://www.legal-tools.org/doc/046698/).

[199] See further Michael Bothe, "Friedenssicherung und Kriegsrecht", in Wolfgang Vitzthum (ed.), *Völkerrecht*, 5th ed., De Gruyter, Berlin, 2010, pp. 639, 697 ff.

[200] See the Israeli Commission Report, paras. 198, 201 and 255, see *supra* note 7.

ception to the civilian protection according to which civilians may not be object of deliberate attack.

Thus, whether passengers on the *Mavi Marmara* or a group in the crew (the International Humanitarian Relief activists, for instance, as identified by the Israelis) were directly participating in hostilities must be analysed. The interpretative guidance of the ICRC provides a legal reading of the notion of 'direct participation in hostilities'. As put by the guidance, there are three constitutive elements of direct participation in hostilities. In order to qualify as a direct participatint in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
3. The act must be specifically designed to directly cause the required threshold in support of a party to the conflict and to the detriment of another (belligerent nexus).[201]

The Israeli Commission Report claims that there were two points at which the passengers targeted by the Israeli soldiers were directly participating in hostilities: first, by being physically present on the *Mavi Marmara* and refused to stop when instructed; second, the crew of the *Mavi Marmara* did use violence against the Israeli soldiers. Such acts may satisfy the first two criteria, but it is highly unlikely that this act would satisfy the third, since not every act that directly adversely affects the military operations of a party to armed conflict necessarily amounts to direct participation in hostilities. This is because the concept of direct participation in hostilities is limited to specific acts "that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities".[202] In other words, the specific

[201] Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, p. 46.

[202] *Ibid*., p. 58.

acts of the civilians must be "specifically designed to do so in support of a party to an armed conflict".[203] Indeed, there are many acts during armed conflict that lack a belligerent nexus even though they cause a considerable level of harm. In cases of individual self-defence or defence of others, for instance, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities, for its purpose clearly is not to support a party to the conflict against another.[204] Indeed, the use of violence by the crew may have been in individual self-defence or their act of protest would be classified as political demonstration, which falls within the ambit of notion civil unrest that cannot establish a belligerent nexus. Indeed, as Buchan rightly puts: "it […] seems difficult to sustain the claim that their [the crew members'] use of force was designed to support Hamas in its armed conflict with Israel. On the contrary, the intention of the Mavi was to protect the cargo (humanitarian aid) and deliver it to the population in Gaza […] the crew that were targeted by the Israeli military should be regarded as civilians engaging in violent unrest rather than as civilians directly participating in hostilities".[205] Further, the ICRC Guidance provides important information with regard to the task of determining the belligerent nexus of an act in concrete situations:

> These determinations must be based on the information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors. In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, could reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian's loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the persons concerned must be presumed to be protected against direct attack.[206]

[203] *Ibid*.

[204] *Ibid*., p. 61.

[205] See Guilfoyle, 2011, p. 210, see *supra note* 51; Buchan, 2011, p. 239, see *supra* note 73.

[206] Melzer, 2009, pp. 63 ff., see *supra* note 201; see further Buchan, 2014, pp. 484 ff., see *supra* note 11.

Consequently, the crew members of the *Mavi Marmara* cannot be civilians directly participating in hostilities; hence, all passengers on the *Mavi Marmara* and passengers of other vessels of the Gaza flotilla were civilians within the meaning of Article 8 of the Rome Statute and thus protected persons under the law of armed conflict.[207]

Further, the OTP Report, on this issue, concludes that:

> Based on the information available, it does not appear that the passengers' resistance to the IDF interception and boarding of the vessel amounts to taking a direct part in hostilities so as to deprive those particular passengers of their protected civilian status.[208]

17.5.1.1. Wilful Killing (Article 8(2)(a)(i))

Wilful killing of a protected person is a grave breach under all the Geneva Conventions and is a war crime under the Rome Statute. The material elements of wilful killing are killing or causing death of a person who was under the protection of the Geneva Conventions. As shown above, the passengers on the *Mavi Marmara* were protected persons under the Geneva Conventions. Under Article 30 of the Rome Statute, the mental element of the offence requires that the perpetrator must have meant to kill a person and meant to cause the death or have been aware that the death will occur in the ordinary course of events.[209] In other words, the perpetrator must have acted either intentionally or recklessly, which excludes accidental, unforeseeable consequences of the actions of the perpetrator. The explained course of events aboard *Mavi Marmara* and execution type of killings of nine passengers by the Israeli forces provide plain evidence for the *mens rea* of wilful killing within the meaning of Article 8(2)(a)(i).

17.5.1.2. Torture or Inhuman Treatment (Article 8(2)(a)(ii))

The elements of torture as war crime in the Elements of Crimes are specified as follows:

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[207] For a critic of the Israeli Commission Report's approach in this regard, see Amichai Cohen and Yuval Shany, "The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks", in *EJIL: Talk!*, 28 January 2011.

[208] The OTP Report, para. 49, see *supra* note 13.

[209] See Knut Dörmann, "Article 8: War crimes", in Triffterer and Ambos (eds.), 2016, margin nos. 82 ff, see *supra* note 2.

1. The perpetrator inflicted severe physical or normal pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

With regard to the war crime of inhuman treatment, the Elements of Crimes provides that:

> The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

The acts of the Israeli forces after capturing the flotilla may constitute either or, in some cases, both the above war crimes. Indeed, the UN Fact Finding Mission provides strong evidence with respect to material and mental elements of these offences:

> It is apparent that a number of the passengers on the top deck were subjected to further mistreatment while lying injured. This included physical and verbal abuse sometime after the operation to secure control of the deck had concluded. Furthermore, these passengers were not provided with medical treatment for two or three hours after the cessation of the operation. Similarly, injured passengers who were inside the ship at the end of the operation of the Israeli forces were denied proper medical treatment for a similar length of time despite frequent efforts by other persons on board, including flotilla organizers, requesting such assistance to be provided.[210]

During the period of detention on board the *Mavi Marmara*, the passengers were subjected to cruel and inhuman treatment which did not respect the inherent dignity of persons who have been deprived of their liberty. Such treatment involved a large number of persons being forced to kneel down on the outer decks in harsh conditions for many hours, physical mistreatment and verbal abuse inflicted on many of those detained, widespread and unnecessarily tight handcuffing, as well as the denial of access to basic human needs such as the use of toilet facilities and provision of foods. In addition, there was a prevailing climate of fear of violence that had a dehumanizing effect on all those detained on board. On other vessels in the flotilla, there were additional instances of persons

[210] The HRC Report, para. 171, see *supra* note 5.

being subjected to similar severe pain and suffering, including a person being seriously physically abused for refusing to provide his passport without receipt.[211] Accordingly, one may conclude that the offences of torture or inhuman treatment have been committed on the vessels of the flotilla.[212]

17.5.1.3. Wilfully Causing Great Suffering (Article 8(2)(a)(iii))

The Elements of Crimes defines the material element of this crime as follows:

> The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.

Contrary to the war crime of torture, this war crime solely refers to suffering which is caused without a specific purpose.[213] The assessment of the seriousness of an act or omission must take all the factual circumstances of a given case into account, including the nature of act or omission, the context in which it take place, its duration and repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.[214] Indeed, the HRC Report concludes that in the following instances, among others, the present offence has been committed:

> The Mission is particularly concerned with the widespread use of tight handcuffing of passengers on board the *Mavi Marmara* in particular and to an extent of passengers on board the Challenger I, Sfedoni and the *Eleftheri Mesogios*. Numerous passengers described the pain and suffering caused by being shackled by plastic handcuffs (also known as 'plastic cuffs') in an overly tight manner, frequently behind their backs, causing further suffering. Many were experiencing neurological damage up to three months after the events of the flotilla […] The Mission is satisfied that the manner in which the handcuffs were used was clearly unnec-

[211] *Ibid*., para. 178.

[212] See *ibid*., paras. 181, 265.

[213] Dörmann, 2016, margin no. 106, see *supra* note 209.

[214] *Ibid*., margin nos. 107 ff.

> essary and deliberately used to cause pain and suffering to passengers.[215]

17.5.1.4. Extensive Destruction and Appropriation of Property, Not Justified by Military Necessity and Carried out Unlawfully and Wantonly (Article 8(2)(a)(iv))

The specific elements of this offence are defined in the Elements of Crimes as follows:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.

As seen above, Israeli forces confiscated cash, and a wide variety of personal belongings, including: passports, identification cards, driving licenses, mobile phones, laptop computers, audio equipment including MP3 players, photographic and video recording equipment, credit cards, documents, books and clothing.[216] As to the element whether the appropriations on the vessels were justified by military necessity, the following remarks of the HRC Report are clear:

> Clearly no military necessity existed to justify the confiscation and continuing appropriation of the property of the passengers of the flotilla. Furthermore, the Mission has been made aware of communications between the Government of Israel and a law firm in the United Kingdom, in which the Government admits to retaining property of the passengers, but does not claim reasons of military necessity but only that the items are necessary for ongoing investigations within Israel.[217]

17.5.1.5. Acts of Unlawful Deportation or Transfer or Unlawful Confinement (Article 8(2)(a)(vii))

The illegal arrest of the passengers by the Israeli forces may amount to the war crime of unlawful confinement. The Elements of Crimes defines the crime as follows:

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[215] The HRC Report, para. 179, see *supra* note 5.

[216] *Ibid*., para. 235.

[217] *Ibid*., para. 248.

> The perpetrator confined or continued to confine one or more persons to a certain location.

In addition, there is a requirement of "unlawfulness". In this regard, the HRC Report states:

> […] Since the Israeli interception of the flotilla was unlawful, the detention of the passengers and crew from the seven vessels at Ashdod was also prima facie unlawful since there was no legal basis for the Israeli authorities to have detained and transported these people to Israel. The passengers found themselves in Israel on the basis of an unlawful act by the State of Israel […][218]

17.5.1.6. Intentionally Directing Attacks against the Civilian Population as Such or against Individual Civilians Not Taking Direct Part in Hostilities (Article 8(2)(b)(i))

This war crime under the Rome Statute has its treaty roots in the First Additional Protocol to the Geneva Conventions. The elements of the crime are listed in the Elements of Crimes as follows:

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

The term 'attack' refers to any combat action, including offensive and defensive acts. It is evident that the Israeli forces directed an attack on the flotilla. As has been shown above, the passengers on the vessels of the flotilla were civilians not taking direct part in hostilities. With regard to the mental element, the crime requires that the perpetrator meant to cause the consequence or was aware that it would occur in the ordinary course of events. The Israeli forces were aware that crew of the flotilla were civilians, and there is evidence regarding the Israeli attack have been conducted intentionally in the knowledge that civilians were being targeted.

17.5.1.7. Intentionally Directing Attacks against Civilian Objects (Article 8(2)(b)(ii))

The specific elements of this crime read as follows:

[218] *Ibid*., para. 215.

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.

The term "civilian object" is defined in Article 52 of Additional Protocol I: in this category fall all objects which are not 'military objectives'. Where there is doubt, the object must be treated as if it were a civilian object. Further, the attack must have caused damage to civilian property. In the present situation, the vessels of the flotilla were civilian objects, since as explained above they were not military objectives and the Israeli attack damaged vessels, humanitarian aid cargo and the property of the passengers.[219]

17.5.1.8. Intentionally Directing Attacks against Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations, as Long as They Are Entitled to the Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict (Article 8(2)(b)(iii))

The last clause of this crime limits the scope of application of this crime considerably, and indeed, it does not seem to criminalize any conduct which would not be covered by Article 8(2)(b)(i) and (ii). Yet, the inclusion of this offence into the Rome Statute was a result of the facts that delegations felt the need to explicitly condemn and criminalize attacks against humanitarian assistance and peacekeeping missions and as noted by Cottier and Baumgartner, thereby visibly signalling the exceptional seriousness of such most serious crimes of international concern.[220] Further, attacks on UN and humanitarian assistance personnel are considered to be of exceptional gravity and of concern to the international community as a whole because they are committed against persons who risk their lives to represent the international community.[221]

[219] See, *Ibid*., paras. 234–49.

[220] Michael Cottier and Elisabeth Baumgartner, "Article 8: War crimes", in Triffterer and Ambos (eds.), 2016, margin no. 219, see *supra* note 2.

[221] *Ibid*.

As has been discussed, the Israeli forces directed an attack on the Gaza flotilla. It needs to be assessed whether the flotilla can be qualified as personnel, installations, material, units or vehicles involved in humanitarian assistance. Although there is no generally accepted definition of what constitutes a humanitarian assistance mission, 'humanitarian assistance' in connection with an armed conflict refers primarily assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate basic needs. Cottier and Baumgartner define it as including: "relief actions with the purpose of ensuring the provision of supplies essential to the survival of the civilian population. Such supplies should at the very least include food, medical supplies, clothing and means of shelter".[222] The humanitarian assistance personnel may include administrative staff, co-ordinators and logistic experts, doctors, nurses and other specialists and relief workers.[223] Byron suggests that assistance by an independent humanitarian organization would clearly come under the heading of humanitarian assistance as well.[224] In this light, the six organizers of the Gaza Freedom flotilla may be subsumed under the term 'humanitarian assistance'.

