**Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair**

Marco Longobardo[[1]](#footnote-2)\*

**Abstract**

*In 2014, the Office of the Prosecutor of the International Criminal Court found that war crimes allegedly committed during the 2010 interception and boarding of the Comorian-registered* Mavi Marmara*, off the coast of Gaza, were of insufficient gravity to initiate an investigation. The Union of the Comoros sought review of this decision by Pre-Trial Chamber I, which concluded that the gravity evaluation was incorrect and requested the Prosecutor to reconsider her decision. This essay explores the two approaches taken to gravity assessment, and advances an alternative view based on the need to take into account the relevant factual circumstances — in this case, crimes aboard a vessel.*

*Nomina nuda tenemus.*[[2]](#footnote-3)

1. **Introduction**

Potential cases before the International Criminal Court (‘ICC’) lead to the opening of an investigation only if they meet the legal criteria envisaged by Article 53(1) of the Rome Statute of the International Criminal Court (‘ICC Statute’). This article explores the requirement of ‘sufficient gravity’ at the preliminary examination stage in light of the events aboard the vessel *Mavi Marmara* and the resulting litigation before the ICC. Notwithstanding the variety of other legal questions raised by this fascinating judicial saga, and especially those concerning the relationship between different ICC organs and the applicable standard of review under Article 53(3), these matters are addressed only to the extent they are relevant for the gravity examination.

In this author’s opinion, all the actors involved – the Office of the Prosecutor (‘OTP’) and Pre-Trial Chamber I (‘PTC I’) alike – failed to address the gravity issue in the correct way, since they did not recognise that the gravity threshold may vary in its application, according to the specifics of particular circumstances. Rather, the application of the international rules on treaty interpretation should result in the conclusion that – just like Einstein theorised – everything is relative, even gravity.

1. **The Events on board the *Mavi Marmara* and the ICC**

In 2010, a group of vessels called the Gaza Aid Flotilla attempted to breach the naval blockade imposed by Israel upon the Gaza Strip in order to bring humanitarian aid and draw the attention of the international community to the dramatic life conditions in the area. The Gaza Aid Flotilla was comprised, among others, of the vessel *Mavi Marmara*, under the flag of the Union of the Comoros (‘the Comoros’). On 21 May 2010, the Israel Defence Forces (‘IDF’) forcibly boarded the vessels of the convoy, most notably the *Mavi Marmara*, in order to enforce the blockade. Some passengers resisted the boarding and, during the operation, nine were killed (and one died later of their wounds). Many others, both on the *Mavi Marmara* and on other vessels, reported suffering abuses while detained by the IDF on their way to port. The very fact of the interception and boarding operation has since nurtured an interesting debate among scholars on the applicability of the rules regulating naval blockades to the Gaza situation.[[3]](#footnote-4)

However, at the time of the assault, the international community reacted weakly. The United Nations (‘UN’) Security Council failed to pass any resolutions; its President only issued one non-binding statement.[[4]](#footnote-5) On the other hand, the UN Human Rights Council (‘HRC’) criticised the Israeli use of force against the convoy.[[5]](#footnote-6) Fact-finding commissions were dispatched by the HRC, and the states of Israel and Turkey; the UN Secretary-General also convened a further panel to review the reports of the Israeli and Turkish inquiries, and to make recommendations.[[6]](#footnote-7)

Notwithstanding these measures, and the obvious impact on the victims, the events aboard the *Mavi Marmara* initially appeared a minor episode in the Israeli occupation of the Palestinian Territory. Yet since the ICC lacked jurisdiction over crimes committed in Palestine – a situation that only changed in early 2015[[7]](#footnote-8) – there was some interest in 2013 when the Comoros, an ICC State Party, referred the situation aboard the *Mavi Marmara* to the ICC.[[8]](#footnote-9) As a result, the OTP opened a preliminary examination under Article 53 of the ICC Statute.[[9]](#footnote-10)

On 6 November 2014, the OTP concluded its preliminary examination, finding reasonable grounds to believe that war crimes may have been committed aboard the *Mavi Marmara*: specifically, wilful killings, wilfully causing serious injury, and outrages upon personal dignity.[[10]](#footnote-11) The OTP also made a conditional finding concerning intentionally directing attacks against civilian objects.[[11]](#footnote-12) This satisfied the requirement of Article 53(1)(a). However, when it came to Article 53(1)(b), the OTP concluded that there was no reasonable basis to proceed with an investigation because any potential case would be inadmissible for lack of ‘sufficient gravity’. As a consequence of the Comoros’ request for review of the Decision Not to Investigate,[[12]](#footnote-13) the ICC’s Pre-Trial Chamber I decided, by majority, to request the OTP to reconsider, finding the OTP’s gravity analysis to be flawed.[[13]](#footnote-14) Although the OTP sought to challenge this decision,[[14]](#footnote-15) its appeal was dismissed as inadmissible.[[15]](#footnote-16)

This article will first consider the gravity analyses undertaken by the OTP and PTC I, and will then present an alternative perspective.

**3. The OTP’s Opinion Regarding the Gravity Issue in the *Mavi Marmara* Affaire**

The Decision Not to Investigate analyses admissibility in sixteen paragraphs,[[16]](#footnote-17) of which fifteen are dedicated to the question of gravity and just one to complementarity.[[17]](#footnote-18)

In accordance with ICC case law, the OTP affirmed that gravity must not be evaluated only from a quantitative perspective, with regard only for the number of victims, but also must comprise qualitative considerations about the scale, nature, manner of commission, and impact of the crimes.[[18]](#footnote-19) The OTP also noted that Article 8(1) stipulates that ‘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 such crimes*’.[[19]](#footnote-20) Acknowledging that the existence of a plan or policy is not an element of war crimes, the OTP nevertheless considered it relevant ‘as statutory guidance indicating that the Court should focus on war crimes meeting these requirements’.[[20]](#footnote-21) The OTP found no reasonable basis to believe that there was such a plan or policy, stressing in this context that its analysis was based only on the events of the interception. In particular, the OTP did not consider any Israeli plan or policy in the Palestinian Territory, a matter which (in 2014) it regarded as outside its jurisdiction.[[21]](#footnote-22) Indeed, one could argue that the limited territorial jurisdiction in this situation—the *Mavi Marmara*, and also the Greek vessel *Eleftheri Mesogios* (also called *Sofia*), and the Cambodian-flagged *Rachael Corrie*[[22]](#footnote-23)*—*was a significant factor underlying the OTP’s analysis.

The OTP addressed each of the factors it stated to be relevant to the question of sufficient gravity. On the matter of scale, the OTP noted that ‘the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office’.[[23]](#footnote-24) It also observed that the interception and boarding of the *Mavi Marmara* was a single event with a limited number of victims.[