Indeed, the Comoros referral provides information with regard to the organizers and the cargo of the flotilla: the flotilla was a humanitarian aid convoy, organized in partner vessel between six international relief organizations. As established by the HRC Report, the flotilla was carrying nothing more than humanitarian aid, medical supplies, and construction materials, intent on reaching the inhabitants of the Gaza Strip through the Israeli-imposed blockade.[225] These organizations were comprised of:

1. The Free Gaza Movement,
2. IHH,
3. The European Campaign to End the Siege on Gaza (the 'ECESG'),
4. The Greek Ship to Gaza Campaign,
5. The Swedish Ship to Gaza, and

[222] *Ibid*., margin no. 226.

[223] *Ibid*.

[224] Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, Manchester, 2009, pp. 78 ff.

[225] The Comoros Referral, para. 30, see *supra* note 1.

6. International Committee to End the Siege on Gaza.[226]

The 10,000 tons of humanitarian assistance consisted of food, medicine, home construction supplies, pre-constructed children's playgrounds, wood, cement, power generators, hardware supplies, desalination units, and paper.[227]

Accordingly, it could be argued that the attack of the Israeli forces on the humanitarian assistance personnel and the material have constituted the war crime of attack on humanitarian assistance within the meaning of Article 8(2)(b)(iii).

The Prosecutor, however, argued in her gravity assessment that due to the lack of neutrality and impartiality of its action, the flotilla cannot be regarded as a humanitarian assistance convoy. She concluded that: "Based on the available information and taking into account the foregoing, the flotilla does not appear to reasonably fall within the humanitarian assistance paradigm envisioned under Article 8(2)(b)(iii), due to its apparent lack of neutrality and impartiality as evidenced in the flotilla's explicit and primary political objectives (as opposed to a purpose limited to delivery of humanitarian aid), failure to obtain Israeli consent, and refusal to cooperate with the Israeli authorities in their proposals for alternative methods of distributing the relief supplies".[228]

The Prosecutor's approach has been criticised on the ground that peacekeeping operations are losing their impartial character.[229] It is, indeed, a matter that requires further discussion, namely, the question whether a humanitarian aid convoy should be devoid of any political conviction and must to be authorised by the UN or the ICRC in order to be qualified as a humanitarian assistance.[230]

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226 *Ibid*., para. 31.

227 *Ibid*., para. 33.

228 The Prosecutor's Decision, para. 125.

229 Marco Longobardo, "Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes", in *Questions of International Law*, 2016, vol. 33, pp. 21, 36.

230 Cf. Schabas, 2016, p. 262, see *supra* note 184; Dapo Akande and Emanuela-Chiara Gillara, "Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges", in *Israel Law Review*, 2017, vol. 50, no. 2, pp. 119, 129 ff.

17.5.1.9. Pillaging a Town or Place, Even When Taken by Assault (Article 8(2)(b)(xvi))

Pillage can be defined as the unauthorized appropriation or obtaining property in order to confer possession of it on oneself or on a third party against the will of the rightful owner. The Elements of Crimes of this war crime reads as follows: (1) The perpetrator must have appropriated certain property for private or personal use, (2) with intent to deprive the owner of his property, and that (3) the appropriation took place without the consent of the owner.[231] The definition of the offence encompasses isolated acts of pillaging as well as organized pillage.[232] Thus, confiscation of the property of the flotilla crew and private use of passengers credit cards by the Israeli soldiers constitutes the crime of pillaging.

17.5.1.10. Committing Outrages upon Personal Dignity, in Particular Humiliating and Degrading Treatment (Article 8(2)(b)(xxi))

The elements of this war crime read as follows:

> 1. The perpetrator humiliated or otherwise violated the dignity of one or more persons.
>
> 2. The severity of the humiliation, degradation or other violations was of such degree as to be generally recognized as an outrage upon personal dignity.
>
> 3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

On the basis of the facts of the situation, it is suggested that an outrage upon personal dignity was committed within the meaning of Article 8(2)(b)(xxi) of the Rome Statute, whereby Israeli forces humiliated, degraded or otherwise violated the dignity of one or more civilians to such a degree as to be generally recognized as an outrage against personal dignity.

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231 Andreas Zimmermann and Robin Geiss, "Article 8: War crimes", in Triffterer and Ambos (eds.), 2016, margin no. 553, see *supra* note 2.

232 Cf. *ibid*., margin nos. 555 ff.

17.5.1.11. Conclusion

In her decision not to initiate an investigation into the Gaza flotilla situation, the Prosecutor concluded that there is reasonable basis to believe that these offences have been committed, save for three of them, namely: wilful killing pursuant to Article 8(2)(a)(i); wilfully causing serious injury to body and health pursuant to Article 8(2)(a)(iii); and committing outrages upon personal dignity pursuant to Article 8(2)(b)(xxi).[233] This economic approach with regard to assessment of facts and the elements of the alleged crimes paved the way for the Prosecutor's gravity analysis. Indeed, as the Principal Counsel writes:

> […] Had the Prosecutor properly examined the available information, she could not have reasonably concluded that there is no reasonable basis to believe that neither the crime of intentionally directing attacks against civilians not taking direct part in hostilities pursuant to Article 8(2)(b)(i) of the Rome Statute, nor the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to Article 8(2)(b)(iv) of the Rome Statute were committed by IDF soldiers.[234]

Likewise, as a consequence of her failure to consider the above circumstances, the Prosecutor concluded that there was no basis to open an investigation into alleged crimes under Articles 8(2)(a)(ii), 8(2)(b)(i), and 8(2)(b)(iv) of the Rome Statute.[235]

17.5.2. Crimes against Humanity

Article 7 of the Rome Statute identifies conduct that amounts to a crime against humanity. The *chapeau* of Article 7 contains a stringent threshold according to which the single acts defined in Article 7 shall be qualified as crimes against humanity. Said acts will only be crimes against humanity when they are: "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

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[233] The OTP Report, para. 149, see *supra* note 13.

[234] The Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", para. 53, see *supra* note 20.

[235] The OTP Report, para. 139, see *supra* note 13. For a comprehensive critic see, The Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", paras. 58–68, see *supra* note 20.

The adjective "widespread" connotes "large-scale nature of the attack and the number of targeted persons". A widespread attack must be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[236] The adjective "systematic", on the other hand, refers to the organized nature of the acts violence and to the improbability of their random occurrence.[237] Even a single act of intentional killing which is committed in one of these contexts may be qualified as killing as crime against humanity.[238] And the fundamental feature of the crimes against humanity is that the widespread or systematic attack, as a rule, occurs at the behest of a State.[239]

In that connection, there is a reasonable basis to believe that the thoroughly organized and planned attack on the flotilla and the acts on the vessels, such as murder and imprisonment, could be considered as crimes against humanity in accordance with Articles 7(1)(a) (murder), 7(1)(d) (serious injury to body or to mental and physical health), 7(1)(f) (torture) and 7(1)(k) (conduct causing "serious injury to body or to mental or physical health"). In other words, the acts committed by the Israeli soldiers on 31 May 2010 on the vessels of the Gaza flotilla may be seen in the context of the actions taken by the Israeli Government's overall policy of blockade against Gaza, and the style of execution and treatment of the crew in the aftermath of the capture would support such finding.

Regard must be given to the "systematic" nature of the Israeli attack on the flotilla by due consideration of the high level of organization, planning and political objectives, as well as the fact that the acts have been committed at the behest of the State of Israel. These factors alone would, however, not necessarily lead to the conclusion that the *chapeau* of Article 7 is satisfied, for the legal definition of the term "attack" narrows the operational scope of Article 7. Article 7(2)(a) of the Rome Statute defines the term "attack" as follows:

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[236] Schabas, 2016, pp. 148 and 164, see *supra* note 184; Stegmiller, 2011, p. 273, see *supra* note 174; Werle, 2012, margin nos. 871, 875, see *supra* note 186.

[237] Schabas, 2016, pp. 149 and 165, see *supra* note 184; Stegmiller, 2011, p. 274, see *supra* note 174; Werle, 2012, margin no. 876, see *supra* note 186.

[238] ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgment, 7 May 1997, IT-94-1-T, para. 649 (http://www.legal-tools.org/doc/0a90ae/); Werle, 2012, margin no. 871, see *supra* note 186.

[239] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 92 ff.

> 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

Accordingly, even a systematic attack has to involve more than a few incidents, even when this requirement of 'multiple acts' does not mean that the attack must be "widespread".[240] Dixon and Hall note that 'multiple acts': "refers either to more than one generic act, even though this not required, or more than a few isolated incidents that would fit under one or more of the enumerated acts".[241] Concerning this issue, Buchan writes that: "The violence used to capture the Mavi would almost certainly constitute 'multiple commission' of acts listed in paragraph 1 […] The abuse of detained crew members that was documented by the UN Report would also satisfy this criterion, given that the reported abuse was committed repeatedly and against numerous crew members".[242]

A further requirement of the crime, that is, it must be committed as a product of policy to commit an attack against a civilian population, needs to discussed. Whether the crew of the Gaza flotilla can be regarded as a civilian population is determined according to the rules of humanitarian law, and we have already made this determination in our discussion with regard to war crimes. In this connection, as the crew were neither combatants nor civilians with no direct participation in hostilities, they should be regarded as civilians within the meaning of Article 7 of the Rome Statute.[243] With regard to the policy element, absent any written plan or policy by the Israel Defence Forces, the existence of such a policy to commit the attack could be inferred from the way in which the acts occur. As put by the HRC Report, the use of live ammunition from helicopters before descending, execution style of killings, close range shots and the unnecessary brutality reveal a concerted and pre-planned strategy. I suggest, therefore, that there is reasonable basis to believe that the vio-

[240] Rodney Dixon and Christopher K. Hall, "Article 7: Crimes against humanity", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck, Hart, Nomos, Munich, 2008, margin no. 88.

[241] *Ibid*., margin no. 87.

[242] Buchan, 2014, p. 487, see *supra* note 11.

[243] *Ibid*., p. 488.

lence and successive acts by the IDF were thoroughly organized as products of a certain chain of command rather than being random or isolated.[244]

It is a debated issue, though, whether a single attack, as in the case of the Israeli attack on the flotilla, that consists of multiple acts may satisfy these requirements. Werle, for instance, expresses an affirmative view by taking the September 11 scenarios into consideration, for even such a single attack may constitute a crime of concern to the international community as a whole.[245] Indeed, the Israeli attack on civilians who were on the vessels of the Gaza flotilla shocked the world community as a whole, and this attack condemned by most of the States and organizations. It is not the number of the killed persons (quantity) make the present situation of international concern but the circumstances in which alleged crimes have been committed: a co-ordinated and planned attack on the high seas against civilians who were on the vessels which were carrying humanitarian aid. For instance, after taking note of PTC II's decision in the Kenya situation, which held that a widespread attack may be the cumulative effect of series of inhumane acts or the singular effect of an inhuman act of extra magnitude,[246] the Principal Counsel, submitted that: "[…] the information available to the Prosecutor a reasonable basis to believe that the against flotilla was, considered on its own, widespread, and considered in its context, widespread and/or systematic in character".[247]

Indeed, considered in its context, the attacks against the Gaza flotilla may well meet the alternative requirement of being of systematic nature. As we have argued respecting policy element, the acts of the IDF were of an organized nature and they were not random occurrences. I suggest, therefore, that both the violence used to capture the Gaza flotilla and treatment of detained crew members were products of a policy; and hence, they may be regard as systematic within the meaning of Article 7. All in

244 See also *ibid*., p. 489.

245 Werle, 2012, margin no. 873, see *supra* note 186.

246 ICC, Situation in the Republic of Kenya, PTC II, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para. 95 (http://www.legal-tools.org/doc/f0caaf/).

247 Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", para. 114, see *supra* note 20.

all, I argue that there is a reasonable basis to believe that crimes against humanity have been committed against the crew of the Gaza flotilla, which merits further investigation.[248]

Yet, in her decision not to investigate, the Prosecutor concluded that there was no reasonable basis to believe that crimes against humanity were committed in the situation on the ground that the required contextual elements are not met. After recalling the contextual elements of the crimes against humanity, the Prosecutor stated that: "on this basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population". Nonetheless, as the Principal Counsel contended, the Prosecutor: "failed to consider critical elements that appear to conform with the contextual elements of crimes against humanity".[249]

17.6. Main Issues

17.6.1. Methodology: The Relationship with Other Fact-Finders

One of the main issues of the preliminary examination in the Comoros situation has been the Prosecutor's failure to consider all relevant information available to her, and her failure to distinguish and properly weigh the existing four reports regarding the situation.

According to Article 54(1) of the Rome Statute, it is indeed the duty of the Prosecutor to investigate incriminating and exonerating circumstances in order to establish the truth.[250] As noted in the Policy Paper on Preliminary Examination, the same principle is applied at the preliminary examination stage in relation to information that forms the basis of a decision to proceed with an investigation.[251]

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248 See Buchan, 2014, pp. 490 ff., see *supra* note 11.

249 Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", para. 117, see *supra* note 20.

250 Rome Statute of the International Criminal Court, 17 July 1998, Article 54(1)(a) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/); Article 54(1)(a) reads: "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".

251 OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 30 (http://www.legal-tools.org/doc/acb906/).

During preliminary examination, the Prosecutor may solely exercise some of the powers that are explicitly provided by the Rome Statute and the Rules of Procedure and Evidence. These powers could be summarised as follows:

- Analyse the seriousness of the information received (Article 15(2), Rule 104(1));
- Seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or any other reliable source (Article 15(2), Rule 104(2)); and
- Receive oral and written testimony at the seat of the Court, in accordance with the procedure in Rule 47 (Article 15(2), Rule 104(2)).[252]

The Prosecutor may, within the ambit of these powers, receive information on alleged crimes and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources that are deemed appropriate.[253] The Policy Paper indicates further actions which may be taken by the OTP:

> […] the Office can send requests for information to such sources for the purpose of analysing the seriousness of the information received. For this purpose, the Office may also undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organizations.[254]

Thus, considering the facts and circumstances of the situation under discussion, the Prosecutor may have undertaken the following activities in the present situation:

- She could have conducted a comprehensive and thorough analysis of the commission reports through the application of a test which takes note of their impartiality, objectivity and reliability, and thus filter out the relevant reliable information and analysis provided by each report;

[252] See Bergsmo, Kruger and Bekou, 2016, margin no. 8, see *supra* note 174; Stegmiller, 2011, pp. 224 ff., see *supra* note 174.

[253] Schabas, 2016, p. 833, see *supra* note 184.

[254] OTP, *Policy Paper on Preliminary Examinations*, 2013, see *supra* note 251.

- She could have clarified the mandate and objectives of these commissions;
- She could have requested assistance of the Chair of the United Nations Fact Finding Mission and other reliable sources which are deemed appropriate by the OTP;
- She could have requested assistance from independent specialized legal experts (who have not been involved with the national commission reports under consideration) concerning the relevant legal issues;
- She could have identified whether the factual differences in the reports would have any material impact upon proof of the criminal nature of the conduct;
- She could have consulted with the victims and participants of the Free Gaza Movement; and
- She could have set up a field mission.

Of these issues relating to methodology of the preliminary examination, I will only address the issue of the relation to one of the other fact-finders, that is, her treatment of the HRC Report. I will argue that the Prosecutor did not give the HRC Report its proper weight. Put in other words, there was a gross asymmetry in the way in which these reports were used. It is indeed a remarkable fact that in the Prosecutor's decision not to investigate, the Israeli Commission Report was referenced 79 times, and the Palmer Report was referenced 64 times, whereas the HRC Report garnered only 50 references. The Turkish Report garnered only 39 references, which shows that she did not give sufficient weight to the Turkish Report that contains valuable factual information especially in its first 50 pages.[255] These numbers show that the OTP Report relies to a greater extent on the reports produced by Israel and the Palmer report. As it will be shown below, the prioritization of the Israeli narrative by the Prosecutor is by no means limited to the number of references that she has made to the Israeli Commission Report.

This is indeed an important quality control issue, for two principal reasons. First, she mainly grounded her decision not to initiate investigation based on the four reports at hand; secondly, she failed to discriminate in favour of the HRC Report in case of conflicting views. Indeed, when

[255] See further Kattan, 2016, pp. 61, 90, see *supra* note 10.

assessing the facts of the present situation, the Prosecutor should have prioritized the HRC Report, being the only impartial fact-finding report. If we look at these reports more closely, it will be self-evident that the HRC Report is the principal and most reliable one among them, if one considers the fact that the Turkish and the Israeli reports are the products of the two governments directly involved in the events that took place between 31 May and 5 June 2010. The Principal Counsel argues that both governments take strong and unilateral positions while assessing their own responsibilities and the responsibilities of their nationals implicated in the events. This approach has a substantial impact when looking at the reliability of the reports. This is even clearer for the Israeli Commission Report, as crucial accounts contained therein have been found by the UN Human Rights Council to be "so inconsistent and contradictory" that it had no other option than to reject them.[256]

As regards the Palmer Report, this Report is not a product of a fact-finding mission, it had rather a narrow mandate. Its mandate was to receive and review the reports of the national investigations with a view to recommending ways of avoiding similar incidents in the future, and "potentially affect the relationship between Turkey and Israel, as well as the overall situation in the Middle East". Reflecting its mandate, the Panel of Enquiry's composition was political. Furthermore, at no time did the Panel perform an independent investigation, nor had it access to first hand evidence. As a result, it pleased no one. Both the Turkish and the Israeli representatives appended a dissenting statement.

This state of affairs, I think, is enough to demonstrate the profound significance of the HRC Report. Indeed, it is the only document emanating from a third party not involved in the events. Indeed, the Mission's task was to investigate "the facts and circumstances surrounding the boarding by Israeli military personnel of a flotilla of ships bound for Gaza and to determine whether in the process violations occurred in international law, including international humanitarian and human rights law".[257] In fulfilling this task, the experts of the Mission were also assisted by external specialists in forensic pathology, military issues, firearms, the law

[256] Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", para. 39, see *supra* note 20.

[257] The HRC Report, para. 4, see *supra* note 5.

of the sea and international humanitarian law.[258] Taking due note of its source, the mandate of the experts who investigated the events and its intrinsic neutrality, the Prosecutor should have prioritized the HRC Report. Remarkably, the Prosecutor in other instances heavily relied on the UN sources and reports. In the situation of Mali, for instance, the Prosecutor's report was mainly built on the UN and independent NGO reports.[259] Notwithstanding this fact, the Prosecutor failed to take due consideration of the HRC Report in her analyses. As the Principal Counsel pointed out:

> Regrettably in this instance, the Prosecutor's Decision does not consider the impartiality of the HRC Report and consequently fails to attach the appropriate weight and reliability to the information contained therein. On the contrary and without providing any explanation, the Prosecutor seems to greatly rely on the national reports, to the point that in several occasions she found the information to be "significantly conflicting" even when the accounts were consistent in the other three reports and only differed in the Turkel [Israeli Commission] Report.
>
> In conclusion, the Principal Counsel contends that the Prosecutor, by relying equally on each of the Reports, failed to discriminate in favour of the HRC Report in case of conflicting views. In light of its composition, mandate, methodology, and the extent of information considered therein, the HRC Report should have been granted the highest evidentiary weight during the preliminary examination.[260]

Interestingly, one of the contributors in this volume also criticizes the Prosecutor's reliance on open source materials like materials by UN fact-finding missions. According to this author:

> […] the Prosecutor should provide additional information (and actual past examples) of the way in which it corroborates and verifies information, and how much weight is given to different source types. This problem was exemplified in the 2014 Report concerning the Situation on Registered Ves-

[258] *Ibid*., para. 3.

[259] See OTP, *Situation in Mali: Article 53 (1) Report*, 16 January 2013 (http://www.legal-tools.org/doc/abb70f/).

[260] Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", paras. 45–46, see *supra* note 20.

> sels of Comoros, Greece, and Cambodia. The OTP relied on four different reports […] seemingly giving all four identical weight. Israel has reason to be concerned about legal and factual determinations based on insufficient evidence.[261]

This argument is untenable. When one considers Israel's long-lasting non-co-operation policy, the UN materials appears to be the only reliable sources, including in the present situation. After taking note of the findings the HRC Report, Sunga makes the following point on the evidence value of the UN reports pertaining to cases relating to the acts of the State of Israel:

> In short, given both the Government of Israel's long history of non-co-operation with the international community, as well as the inability of the Security Council to agree to investigate Israeli action in the Occupied Territories, international criminal investigations and prosecutions into Israeli Government practices (itself admittedly a highly unlikely eventuality) would have to rely heavily on information coming from the array of UN human rights sources, including commissions of inquiry, that have been activated by the Human Rights Council from time-to-time. In this respect, one should not overlook the work of the General Assembly's Special Committee on Israeli Practices that has been in operation since 1968.[262]

The non-co-operation of the Israeli Government was evident also in the present situation. As the HRC Report points out:

> The Mission expresses its profound regret that, notwithstanding a most cordial meeting on 18 August 2010, the Permanent Representative of Israel advised in writing at the end of the meeting that the position of his Government was one of non-recognition of, and non-cooperation with, the Mission.[263]

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[261] Asaf Lubin, "Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 19.

[262] Lyal S. Sunga, "Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. 388 ff.

[263] The HRC Report, para. 16, see *supra* note 5.

Given the fact that the Israel did not co-operate with the OTP either,[264] for the quality of the preliminary examination in the present situation, the Prosecutor should have heavily relied on the HRC Report for the reasons provided above, which is indeed not a matter of preference but a direct consequence of the Prosecutor's duty of objectivity and impartiality, and her obligation to provide a fully reasoned decision not to proceed with an investigation. As Sunga highlights: "In order to discharge their solemn responsibility towards fair and effective international criminal justice, international criminal investigators and prosecutors cannot afford to ignore information from UN human rights sources".[265]

Unfortunately, the Prosecutor's failure to fully assess the HRC Report and other materials available to her had enormous impact not only on her assessment of facts but also, as shown above, on her assessments with respect to the elements of the alleged crimes. This has, among others, affected her analysis regarding the gravity factors. These failures have been captured by the Principal Counsel's thorough analysis of the Prosecutor's evaluations and assessments with regard to the present situation. With respect to the Prosecutor's evaluation of the available information, she makes the following four crucial points:

1. The Prosecutor failed to consider and refer to all relevant information available to her;
2. The Prosecutor failed to distinguish and deal properly with the Reports;
3. The Prosecutor failed to consider and apply the correct evidentiary standard to the Reports; and
4. The Prosecutor unreasonably assessed the elements of the alleged crimes.[266]

Besides, the Principal Counsel identified further significant failures in the Prosecutor's legal analysis in the situation at question:

1. The Prosecutor's failure to take into account the continuous character of alleged crimes;

[264] The OTP Report, para. 9, see *supra* note 13.

[265] Sunga, 2013, p. 401, see *supra* note 262.

[266] For a detailed account see Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", paras. 27–68, see *supra* note 20.

2. The Prosecutor's failure to consider the temporal dimension of the alleged crimes;
3. The Prosecutor's failure to take a position on the lawfulness of the blockade;
4. The Prosecutor's analysis is almost entirely premised on the lawful nature of the blockade;
5. The Prosecutor's failure to address the link between the alleged crimes and the characterization of the armed conflict;
6. The Prosecutor's failure to address the contextual elements of the alleged crimes against humanity; and
7. The Prosecutor failed to properly weigh the gravity factors.[267]

Likewise, Comoros's application for review impugned the preliminary examination of the Prosecutor, among others, on the following grounds:

- Not considering "all available evidence";
- Giving "no weight to the most relevant aggravating factors";
- Failure to take account the wider context in which the crimes have been committed;
- Failure to not making any reference to any potential perpetrators who could be held to bear the greatest responsibility;
- Making an error with regard to the systematic or planned nature of the alleged crimes despite the information that "the IDF fired live ammunition from the boats and the helicopters before the boarding of the *Mavi Marmara*"; and
- Making "an astonishingly narrow interpretation of the impact of the attack".[268]

All in all, our analysis so far suggests significant flaws in the Prosecutor's appreciation of facts and in her assessments of the relevant legal question, which have had an impact on the overall quality of the preliminary examination in general, and her analysis of the gravity in the situation at question in particular.

[267] For a detailed account, see *ibid*., paras. 68–140.

[268] See further Kattan, 2016, pp. 69 ff., see *supra* note 10.

17.6.2. Analysis of the Prosecutor's and Pre-Trial Chamber I's Gravity Assessments

Neither the Rome Statute nor the Rules of Procedure and Evidence define the notion of "gravity". It is widely acknowledged that the concept of gravity remains largely unclear.[269] That said, gravity has turned into one of the central themes for selection of situations in the practice of the OTP. As stated by PTC I: "[…] the gravity notion was introduced in order to assure States Parties that the Court would not prosecute crimes that could be handled more expeditiously at a national level".[270] The assessment with regard to gravity is, therefore, a mandatory component for the determination of the question of admissibility. Yet, the assessment of gravity is exercised only when there are substantial grounds to believe that at least of the ICC crimes have been committed in a given situation. Thus, the context within which the said crimes have been committed, that is, their *modus operandi*, lies at the heart of the gravity test. Overall, although the Court generally has rejected the application of a high threshold in defining gravity, the Prosecutor has been invoking gravity as a justification for a reluctance to proceed with investigations.[271] In the present situation gravity was invoked by the Prosecutor as well. The decision not to initiate an investigation stated that: "considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate".[272] In the Gaza flotilla situation, the Prosecutor for the first time decided not to proceed with an investigation following a State Party referral.[273]

According to the practice of the OTP, any assessment of the gravity needs to take both quantitative perspective and qualitative dimension of the crime into account.[274] Similarly, PTC I in *Abu Garda* stated that: "[…]

[269] For references see ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Charles Blé Goudé*, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, 27 September 2014, ICC-02/11-02/11-171, para. 15 (http://www.legal-tools.org/doc/be1618/); see further Ambos, 2016, pp. 288 ff., see *supra* note 4.

[270] ICC, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, para. 16, see *supra* note 269.

[271] See Schabas, 2016 pp. 462 ff., see *supra* note 184.

[272] The OTP Report, para. 142, see *supra* note 13.

[273] Cf. Schabas, 2016, pp. 465 ff., see *supra* note 184.

[274] ICC, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, para. 20, see *supra* note 269.

the gravity of a given case should be assessed only from a quantitative perspective, that is, by considering the number of victims; the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case".[275] Thus, both the OTP and the Court has moved away from the magic number approach, which took only the number of victims into account, by focusing upon both qualitative and quantitative criteria. This interpretation of the gravity threshold is correct, since it aptly takes into account the circumstances in which the crimes committed.

Regulation 29(2) of the Regulations of the Office stipulates with respect to assessment of gravity, among others, following guiding factors for the Prosecutor's assessment: scale, nature, manner of commission and impact of the crimes. In 2013, the Office developed its analytical scheme respecting its gravity criteria, which takes quantitative and qualitative factors into account.[276] That provides some guidance with respect to interpretation of these factors.[277] The scale of crimes, for instance, may be

[275] ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Public Redacted Version of Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 31 (http://www.legal-tools.org/doc/cb3614/).

[276] OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 9, 59 ff., see *supra* note 251; see further Ambos, 2016, pp. 285 ff., see *supra* note 4.

[277] *Policy Paper on Preliminary Examinations* provide some interpretation with regard to these notions:

1. The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical and temporal spread (intensity of crimes over a brief period or low intensity over an extended period);
2. The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction;
3. The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed the execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups;
4. The impact of crimes may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

assessed, according to the OTP Policy Paper on Preliminary Examinations, in the light of, among others, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families.[278] While the Prosecutor shall not limit her assessment to the number of killings, the numbers of victims of other crimes, especially crimes against physical integrity, need to be taken into consideration as well.[279] Regarding the nature of crimes, the OTP considers that, while all the Rome Statute crimes are grave, the nature of some crimes, such as crimes committed against women or children, are of particular concern.[280]

Regarding the manner of commission of the crimes, the OTP provides some guidance: "[…] the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or result from a plan or organized policy, or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination".[281] Indeed, the vulnerability of victims has played a significant role in the practice of the OTP and it is an important qualitative factor in the gravity assessment. It shows that this assessment is not fixed to the number of victims. An example of this occurred when the Prosecutor applied for arrest warrants concerning the September 2007 attack on the African Union Mission in Sudan, which involved the killing of 12 peacekeepers and the wounding of eight others. The Prosecutor referred to Article 8(1) and stated that in applying the provision "the issues of nature, manner and impact of the attack are critical".[282] Attacks on peacekeepers are regarded as intolerable and are inherently grave.[283]

OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 62–65, see *supra* note 251.

278 *Ibid*., para. 62.

279 Cf. Stegmiller, 2011, pp. 339 ff., see *supra* note 174.

280 Ambos, 2016, pp. 286 ff., see *supra* note 4.

281 OTP, *Policy Paper on Preliminary Examinations*, 2013, para. 64, see *supra* note 251.

282 OTP, Situation in Darfur, Sudan, Summary of the Prosecutor's Application under Article 58, 20 November 2008, ICC-02/05-162, para. 7 (http://www.legal-tools.org/doc/613cd2/); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, pp. 201–02.

283 Stegmiller, 2011, pp. 340 ff., see *supra* note 174.

With respect to the impact of crimes, the Prosecutor will, among other things, consider the broader impact of crimes on the international community and on regional peace and security as well as the social economic and environmental damage inflicted on the affected communities, and the extent of responsibility of the perpetrator, that is, the so-called most responsible person criterion.[284]

The OTP's practice regarding the interpretation of the notion of gravity so far has been criticised as being a cherry-picking approach, which chooses both criteria and its interpretation thereof on a per case basis. As Azarova and Mariniello write: "Indeed, its *ad hoc* approach to the application of the gravity test affirms the view that "gravity" is merely a fig leaf for what is really a form of unaccountable discretion – one that basically allows prosecutors to make dramatic decisions about the destinies of individuals and the future of nations without engaging in the politics that this should entail".[285] Here, in her OTP Report, the Prosecutor considers all factors in turn and reaches negative conclusions in each and every aspect of her gravity assessment. This is not surprising if one reads her contextualisation and her disregard of plain facts of situation closely.[286] Her approach is reflected in her following remarks:

> With respect to the flotilla incident, according to the available information, it does not appear that the criteria of Article 8(1) are satisfied, especially considering *that the Court's jurisdiction does not extend to other alleged crimes committed in the context of the conflict between Israel and Hamas nor in the broader context of any conflict between Israel and Palestine*. Therefore, the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling

[284] *Ibid*., pp. 337 ff.; Ambos, 2016, p. 287., see *supra* note 4.

[285] Valentina Azarova and Triestino Mariniello, "Why the ICC Needs A 'Palestine Situation' (More Than Palestine Needs the ICC): On the Court's Potential Role(s) in the Israeli-Palestinian Context", in *Diritti umani e diritto internazionale*, 2017, vol. 11, no. 1, pp. 115 ff.

[286] For a brief overview of the Prosecutor's gravity analysis, see Marco Longobardo, "Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, pp. 1011, 1014 ff., 1018 ff.

> outside the scope of the referral and the jurisdiction of the ICC.[287]

While the situation with regard to the civilian population is a matter of international concern, 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 the vessels during the interception of the flotilla.[288]

This very contextualisation almost equates the question of jurisdiction and the assessment of gravity, and it turns the situation at hand, inevitably, into an attack committed against a group of civilians sailing on the high seas by a group of armed people for no particular reason. This would be at best piracy but not one of core international crimes under the Rome Statute. Therefore, it is an evident contradiction to acknowledge on the one hand that the attack against the flotilla was a war crime in the context of the international armed conflict between Israel and Hamas, and not to take the nature of the conflict and human tragedy in Gaza, on the other. This contraction is also identified by PTC I in its review decision:

> The stance that the Prosecutor cannot consider for the assessment of gravity any information in relation to facts occurring elsewhere than on the three vessels over which the Court may exercise territorial jurisdiction on an untenable understanding of jurisdiction. The rules of jurisdiction in part 2 of the Statute limit the Court's power to make judgment, i.e. to examine given conduct and make a judicial finding of whether such conduct constitutes a crime, but do not preclude the Court from considering facts that in themselves occur outside of its jurisdiction for the purpose of determining a matter within its jurisdiction. Thus, the rules of jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes, which were committed elsewhere than on the three vessels falling into its jurisdiction, *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*.[289]

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[287] The OTP Report, para. 137, see *supra* note 13 (emphasis added).

[288] *Ibid*., para. 147.

[289] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 17, see *supra* note 21 (emphasis added).

And PTC I emphasizes the evaluative contradiction caused by the Prosecutor's wrong contextualization of her assessment of gravity, when it contends that:

> By articulating in the Decision Not to Investigate a principle without basis in the law, the Prosecutor committed an error. However, the Chamber observes that the Prosecutor did not in fact apply the principle she announced, and did take into account certain facts "outside the Court's jurisdiction" for the purposes of her analysis under Article 53(1) of the Statute, such as for her conclusion that crimes were committed only on the *Mavi Marmara* and that no serious injuries occurred on the other vessels in the flotilla […], or for her conclusion that the identified crimes had no significant impact on the population in Gaza […].[290]

Accordingly, the Prosecutor's assessment of gravity was mistaken at the outset, for she did not take the context of the alleged crimes correctly and properly into account. As shown above, aggravating factors that should have been evaluated include the nature of Israel's interception of the flotilla, Israel-Gaza conflict, international reaction and deliberate plan and policy to use violence by the Israeli forces. There is indeed a legal and moral difference between stating that "merely" 10 people were killed, on the one hand, and that four of the 10 civilians were shot dead by Israeli forces even though they posed by no means a threat to Israeli forces by close range execution type shootings, on the other. If one considers the number of victims alone, as the Prosecutor did, without taking due account of the qualitative dimension the Comoros referral, it is not likely to exceed the gravity threshold. As the Prosecutor failed to do so, it was not a difficult task for her to reach the conclusion that the referred situation is not of sufficient gravity.

As put by PTC I, the fundamental evaluative and methodological error of the Prosecutor was to divorce the attack against the flotilla from the underlying conflict of Israel and Palestine by linking the gravity assessment to the issue of jurisdiction. This excessively restrictive approach would have barred the international criminal tribunals to take the historical and contextual background of any conflict before them. In *Akayesu*, for instance, the ICTR took the facts and the alleged crimes that were beyond its jurisdiction into account in order to explain the wider context

[290] *Ibid*., para. 18.

of the genocide in Rwanda. Although the ICTR's temporal jurisdiction was limited to the events that took place between 1 January 1994 and 31 December 1994,[291] the Tribunal has utilized events and historical background of the crimes for the contextualization and for proving the existence of a genocidal policy. The ICTR considered, for example, the crimes and preceding events that are committed well beyond its temporal jurisdiction:

> In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups, with the Hutu representing about 84% of the population, while the Tutsi (about 15%) and Twa (about 1%) accounted for the rest. In line with this division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity. The Chamber notes that the reference to ethnic background on identity cards was maintained, even after Rwanda's independence and was, at last, abolished only after the tragic events the country experienced in 1994.
>
> From the late 1940s, at the dawn of the decolonization process, the Tutsi became aware of the benefits they could derive from the privileged status conferred on them by the Belgian colonizers and the Catholic Church. They then attempted to free themselves somehow from Belgian political stewardship and to emancipate the Rwandan society from the grip of the Catholic Church. The desire for independence shown by the Tutsi elite certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu, a shift rendered more radical by the change in the church's philosophy after the second world war, with the arrival of young priests from a more democratic and egalitarian trend of Christianity, who sought to develop political awareness among the Tutsi-dominated Hutu majority.
>
> To make the economic, social and political conflict look more like an ethnic conflict, the President's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted of fabricating events. Dr. Alison Desforges in her testimony referred to this as "mirror politics", whereby a person accuses others of what he or she

[291] Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994 (http://www.legal-tools.org/doc/f5ef47/).

> does or wants to do. In this regard, in the morning hours of *5 October 1990*, the Rwandan army simulated an attack on Kigali and, immediately thereafter, the Government claimed that the city had just been infiltrated by the RPF, with the help of local Tutsi accomplices. Some eight thousand Tutsi and members of the Hutu opposition were arrested the next morning. Several dozens of them died in jail. *Another example of mirror politics is the March 1992 killings in Bugesera which began a week after a propaganda agent working for the Habyarimana government distributed a tract claiming that the Tutsi of that region were preparing to kill many Hutu. The MRND militia, known as Interahamwe, participated in the Bugesera killings. It was the first time that this party's militia participated in killings of this scale*. They were later joined by the militia of other parties or wings of Hutu extremist parties, including, in particular, the CDR militia known as the Impuzamugambi.[292]

The consideration of events that took place before 1 January 1994 by the ICTR did not mean that those crimes were also tried by the Tribunal. Yet, it was inevitable for the Tribunal to take note of the history and context of the crimes in order to explain and justify the *chapeau* element of the crime of genocide. Similarly, the Prosecutor of the ICC should have taken into consideration the wider context of the attack against flotilla just as she did it for the legal analysis with respect to jurisdiction *ratione materiae*. Thus, the following argument of the Prosecutor is mistaken and overly restrictive: "[…] the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC".[293]

The Prosecutor did not take into account the wider context of the crimes committed aboard *Mavi Marmara*, presumably, because of the fact that only a glimpse of events two years preceding to the attack against the flotilla would show the organized and planned nature of the crimes of Israel committed by its ablest and disciplined armed forces. In December 2008, Israel's Operation Cast Lead, for instance, resulted in the deaths of

[292] International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T (emphasis added) (http://www.legal-tools.org/doc/b8d7bd/).

[293] The OTP Report, para. 137, see *supra* note 13.

1,400 Palestinians – of whom at least 850 were civilians, including 300 children and 110 women – and the wounding of over 5,000 Palestinians.[294] The UN Fact Finding Mission on the Gaza Conflict established by the Human Rights Council[295] called the UN Security Council and the ICC to take action to prevent impunity for most serious crimes allegedly committed by Israel. It is worth labouring over the exact language used by the report:

> 1957. The Mission was struck by the repeated comment of Palestinian victims, human rights defenders, civil society interlocutors and officials that they hoped that this would be the last investigative mission of its kind, because action for justice would from it. It was struck, as well, by the comment that *every time a report is published and no action follows, this "emboldens Israel and her conviction of being untouchable". To deny modes of accountability reinforces impunity, and tarnishes the credibility of the United Nations and of the international community.* The Mission believes these comments ought to be at the forefront in the consideration by Member States and United Nations bodies of its findings and recommendations and action consequent upon them.
>
> […]
>
> 1964. The Mission believes that, in the circumstances, there is little potential for accountability for serious violations of international humanitarian and human rights law through domestic institutions in Israel and even less in Gaza. The Mission is of the view that *long-standing impunity* has been a key factor in *the perpetuation of violence* in the region and in the reoccurrence of violations, as well as in the erosion of confidence among Palestinians and many Israelis concerning prospects for justice and a peaceful solution to the conflict.
>
> […]
>
> 1966. *The Mission considers that the serious violations of international humanitarian law recounted in this report fall within the subject-matter jurisdiction of the International*

[294] For analysis of crimes against humanity and war crimes allegedly committed by the Israel Defense Forces during the Operation Cast Lead by an Israeli lawyer, see Oded Friedmann, *The Possibility of the ICJ and the ICC Taking Action in the Wake of Israel's Operation "Cast Lead" in the Gaza Strip: A Jurisdiction and Admissibility Analysis*, Peter Lang AG Internationaler Verlag der Wissenschaften, Frankfurt am Main, 2013.

[295] The Goldstone Report, see *supra* note 94.

> *Criminal Court* […] The Mission is of the view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace.
>
> […]
>
> 1969. […] (e) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations and that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, *refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13 (b) of the Rome Statute.*
>
> 1970. *To the Prosecutor of the International Criminal Court*, with reference to the declaration under Article 12 (3) received by the Office of the Prosecutor of the International Criminal Court from the Government of Palestine, *the Mission considers that accountability for victims and the interests of peace and justice in the region require that the Prosecutor should make the required legal determination as expeditiously as possible*.[296]

Yet neither the Security Council nor the ICC took action. And after eight months of the HRC Report's publication, the Gaza Freedom flotilla sailed – a group of individuals who represent the conscience of international community tried to channel humanitarian help to the Gazans, who were suffering under strict illegal and disproportionally harsh blockade imposed by Israel upon them.

After identifying that the gravity contextualization adopted by the Prosecutor as mistaken, PTC I decided to proceed with an assessment of single gravity conclusions of the Prosecutor on the ground that, despite the articulation of the erroneous abstract principle, the Prosecutor did in fact consider the extra-jurisdictional factors.[297] Therefore, PTC I went on

[296] Emphasis added.

[297] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 19, see *supra* note 21.

analysing the second argument of the Comoros, namely, the alleged failure of the Prosecutor to properly address the factors relevant to the determination of gravity under Article 17(1)(d) of the Rome Statute. Also, the issue of contextualization of the gravity analysis will be a matter of interest, since it is the basis upon which the single gravity factors are evaluated.[298]

Indeed, the remainder of the gravity analysis of the Prosecutor contains omissions and failures with respect to the single factors of gravity. For example, although the Prosecutor affirms in her Report that an evaluation of 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", she failed to assess this factor in the present situation, which is criticized by Comoros in following terms:

> The Prosecutor has not at any stage in the Decision considered and referred to any potential perpetrators at any level of command, let alone those who could be held to bear the greatest responsibility. This is a glaring omission that demonstrates that the Prosecutor has not applied the very criteria for assessing the gravity which she herself identified […][299]
>
> The Applicant had highlighted in its submissions to the Prosecutor that senior IDF commanders and Israeli leaders could be investigated for planning, directing and overseeing the attack on the Flotilla […][300]

[298] Longobardo argues that the situation specific conditions should be taken into account. He proposes, for instance, an assessment of the gravity issue in the *Mavi Marmara* incident with reference to alleged crimes that occurred on board other vessels. He, therefore, looks for examples from case law of Nuremberg and Tokyo tribunals which dealt with war crimes committed during naval warfare. Yet, the author himself admits the fact that "the OTP should have examined the gravity issues in the Mavi Marmara case in comparison with crimes committed on board vessels, it is difficult to find case law and state practice that is relevant". That said, he is, though without sufficient reasoning, of the opinion that if the Prosecutor could have mentioned the Nuremberg and Tokyo regarding unrestricted naval warfare "in order to strengthen its opinion regarding the lack sufficient gravity with regard to the alleged crimes that occurred during the Mavi Marmara boarding". Longobardo, 2016, pp. 1026 ff., see *supra* note 286.

[299] ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 85, see *supra* note 14.

[300] *Ibid*., para. 86.

PTC I affirmed Comoros's argument and criticized the Prosecutor's failure to consider "whether the persons likely to be the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes".[301] According to PTC I, then, the Prosecutor misinterpreted the criteria at stake when she came to the conclusion that there was not a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the identified crimes. Yet, according to the PTC, this assessment does not answer the question at hand. What is at stake here, according to the Chamber, is whether the Prosecutor shall be able to investigate and prosecute those most responsible for the crimes under consideration; hence, the issue is not the seniority or hierarchical position of those who may be responsible for such crimes.[302] Besides, it is not clear how the Prosecutor could categorically exclude the involvement of senior officials from the alleged offences committed aboard *Mavi Marmara* incident without conducting an investigation into the situation.[303]

With respect to the scale of crimes, PTC I found that 10 killings, 50–55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment should have been taken into account by the Prosecutor in favour of sufficient gravity. By failing to correctly assess the factor of scale, according to PTC I, the Prosecutor committed a material error. Indeed, if one considers cases from the relevant case law such as *Bahar Idriss*, *Abu Garda* and *Abdallah Banda*, as PTC I did, it will be evident that in such instances cases were not only investigated but even prosecuted by the Prosecutor.[304]

Concerning the nature of the alleged crimes committed on the *Mavi Marmara*, there are a number of aggravating factors that have not been considered by the Prosecutor.[305] Her conclusion was that: "[…] the information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment".[306] It is hard

[301] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 23, see *supra* note 21.

[302] *Ibid*., para. 24.

[303] Cf. Azarova and Mariniello, 2017, pp. 115 ff., see *supra* note 285.

[304] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 26, see *supra* note 21.

[305] Cf. Longobardo, 2016, pp. 1019 ff., see *supra* note 286.

[306] The OTP Report, para. 139, see *supra* note 13.

to comprehend why she chose to ignore the following findings in the HRC Report:

> The Mission thus determines that the treatment of passengers on board the *Mavi Marmara* and in certain instances on board the *Challenger 1*, *Sfendoni* and the *Eleftheri Mesogios*, by the Israeli forces amounted to *cruel, inhuman and degrading treatment* and, insofar as the treatment additionally applied as a form of punishment, *torture*.[307] (Emphasis added)

> The same report, which is the most reliable among the four reports in consideration, concerning the manner of commission of crimes stated that: "*The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds.*"[308]

In its assessment regarding the nature of crimes, PTC I found that there is merit in the following statement of Comoros, which highlights the error and omission in the Prosecutor's conclusion above:

> In dismissing that the nature of the crimes shows that they were of a sufficient gravity to warrant investigation, the Prosecutor has taken the definitive position that the treatment inflicted on the passengers did not amount to torture or inhumane treatment, as it lacked severity.
>
> This is a surprisingly premature judgment to make; especially when the Prosecutor has herself indicated that she need not draw any conclusions at the Preliminary Examination phase.[309]

Again, in its assessment with respect to the nature of crimes, PTC I made clarifications regarding the nature of preliminary examinations and a proper investigation, and opined that:

> At this stage, the correct conclusion would have been to recognize that there is a reasonable basis to believe that acts

[307] The HRC Report, para. 181, see *supra* note 5.

[308] *Ibid*., para. 263.

[309] ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", paras. 94–95, see *supra* note 14.

> qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test. The Prosecutor thus erred in not reaching this conclusion.[310]

Likewise, in its assessment with regard to the manner of commission of crimes, PTC I found significant errors and omissions in the Prosecutor's decision not to investigate. PTC I commenced its analysis in this regard with one of the most significant issues of the flotilla incident, that is, use of live fire by the Israeli Defence Forces prior to boarding. In this regard, the Comoros submitted that:

> There is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters *before* the IDF forces boarded the *Mavi Marmara*, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians.[311]

As shown above, the conclusions of the HRC Report as well as autopsy reports indicate that persons were shot from above. Thus being so, the Prosecutor gave preference to the Israeli Commission Report which records that the IDF denied that any live rounds were fired from the helicopters,[312] that soldiers faced fierce resistance when boarding, and that the IDF never anticipated at the time of planning the attack that excessive force would be used. Comoros' Request for Review submits the following with regard to the Prosecutor's prioritization of the Israeli Commission Report:

> […] The Prosecutor should have resisted placing reliance on this report to the exclusion of evidence that was supplied to her by the Applicant and which was available from other sources including the two UN reports. The autopsy reports alone, for example, indicate that persons were shot from above. The damage to the *Mavi Marmara* is also consistent

[310] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 30, see *supra* note 21.

[311] ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 101, see *supra* note 14.

[312] The OTP Report, para. 41, see *supra* note 13.

> with firing downwards from the helicopters and with excessive force being used on boarding.[313]

After considering these arguments, PTC I emphasized the importance of the issue of use of live fire by the IDF prior to boarding as follows:

> […] there may be some merit already in the Comoros' assertion that the Prosecutor, for the purpose of assessing the gravity of the identified crimes, willfully ignored this information. In the view of the Chamber, the question whether live fire was used by the IDF prior to the boarding of the *Mavi Marmara* is material to the determination of whether there was a prior intent and plan to attack and kill unarmed civilians – something that informs the Prosecutor's conclusions with respect to the manner of commission of crimes and, in turn, the ultimate determination that the potential case(s) would not be of sufficient gravity.[314]

In addition, PTC I underlined the methodological error in the Prosecutor's assessment:

> […] if the Prosecutor, as she states in the Response, had indeed set aside the issue of live fire prior to the boarding on the grounds that the "significantly conflicting accounts" make it "difficult to establish the exact chain of events", such position would be equally erroneous. Indeed, it is inconsistent with the wording of Article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to disregard available information other than when that information is manifestly false. In the present instance, however, there is no indication that the witness statements, the UN Human Rights Council Report, or the autopsy reports are manifestly false.[315]
>
> It is only upon investigation that it may be determined how the events unfolded. For the purpose of her decision under Article 53(1) of the Statute, the Prosecutor should have accepted that live fire may have been used prior to the board-

[313] ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 115, see *supra* note 14.

[314] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 34, see *supra* note 21.

[315] *Ibid*., para. 35.

> ing of the *Mavi Marmara*, and drawn the appropriate inferences. This fact is extremely serious and particularly relevant to the matter under consideration, as it may reasonably suggest that there was, on the part of the IDF forces who carried out the identified crimes, a prior intention to attack and possibly kill passengers on board the *Mavi Marmara*.[316]

Indeed, the emphasis put on the issue of premeditation in gravity assessments by PTC I is extremely important for any comprehensive analysis of the situation at hand. Remarkably, as Buchan writes, the Israeli conduct "was not momentary or ephemeral, but instead perpetrated over a 12 h period".[317] This point is a strong indicator for the amount of premeditation and planning, which is an important aspect for the assessment of gravity.[318] Furthermore, the Comoros referral also pointed to the existence of such a deliberate plan and policy by stating that: "[…] the actions of the IDF were manifestations of a plan or policy to use violence to dissuade the humanitarian flotillas to directly reach a blockaded Gaza".[319]

PTC I also identified the following the following errors of fact with regard to the Prosecutor's analysis of the manner of commission of the identified crimes:

- The Prosecutor unreasonably failed to consider that the fact that the detained passengers suffered cruel and abusive treatment in Israel reasonably suggests that the identified crimes may not have occurred as individual excesses of IDF soldiers; and
- The Prosecutor unreasonably failed to recognize the fact that the unnecessarily cruel treatment of passengers on the *Mavi Marmara*, the attempts of the perpetrators of the identified crimes to conceal the crimes, and the fact that the events did not unfold on other vessels in the flotilla in the same as they did on the *Mavi Marmara*, are compatible with the hypothesis that the identified crimes were planned.[320]

316 *Ibid*., para. 36.

317 Buchan, 2014, p. 498, see *supra* note 11.

318 Stegmiller, 2011, p. 343, see *supra* note 174.

319 ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 25, see *supra* note 14.

320 ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 44, see *supra* note 21.

Lastly, PTC I found error in the Prosecutor's assessment with respect to the impact of the crimes. Concerning this issue, the Prosecutor submitted that the supplies were later distributed in Gaza and, according to her, "in these circumstances, the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on the vessels in the flotilla".[321] Yet again, she failed to recognize the fact that the Israel's violent interception of the Freedom flotilla had "the consequence of deterring other humanitarian agencies from attempting to deliver to this population. As both the guidance of the OTP and decisions of the Court have made clear, the impact of international crimes on the local population is relevant to the gravity assessment".[322] The impact of crimes on the direct victims and their impact on Gazan people, therefore, are relevant to the gravity assessment as well as the significant impact of the identified crimes on the lives of the victims and their families. Comoros' request for review also made such an argument:

> It is arguable that the acts of the IDF on the Flotilla would have sent a clear message to those in Gaza that the occupation of Gaza was in full force and that even if humanitarian aid was to get through to the Gaza, its delivery would be controlled and supervised by the Israeli authorities, and could be stopped at any point. Such an impact on the civilian population of Gaza must at least be compatible with the effects on peacekeeping of single attack in Haskanita, Darfur.[323]

Moreover, the Prosecutor also failed to recognize the considerable social alarm caused by the Israeli attack in the international community. She ignored, among other things, that the attack on the *Mavi Marmara* of Comoros, was condemned by the Security Council during its 6325th and 6326th meetings,[324] and the Israeli action condemned by many States. In-

321 The OTP Report, para. 141, see *supra* note 13.

322 Buchan, 2014, p. 497, see *supra* note 11.

323 ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 135, see *supra* note 14.

324 Statement [Made on Behalf of The Security Council, at The 6326th Meeting, 1 June 2010, in Connection with the Council's Consideration of the Item Entitled "The Situation in the Middle East, Including the Palestinian Question"], UN Doc. S/PRST/2010/9, 1 June 2010 (http://www.legal-tools.org/doc/356fb8/); UN Security Council, "Security Council Con-

deed, Turkey, Mexico, Brazil, Austria, Russia, Uganda, France, Bosnia and Herzegovina, and Lebanon all condemned the use of force by Israel aboard the *Mavi Marmara* in the UN Security Council.[325] France, for instance, stated that the human toll of the operation had led the country to believe that there had been an unjustifiable and disproportionate use of force.[326] The attack on the flotilla has had further serious international repercussions. As stated by the Comoros referral, these include, among others, Security Council resolutions, debates in the UN Human Rights Council, and the appointment of a commission of inquiry by the Secretary-General of the United Nations. This is important for the assessment of gravity, for this fact shows the alleged crimes committed by the IDF forces are among the most serious crimes of truly international concern, which to be sure is in line with the philosophical underpinning of the ICC.[327] Yet, aside from the four reports, which exacerbated the social alarm surrounding the attack against *Mavi Marmara* rather alleviating it, there is no legal action taken to address the Israeli attack.[328] PTC I arrived at similar conclusion with regard to the impact of crimes when it held that:

> […] the commission of the identified crimes on the *Mavi Marmara*, which were highly publicised, would have sent a clear and strong message to the people in 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. Also, the international concern caused by the events at issue, which, inter alia, resulted in several fact-finding missions […] is somewhat at odds with the Prosecutor's simplistic conclusion that the impact of identified crimes points towards the insufficient gravity of the potential case(s) on the mere grounds that the supplies carried by the vessels in the flotilla were ultimately later distributed to the population in Gaza.[329]

demns Acts Resulting in Civilian Deaths during Israeli Operation against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement,", 31 May 2010, SC/9940.

325 Security Council, 65th year: 6325th meeting, Monday, 31 May 2010, New York, UN Doc. S/PV.6325, 31 May 2010, pp. 4–12 (http://www.legal-tools.org/doc/1a733c/).

326 *Ibid*.

327 See ICC Statute, Preamble, paras. 3 and 4, and Articles 1 and 5, see *supra* note 250.

328 Cf. Buchan, 2014, p. 497, see *supra* note 11.

329 ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 48, see *supra* note 21.

Despite the positive formulation of Article 53, by ignoring fundamental facts or overlooking them as well as misinterpreting the existing information and the law, the Prosecutor had regarded the present situation not grave enough to justify an investigation. Nevertheless, the number of aggravating factors speak against this decision: a deliberate plan and policy to use violence in order to enforce an unlawful blockade, vulnerability of victims, impact on the local people, and manner of commission of crimes (close range execution type killings against unarmed civilians who were hiding from the IDF forces), continuous degradation and outrages upon human dignity even after the taking control of the flotilla ships that shows the systematic character of the conduct, 12-hour duration of criminal conduct which has been committed at behest of the highest authorities of the State of Israel, among others. These aggravating factors, for the reasons given above, are indeed sufficiently grave to justify attention of the Court.[330]

As shown above, PTC I requested the Prosecutor to reconsider her decision not to initiate an investigation by taking due note of her false contextualization of the gravity requirement. PTC I has adopted a quantitative-qualitative approach in identifying the errors contained in the Prosecutor's decision with regard to the factors of assessment, namely, the nature, scale, manner of commission and impact of identified crimes.[331]

In conclusion, by way of final note, PTC I shed light upon the fundamental flaw in the Prosecutor's gravity assessment:

> […] the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the *raison d'être* is to investigate and prosecute international crimes of concern to the international community, and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the event.[332]

The Prosecutor is now re-considering her decision not to investigate into the flotilla situation in light of the reasoning of PTC I in its request to

[330] For a similar view see Buchan, 2014, p. 498, see *supra* note 11.

[331] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", paras. 49–50, see *supra* note 21.

[332] *Ibid*., paras. 51.

the Prosecutor to review her prior decision based upon the Office's *de novo* review of all the information available to it prior to 6 November 2014, upon which the 6 November 2014 report was based.

As a final note, in his dissenting opinion, agreeing with the Prosecutor, Judge Kovacs denies the gravity in the present situation on the ground that the situation is narrow in scope with much less qualitative impact than other situations. Remarkably, Judge Kovacs' observations are heavily drawn from the Israeli Commission Report and the Prosecutor's decision not to open an investigation, which in turn adopts the Israeli narrative in key aspects regarding the situation. The core of the Judge Kovacs' approach, I suggest, could be found in his following remarks concerning the incidents that took place aboard *Mavi Marmara*:

> The injuries sustained by the individuals on board the *Mavi Marmara* were apparently incidental to lawful action taken in conjunction with protection of the blockade.[333]
>
> […] Israeli forces had a right to capture the vessel in protection of their blockade. Furthermore, irrespective of this right, it was a logical reaction. Faced with a potential breach of the blockade, the IDF acted out of necessity.[334]

As I have extensively dealt with such assumptions in the preceding sections, I will not deal with the arguments advanced by Judge Kovacs, which are largely drawn from the Israeli Commission Report and the Prosecutor's decision not to investigate.[335]

17.6.3. Prosecutorial Discretion and Judicial Review

Comoros' application for review and PTC I's request from the Prosecutor to reconsider her decision not initiate an investigation were first of their kind. Indeed, for the first time, the ICC Prosecutor decided not to open an

[333] ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber I, Corrigendum of Annex to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Péter Kovács, 16 July 2015, ICC-01/13-34-Anx-Corr, para. 31 (http://www.legal-tools.org/doc/0fceb2/); cf. Ambos, 2016, p. 291 ff., see *supra* note 4.

[334] ICC, Corrigendum of Annex to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Péter Kovács, para. 32, see *supra* note 333.

[335] For a critical analysis of the Judge Kovacs assessments, see Kattan, 2016, pp. 84 ff., see *supra* note 10.

investigation after having received a referral by a State Party, thus giving the opportunity to the judges to review the decision.[336] I shall now proceed with an analysis of the findings of PTC I and the Appeals Chamber's findings with regard to the nature and scope of the judicial review and the limits of prosecutorial discretion as set out in Article 53 of the Rome Statute.

17.6.3.1. Pre-Trial Chamber I's Decision

PTC I made significant clarifications regarding `the nature and scope of the review process under Article 53(3)(a) of the Statute. Indeed, given the fact that the Prosecutor enjoys a very significant degree of autonomy and discretion, the proper exercise and limits of this discretionary power should have been determined by the very first decision of PTC I based on the principle of *kompetenz-kompetenz*. I argue that PTC I's review decision in the situation at question has contributed to a better understanding concerning the limits of the discretion through a proper exercise of institutional checks and balances of the Court, which has in fact also contributed to the institutional integrity and credibility of the Court as a court of law.[337]

After stating the statutory basis and the subject-matter of the review, the Chamber provided its interpretation in respect of the object and purpose of the judicial review contained in Article 53(3)(a) of the Statute. According to PTC I's interpretation, such a review provides "referring entities the opportunity to challenge, and have the Chamber test, the validity of the Prosecutor's decision not to investigate".[338] In this vein, PTC I has limited the scope of its review to the issues that are raised in the request for review and have a bearing on the Prosecutor's conclusion not to investigate,[339] thereby adopted the standard of review applied by the Appeals Chamber with regard to interlocutory appeals.[340]

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[336] See further, Meloni, 2016, p. 5, see *supra* note 9.

[337] Cf. Giulia Pecorella, "The Comoros Situation, the Pre-Trial Chamber and the Prosecutor: The Rome Statute's system of checks and balances is in good health", in *An International Law Blog*, 30 November 2015.

[338] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", paras. 9–10, see *supra* note 21.

[339] *Ibid*., para. 10; see further, Ambos, 2016, p. 382, see *supra* note 4.

[340] See *ibid*., pp. 382 ff. footnote 486 and pp. 569 ff.

Furthermore, PTC I shed light upon the limits of prosecutorial discretion, and in this regard I argue that PTC I's interpretation concerning the limits of the prosecutorial discretion is more in line with the wording and the scheme of the preliminary examinations as set out in Article 53 of the Statute. Indeed, a close reading of PTC I's decision reveals that, in the interpretation of the Chamber, in the present situation, the Prosecutor should have either commenced an investigation on the ground of the presumption for investigation as expressed in Article 53(1) by the use of the word "shall" or, as set out in Article 53(1)(c), should have based her decision not to initiate an investigation on the interests of justice clause. In this regard, PTC I held that:

> […] If 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. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under Article 54 of the Statute, conversely powers are more limited under Article 53 (1) of the Statute.

Indeed, this interpretation reflects a correct reading of Article 53(1)'s *chapeau*, according to which a principle of legality is incumbent on the Prosecutor, which is designed to rule out any arbitrary decision making by the Prosecutor regarding the appropriateness of an investigation.[341]

On this issue, the following significant remarks have been made in a leading commentary of the Rome Statute:

> The use of the imperative verb 'shall' emphasises that the sole discretion in the chapeau is whether there is reasonable basis to proceed with a full investigation. If such a reasonable basis is found to exist, the prosecutor is obliged with an investigation with a view to formulating an indictment […] The provision does not give the Prosecutor room for arbitrary decision-making if he or she deems that the preliminary

[341] See Karel De Meester, "Article 53: Initiation of an investigation", in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 387.

> information a reasonable basis on which to proceed under the Statute.[342]

Yet, despite this plain meaning interpretation of the imperative verb 'shall', there is an ongoing debate regarding whether there is room for prosecutorial discretion based on the principle of opportunity, or whether the principle of legality, as the wording suggests, shall prevail.[343] In the Rome Statute context, the debate should go beyond the legality-opportunity divide.[344] Although these notions may inform the debates concerning the limits of prosecutorial discretion of the Prosecutor, the *sui generis* structure of the statutory scheme needs to be recognized, which can be dubbed as 'managed adversarialism'. In such a scheme, the role of the Prosecutor as the master of proceedings is limited by the managerial powers of judges.[345] Nonetheless, whether the existing scheme of investigations and preliminary examinations is compatible with the realities of an amorphous international community is a subject of another debate, that is, the politics of institutional design. Accordingly, PTC I's reading of Article 53 – more concretely, its interpretation of the scope and effects of the judicial review and the limits of prosecutorial discretion, based upon the existing canon of juridical interpretation – is correct. PTC I held that the proper place of exercise of the prosecutorial discretion in the Article 53 context is to be found the interests of justice clause, in line with the wording of Article 53, yet in contravention to the prior practice of the Prosecutor (which solely relied on the gravity test):

> The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by Article 53(1) of the Statute, *that discretion expresses itself only in paragraph (c)*, i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require *the application of exacting legal requirements*. [Emphases added]

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342 See Bergsmo, Kruger and Bekou, 2016, margin no. 6, see *supra* note 174; see further De Meester, 2017, see *supra* note 341.

343 *Ibid*.

344 Cf. Frank Meyer, "Discretion", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, pp. 914, 919.

345 Cf. Carsten Stahn, "Judicial Review of Prosecutorial Discretion: Five Years On", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 247, 253 ff., 264.

Consequently, in the interpretation of the Chamber, if there are reasonable grounds that the crime within the Court's jurisdiction have been committed and the situation is admissible, but the Prosecutor does not want to initiate an investigation, then she should base her decision on the interests of justice clause, which has been never utilised by the Prosecutor so far. Thus, the Prosecutor's discretion is in fact subject to restrictions set out in the Statute and potential review by the Chamber, which will check the application of exacting legal requirements. This interpretation, if put into practice, would be beneficial for the Court's institutional checks and balances, as a review that will take place within the ambit of the interests of justice clause shall make the effectiveness of the Prosecutor's decision not to initiate an investigation depend on the PTC's determination. Besides, such a review would enhance the balance between the institutional independence of the Prosecution and its accountability as an agent of justice.[346]

Yet, as will be shown, in the review proceedings concerning the flotilla situation, the Prosecutor has the final say as it takes place within the ambit of Article 53(3)(a) of the Statute.[347]

Finally, the Chamber made its approach plain in respect of the nature of judicial review set out in Article 53(1) when it stated that:

> […] the Chamber considers it necessary to add that there is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under Article 53(1) of the Statute which are erroneous, but within some filed of deference. *The role of the Chamber in the present proceedings is to exercise independent judicial oversight* [italics added].

17.6.3.2. The Appeals Chamber

Presumably due to the strong rejection of almost every argument made by the Prosecutor in her gravity assessment by PTC I, and the Chamber's findings in respect of the nature and scope of the judicial review, the Prosecutor filed an appeal against the decision by PTC I. As there is no express right to appeal against the PTC's decision, the Prosecutor requested a right appeal by drawing an analogy between the present case and that of

[346] See *ibid*., pp. 258 ff.

[347] See further Meloni, 2016, p. 10, *supra* note 9.

admissibility decisions, which may be directly appealed under Article 82(1)(a) of the Statute. In her appeal the Prosecutor, among other things, asserted that:

> This appeal is important because the Decision not only purports to rule on the admissibility of many potential case(s) arising from this situation, but interprets the law in a manner that alters the Prosecution's mandate under the Statute and dramatically expands the scope of the Court's operations.[348]

As Articles 53 and 82 of the Statute do not expressly provide a right of appeal against decisions rendered pursuant to Article 53(3)(a), the Appeals Chamber, without discussing the merits of the Prosecutor's appeal, dealt solely with the question whether PTC I's decision is a decision with respect to admissibility within the meaning of Article 82(1)(a) of the Statute. In light of the letter, drafting history and the Appeals Chamber's prior jurisprudence, the Chamber held by majority that PTC I's Article 53(3)(a) decision is not appealable, and therefore it dismissed the appeal *in limine*.[349]

The Appeals Chamber commenced its analysis with its own case law including its Kenya Appeal Decision and the Libya Appeal Decision. The Chamber underlined its consistent jurisprudence which requires that decisions with respect to admissibility "consist of or are based upon a ruling that a case is admissible or inadmissible and that the operative part of the decision must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case".[350] And the decision of PTC I in the Comoros referral case, as put by the Appeals Chamber, did not consist of, nor was it based upon, a ruling on admissibility which could be appealed under Article 82(1)(a). While taking the Prosecutor's argument with respect to the language and tone of PTC I's decision[351] into consideration, the Appeals Chamber did not consider such factors to alter the na-

[348] ICC, "Notice of appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)", para. 4, see *supra* note 22.

[349] ICC, "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'", paras. 40, 66, see *supra* note 23.

[350] *Ibid*., para. 49.

[351] OTP, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Prosecution's Further Submissions concerning Admissibility, ICC-01/13-47, 14 August 2015, para. 28 (http://www.legal-tools.org/doc/a2a58c/).

ture of the proceedings. Furthermore, the Appeals Chamber made it plain that the PTC's decision "is a request to the Prosecutor to reconsider her decision not to initiate an investigation and […] the ultimate decision as to whether to do so is for her".[352] The Chamber put the emphasis in the present case on the operative part of the Article 53 decisions,[353] when it contends that:

> While the Impugned Decision might conceivably have an effect on the admissibility of potential cases arising out of the situation, in that it could potentially lead to the Prosecutor coming to a different conclusion in relation to admissibility (pursuant to Article 53 (1) (b)) at the time that she reconsiders her initial decision not to initiate an investigation, the Impugned Decision is not by its nature a decision determining admissibility.[354]

In other words, as aptly put by the Appeals Chamber, PTC I's decision does not determine admissibility. It requests the Prosecutor to reconsider her decision as provided in statutory scheme for review of prosecutorial decisions not to investigate in Article 53.[355] Indeed, the Appeals Chamber enforces the operational effect argument with a lexical and systematic interpretation of Article 53, when it states that:

> Article 53 of the Statute provides a distinct scheme for the judicial review by the Pre-Trial Chamber of negative admissibility determinations by the Prosecutor, i.e. where she finds that such cases are not or would not be admissible. Article 53 makes no express provision for an appeal of the decision of the Pre-Trial Chamber requesting the Prosecutor to reconsider her decision not to initiate an investigation, where such decision is based on the admissibility or the inadmissibility of the case, or indeed in any other circumstances.[356]

In its analysis of the statutory structure, the Appeals Chamber makes the following significant clarifications with regard to the extent of the prosecutorial discretion within the scheme of Article 53:

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[352] ICC, "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'", para. 50, see *supra* note 23.

[353] *Ibid*., para. 51.

[354] *Ibid*., para. 50.

[355] *Ibid*., paras. 51, 53.

[356] *Ibid*., para. 55.

> The Appeals Chamber further notes that the Pre-Trial Chamber's review of the Prosecutor's decision must be triggered by a request for review from the referring State or the Security Council. In the absence of such a request, the Pre-Trial Chamber has no power to enter into a review of the Prosecutor's decision not to proceed with an investigation on its own motion, irrespective of how erroneous it may consider the Prosecutor's admissibility determination to be. In addition, in the event that, upon review, the Pre-Trial Chamber disagrees with the findings or conclusions of the Prosecutor, it may request reconsideration of that decision. Rule 108 (3) of the Rules of Procedure and Evidence then provides that the "final decision" is for the Prosecutor.[357]

Put in plain terms, if, after reconsidering the situation, the Prosecutor still holds on to her prior decision not to investigate, this will be the end of the procedures; if, in the flotilla situation, she would decide not to initiate an investigation again, this would be the end of the matter. As put by the Appeals Chamber: "[…] the prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed".[358] The Appeals Chamber further held 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*. To find that the impugned Decision was a decision with respect to admissibility would also fail to respect the discretion that has been granted to the Prosecutor in the context of Article 53.[359]

As well, the drafting history analysis of the Appeals Chamber confirmed the above understanding of Article 53(3)(a) of the Statute. Indeed, the commentary on the corresponding article in the 1994 draft statute for an international criminal court prepared by the Working Group of the International Law Commission provides the part of *raison d'être* of the review process contained in Article 53, relevant part of which reads:

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[357] *Ibid*., para. 56.

[358] *Ibid*., para. 59.

[359] *Ibid*., para. 60 (emphasis added).

> This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor.[360]

The body responsible for the review under Article 53(3)(a) of the Statute was subsequently changed from the Presidency to the PTC. Yet, the nature and content of the review remained one to be carried out with a view to determining whether to request the Prosecutor to reconsider her decision not to initiate an investigation.[361] In addition, the Appeals Chamber noted that a proposal by France to include an express provision to clarify that Article 82(1)(a) would apply to review decisions under Article 53(3)(a) was not adopted.[362]

Consequently, three significant clarifications flow from the Appeals Chamber's decision: firstly, the Chamber held that the reviews of Article 53 by the PTC are not appealable; secondly, if the PTC requests from the Prosecutor to reconsider her decision to initiate an investigation, the ultimate decision as to whether to do so is her decision (the Prosecutor is, if she chooses to do so, not bound by the PTC's decision); and thirdly, as the Prosecutor's decision upon reconsideration is final, the referring State would not be entitled to request a further review.

There is also support in the literature for such a reading of the scope of Prosecutor's obligation to reconsider her decision not to initiate an investigation. Bergsmo, Kruger and Bekou, for instance, make in this regard the following observations:

> […] Whilst the Prosecutor indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not, strictly speaking, be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided that the Prosecutor had

[360] *Ibid*., para. 62.

[361] *Ibid*., para. 63.

[362] *Ibid*., para. 65.

> properly applied his or her mind in coming to the conclusion.[363]

If, in the Gaza flotilla situation, the Prosecutor bases her final decision on gravity, it will be the end of the matter, and as Schabas writes: "Can anything further be done if the Prosecutor 'reconsiders' and decides to maintain her decision? It seems that as long as the Prosecutor bases her decision on the grounds of jurisdiction and admissibility, this is where the matter ends. These issues are relatively straightforward with the exception of the vague, nebulous and quintessentially subjective notion of 'gravity'. A prosecutor who does not wish to proceed with an investigation of a situation referred to by a State Party or the Security Council will have every interest in relying upon the gravity ground".[364]

It is questionable whether it is a wise strategy for the integrity and legitimacy of the Court to squeeze the throat of the gravity ground each and every time, even when there are compelling reasons that situational gravity exists. As clarified by the PTC I Decision, if the Prosecutor wishes to exercise her discretion, it will be within the confines of Article 53(1)(c), whereas Article 53(1)(a) and (b) require the application of exacting legal requirements. There is also support for the idea that the Prosecutor should abandon her restrictive interpretation of the interests of justice clause and refrain from trumping judicial oversight.[365] Indeed, the judicial review exercised by PTC I in the Gaza flotilla situation made the significance of the judicial oversight envisaged by the drafters of the Rome Statute explicit, contributing to transparency. Thanks to the review process, there is possibility for the referring State Party to express its arguments concerning the Prosecutor's decision. The intervention of the PTC as an independent and impartial instance would, I think, enhance the overall quality of preliminary examinations, at least for referrals ensuing from the Security Council or a State Party.

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363 See Bergsmo, Kruger and Bekou, 2016, margin no. 39, see *supra* note 174.

364 William A. Schabas, *An Introduction to the International Criminal Court*, 5th ed., Cambridge University Press, Cambridge, 2017, pp. 241–42.

365 Cf. Cale Davis, "Political Considerations in Prosecutorial Discretion at the International Criminal Court", in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 170; Talita de Souza Dias, "'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court", in *Leiden Journal of International Law*, 2017, vol. 30, no. 3, p. 731.

17.7. The Turkish-Israeli Agreement: An Amnesty?

The Turkish-Israeli Agreement is significant. The *Procedural Agreement on Compensation between the Republic of Turkey and the State of Israel*, which required a prior approval by Parliament by law and ratification by a decree of the Council of Ministers signed by the President of the Republic (Article 104) after completion of ratification process,[366] was published in the Official Gazette of Turkey on 9 September 2016, and is now part of Turkish law.[367] According to the Turkish Constitution of 1982, ratified international treaties rank above ordinary statutes and below the Constitution. Accordingly, international treaties duly put into effect have the same legal value as domestic laws.[368] Yet, the Constitution exempts international treaties from the constitutional review, when it states that: "No appeal to the Constitutional Court shall be made with regard to these agreements". The rationale for this limitation rests on the idea of upholding the principle of *pacta sunt servanda*. Put in plain terms, the Turkish-Israeli Agreement is exempt from constitutional review by the otherwise active Turkish Constitutional Court.

With regard to the main obligation of the State of Israel, Article 1 of the Agreement provides that:

> The Government of Israel shall make an *ex gratia* payment of 20 million US dollars to an account opened by the Government of Turkey to compensate the bereaved families during the flotilla (*Mavi Marmara*) incident that took place on 31 May 2010.

This enables the parties to normalise their deteriorated relationship and provide to the victims a kind of relief, or a consolation, as it were, in recognition of their losses through a compensatory payment. Yet, the priorities and the conduct of negotiations followed the suit of traditional diplomacy, which excluded the individuals involved from the entire process.

Article 4 of the Agreement contains an amnesty requirement for Israeli citizens in relation to the flotilla incident:

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366 See, for the ratification process of international treaties in Turkish law, Ergun Özbudun, *The Constitutional System of Turkey: 1876 to Present*, Palgrave Macmillan, New York, 2011, p. 69.

367 The Official Gazette of the Republic of Turkey, no. 29826, 9 September 2016.

368 Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Turkey), 7 November 1982, Article 90 (http://www.legal-tools.org/doc/678fed/); see further Özbudun, 2011, see *supra* note 366.

> […] this agreement will constitute full release from any liability of Israel, its agents and citizens with respect to any and all claims, civil or criminal, that have been or will be filed against them in Turkey, direct or indirect, by the Republic of Turkey or Turkish real and legal persons, in relation to the flotilla incident.

An amnesty in Turkish law has "the effect of discontinuing the criminal proceedings and setting aside any penalty imposed and its consequences".[369] Thus, the Istanbul Court, on 9 December 2016, dropped the pending case relating to the flotilla incident in accordance with Article 223(8) of the Turkish Criminal Procedure Code. The Court relied on Article 4 of the Turkish-Israeli Agreement in its decision, using the term "release from liability" (*muafiyet*, exemption) in its reasoning. Thus, the relevant article of the Agreement has had the effect of amnesty in terms of its legal consequence.

The high-ranking Israeli military officials Rau Aluf Gabiel Ashknazi, Eliezer Alfred Marom, Amos Yadlin and Avishay Levi were being tried *in absentia*[370] for inciting under the following charges:

- 10 counts of murder through cruelty or through torment (the Turkish Penal Code ('TPC'), Article 82/1-b);
- 114 counts of Intentional bodily injury with weapon (the TPC, Article 86/1, Article 86/3-e);
- 14 counts of intentional bodily injury results in the fracture or dislocation of a bone (the TPC, Articles 87/3, 86/1, 86/3-e);
- 490 counts of qualified deprivation of liberty (the TPC, Article 109/2, 109/3-a, b);
- one count of prevention of communication (the TPC, Article 124);
- 490 counts of torment (the TPC, Article 96);
- 490 counts of robbery (the TPC, Article 149/1/a, b, c, h);
- one count of qualified damage to property (the TPC, Article 152-2-a); and
- torment, and damage to property.

[369] Türk Ceza Kanunu (Turkish Penal Code), 26 September 2004, Article 65 (http://www.legal-tools.org/doc/d7732f/).

[370] Ceza Muhakemesi Kanunu (Turkish Criminal Procedure Code), 4 December 2004, Article 247 (http://www.legal-tools.org/doc/918cad/).

Although the TPC contains international crimes such as the crime of genocide and crimes against humanity, the prosecutors have chosen to accuse the defendants for ordinary crimes listed above.

The trial began on 6 November 2012, and although the Court has requested in May 2014 issuance of a red notice, the Foreign Affairs Ministry has not passed the notice onto Interpol. On 9 December 2016, following the entry into force of the Agreement, the Court decided, upon request by the Prosecutor (who made reference to Article 4 of the Agreement), to drop the case.[371] The victims have protested the decision of the Court and appealed against the judgment.

This state of affairs begs the question of whether the present Agreement is in conformity with international law at all. One can look for an answer in the Vienna Convention on the Law of Treaties of 1969, to which neither Turkey nor Israel is party. The relevant parts of the Treaty would, however, be considered as binding on both States as part of customary international law. Of the reasons of invalidity of a treaty in the Convention, the most relevant one is the provision concerning *jus cogens*. Article 53 of the Convention provides that:

> A treaty is void, if at time of its conclusion, it conflicts with a norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This article was a novelty of the Convention rather than a codification of existing law. France, for instance, raised objections to the existence of such a concept in international law. There is, however, no sufficient evidence whether in this regard Turkey and Israel can be qualified as persistent objectors. It is frequently asserted that some or all of the crimes under customary international law of genocide, crimes against humanity, war crimes, and aggression enjoy the status of *jus cogens*.[372]

[371] "Turkish Court drops flotilla raid case against Israel", in *Hürriyet Daily News*, 10 December 2016.

[372] Roger O'Keefe, *International Criminal Law*, Oxford University Press, Oxford, 2015, p. 81.

Assuming, therefore, that the Agreement derogates from the peremptory norms of international law, then, the next question would be whether parties to the present Agreement would ever invoke the procedure of nullity of a Treaty under the Convention. Indeed, the Convention provides that only a treaty whose invalidity is established under the Convention is void. Accordingly, before the invalidity procedure is terminated, no party may treat the agreement as a nullity. The invalidation procedure in the Convention is solely foreseen for the parties to a treaty, which means that third States and international courts may disregard a treaty because it conflicts with a rule of *jus cogens* without having any procedural hurdle.[373] Besides, Article 34 of the Vienna Convention expresses a basic rule of law of treaties: "A treaty does not create either obligations or rights for a third State without its consent". These are significant arguments, since they open new legal avenues for prosecutions of alleged crimes committed aboard *Mavi Marmara* by, for example, the ICC or by another domestic court under the principle of universal jurisdiction. Israeli lawyers, who are taking account of such alternative legal avenues that can be utilised by the victims, have suggested that:

> […] With this [the *Mavi Marmara* incident] and any other claims of international law violations, the best way to protect Israeli soldiers from prosecution abroad is conducting impartial and effective investigations in Israel. Without such investigations, no international agreement can protect soldiers against legal proceedings taking place around the world.[374]

Indeed, the present Agreement in and of itself does not shield the alleged offenders against criminal proceedings that may be initiated in other countries, including the possible investigations in Israel, or the ICC. Moreover, the validity of national amnesties before the ICC is a contested issue, which was first debated in the context of the transitional justice process in South Africa. Amnesties have been discussed in the ICC context in terms of transitional justice so far. It is debatable whether the *ex gratia* payment made to the victims may be qualified as a transitional justice or restorative justice measure. The Prosecutor may, however, consider the present Agreement in the context of Article 53(1)(c). That said,

[373] Jochen A Frowein, "Ius Cogens", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013.

[374] Amichai Cohen and Tal Mimran, "Israel's Agreement with Turkey: Does it Protect IDF Soldiers from Prosecution?", in *Jerusalem Post*, 4 July 2016.

this will likely to open the Pandora's box about the recognition of national amnesties, and more general debate with respect to the sense and sensibility of criminal justice on the international plane.

17.8. Concluding Remarks

In making his or her determination concerning the initiation of an investigation, the Prosecutor is required to consider the following criteria:

1. the available information must provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Article 53(1)(a));
2. the admissibility must be examined, taking into account gravity and complementarity as to national proceedings (Article 53(1)(b), Article 17); and
3. the "interests of justice", taking into account "gravity of the crime and the interests of victims", must be analysed (Article 53(1)(c)).[375]

In this regard, the determination shall be made on the basis of fourfold filtering process advanced by the OTP.[376] Phase 2 "entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand".

As the preceding sections have shown, the preliminary examination conducted by the OTP in the Gaza flotilla situation suffers from various errors, failures and omission with enormous impact on the quality of the process. The Prosecutor, for instance, has failed to appreciate the weight of the United Nations Fact Finding Mission Report, and she has extensively relied on the Israeli Commission Report's factual and legal assessments. Furthermore, she failed to assess the evidence presented to her by Comoros and the victims. Unfortunately, the Prosecutor failed to consider and refer to all relevant information available to her, failed to apply the correct evidentiary standard to the Reports, and she unreasonably assessed the alleged crimes. Likewise, in her legal assessments with regard to the blockade, she has proceeded based upon the presumption of the legality of blockade. Besides, the OTP in the Gaza flotilla situation did not take the lower threshold of "a reasonable basis" embodied in Article 53(1)(a) *vis-à-vis* "sufficient basis" as required by Article 53(2)(a) into account, there-

[375] See Stegmiller, 2011, pp. 214–15, see *supra* note 174.

[376] OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 78–83, see *supra* note 251.

by failing to apply the legal requirements, which is in and of itself a significant cause of concern for the quality of the process.

Based upon such an incomplete analysis of facts and preliminary legal issues, her gravity analysis was destined to arrive at a negative conclusion with regard to admissibility. In her gravity analysis, first and foremost, her methodological approach of not considering facts and context outside the Gaza flotilla incident was parochial. As PTC I held, the Court has the authority to consider all necessary information, including extra-jurisdictional facts for the purpose of establishing crimes within the jurisdiction of the Court as well as their gravity. Indeed, what happened on 31 May 2010 on board the *Mavi Marmara* was an interlude between Operation Cast Lead and Operation Protective Edge. Against this background, it did not come as a surprise that the Prosecutor arrived at the negative conclusion with regard to each and every component of the gravity analysis.

The Decision of PTC I should, therefore, be welcomed. The Chamber found that the Prosecutor's decision was affected by significant errors of fact and law. The Chamber took note of (i) the Prosecutor's failure to consider that the persons likely to be the object of the investigation into the situation could include those who bear the greatest responsibility; (ii) the Prosecutor's error in appreciating the nature of identified crimes; (iii) the Prosecutor's error in fact in properly assessing the manner of commission of the identified crimes, in particular with respect to the question of whether the identified crimes may have been "systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians"; and (iv) the Prosecutor's error in determining the impact of the identified crimes.[377] Indeed, as Meloni rightly stated, the Gaza flotilla situation: "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".[378]

The review of the Prosecutor's decision, which was the first of its kind, has demonstrated the significance of the system of checks and balances within the Court. Although the right to get the final word, as held by

[377] ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 49, see *supra* note 21.

[378] Meloni, 2016, p. 17, see *supra* note 9.

the Appeals Chamber, belongs in the context of the present situation to the Prosecutor, the review of her decision has a potential to minimise the risk of arbitrary decision-making.

The Prosecutor has been often criticised for acting politically. Kearney and Reynolds, for instance, write: "The reality is that all international legal institutions are 'intensely political actors'. The International Criminal Court is no different […] The premise that international criminal justice can fully transcend international politics is a false one – it is inherently political. The International Criminal Court in both its constitution (its relationship to with the Security Council, for example) and its functioning (the Prosecutor's exercise of discretion, for example) essentially serves to implement a form of foreign policy".[379] I am not in a position to pass analytical judgment on extra-legal considerations such as mutual accommodation between the big powers and prosecutorial behaviour,[380] Orientalism,[381] double standards,[382] the general fall and decline of international law post-9/11,[383] or inherent inability of criminal law to cope with large crises.[384] But the low quality of the preliminary examination in the present situation cannot be explained by errors of fact or law made by the Prosecutor in Phases 2 and 3, or by an under-qualification on the part of those who have conducted the preliminary examination.

As Azarova and Mariniello observe: "The Comoros situation is emblematic of the OTP's abuse of its discretionary powers by applying a double-standard for the selection of situations and cases. The OTP's marked errors in the evaluation of gravity, together with the contradictions

379 See Michael Kearney and John Reynolds, "Palestine and the Politics of International Criminal Justice", in William A. Schabas, Yvonne Mcdermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate Publishing, Farnham, 2013, pp. 407, 430.

380 See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, *passim*.

381 See Jean Allain, "Orientalism and International Law: The Middle East as the Underclass of the International Legal Order", in *Leiden Journal of International Law*, 2004, vol. 17, no. 2, p. 391.

382 Cf. Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, *passim*.

383 See Gerry Simpson, "International Law in Diplomatic History", in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2012, pp. 25, 42 ff.

384 See Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration", in *Cambridge Review of International Affairs*, 2014, vol. 17, no. 2, pp. 172, 210.

and inconsistencies of the Comoros decision in light of its other practice, beg the conclusion that gravity can constitute a mere ex post justification of a decision adopted by the Prosecutor so as to avoid bringing Israeli Forces before the Court".[385] Thus, if political considerations, as it has been suggested here, play a decisive role in the decision-making processes of the Prosecutor, these concerns should be made transparent by establishing them positively through the invocation of the interests of justice enshrined in Article 53(1)(c) of the Rome Statute. Accordingly, the Prosecutor's decision shall be subjected to judicial oversight which is required for proper quality control of the exercise of prosecutorial discretion, which can contribute to the effectiveness and the legitimacy of the Court.

If the Prosecutor pretends that her decisions are divorced from policy considerations, and rely on the notion of gravity for such policy considerations, she would be arbitrary, biased and discriminatory. She must make her arguments with regard to the policy issues explicit within the ambit of the interests of justice clause, thereby sharing the heavy burden of being a single individual possessing extraordinary discretion in the selection of situations.

The creation of a permanent international criminal court based on the model of an independent prosecutor was a result of two main concerns: firstly, some small and medium powers sought to weaken the authority of big powers by reducing the influence of the Security Council; and secondly, the agenda of a prospective court could not be determined by political bodies without compromising its independence and impartiality.[386] Judicial oversight is a product of these concerns – that is, the transfer of control over prosecutorial decisions from the Security Council to the Court itself. Without such judicial oversight, the only things we should rely on in the prosecution processes of the gravest offences that shock humanity as a whole would have been the integrity and credibility of the individual who is selected for the position.[387] Therefore, greater judicial involvement is required so as to reduce inter-institutional distrust, to enhance the legitimacy of prosecutorial choices, and, more importantly, to minimise the risk of arbitrary decision-making.[388]

385 Azarova and Mariniello, 2017, p. 127 ff., see *supra* note 285.

386 Cf. Schabas, 2016, p. 830, see *supra* note 184.

387 Cf. *ibid*.; Ambos, 2016, p. 340, see *supra* note 4.

388 Stahn, 2009, p. 279, see *supra* note 345.

As it has been crystallised by PTC I in its judicial review regarding the present situation, the Prosecutor should apply exacting legal requirements, and cease invoking gravity where concerns other than gravity are the prevailing factors. Despite the evident political nature of a decision not to initiate an investigation, if the Prosecutor persists with the mantra that his or her sole function is to apply the law, such approach does more harm than good to the institutional accountability, effectiveness and legitimacy of the ICC, which has been already the case in the Iraq referral, the first Palestine referral, and perhaps even more so in the situation in question. The prosecutorial powers regarding the initiation of an investigation are not arbitrary, but rather discretionary, which means the Prosecutor's *espace de manoeuvre* is shaped by the rules and principles embodied in the Statute. Yet, in practice, as Stahn writes: "Many of the key factors guiding the selection of situations and cases were developed outside the box of legality requirements and thus moved from the domain of review to the area of prosecutorial policy".[389] The judicial review is the only remedy provided in the Rome Statute that enables the referring entity to put its arguments forward. As in the present situation, if the Pre-Trial Chamber requests a reconsideration, the Prosecutor should take such a decision seriously.

Considering her wide discretionary powers and her role as a linchpin of the Court in the filtering process in the selection of situations, the Prosecutor has been dubbed as the "Gatekeeper of the ICC".[390] Unfortunately, some practices of hers, including the low quality of preliminary examination performance in the present situation, inevitably conjure up Kafka's gatekeeper before the law.

17.9. Postscript

On 29 November 2017, after the manuscript of this chapter was submitted, the Prosecutor announced that the review had been completed, and that she had informed Pre-Trial Chamber I of her decision under Rule 108(3) of the Rules of Procedure and Evidence not to initiate an investigation in

[389] *Ibid*., p. 270.

[390] Héctor Olásolo, "The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?", in *International Criminal Law Review*, 2003, vol. 3, no. 2, pp. 87, 89; Lovisa Bådagård and Mark Klamberg, "The Gatekeeper of the ICC – Prosecutorial strategies for selecting situations and cases at the International Criminal Court", in *Georgetown Journal of International Law*, 2017, vol. 48, no. 5.

the situation.[391] Upon this decision, on 23 February 2018, the Government of the Union of Comoros submitted the "Application for Judicial Review by the Government of the Union of the Comoros".[392] On 2 March 2018, Pre-Trial Chamber I ordered the Prosecutor and the victims' legal representative, in case they wish to make submissions, to do so no later than 3 April 2018.[393] On 13 March 2018, the Prosecutor applied to Pre-Trial Chamber I to dismiss the Government of Comoros's application *in limine* for lack of jurisdiction.[394] On 3 April 2018, representatives for victims submitted the victims' response to the Application for Judicial Review by the Government of the Comoros.[395]

The present author shall not analyse the parties' submissions here in detail. At this juncture, it would suffice to say that instead of reconsidering her decision not to initiate an investigation into the situation, she has invested considerable energy to respond to Pre-Trial Chamber I's reconsideration decision, which is more or less a detailed account of the Prosecutor's failed appeal to the Appeals Chamber. Her analysis in regard to the evidence made available to her after 6 November 2014 suffers from similar methodological and analytical errors that have been analysed in this study. It remains to be seen whether Pre-Trial Chamber I shall dismiss the Comoros' and the victims' application for review *in limine* or decide to review the Prosecutor's decision not to proceed with an investigation. In any event, the central issue, as put by the victims' representative, is

391 OTP, Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017 (http://www.legal-tools.org/doc/298503/).

392 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018 (http://www.legal-tools.org/doc/24c550/).

393 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the Request for an Extension of Time, ICC-01/13-60, 2 March 2018 (http://www.legal-tools.org/doc/1b168c/).

394 ICC, 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 Judicial Review" (ICC-01/13-58 (Lack of Jurisdiction), ICC-01/13-61, 13 March 2018 (http://www.legal-tools.org/doc/a17312/).

395 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Victims' Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber's "Decision on the Request for an Extension of Time" of 2 March 2018, ICC-01/13-66, 3 April 2018 (http://www.legal-tools.org/doc/1fd1a7/).

"whether the Prosecutor is entitled to dispute the errors identified by the Majority, and not address them, and take a different view on the applicable law and not follow the law ruled on by the Judges; and, whether the OTP is then entitled to be free of any further review by the Judges who so directed".[396]

Indeed, the Chamber's judgment will have repercussions with regard to efficiency of the Court's system of checks and balances, and it may provoke *de lege feranda* thoughts with respect to the review process under Article 53(3)(a) of the Statute, which is in the end a product of a compromise between the negotiating parties.

[396] *Ibid.*, para. 4.

Publication Series No. 32 (2018):

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Morten Bergsmo and Carsten Stahn (editors)

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ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).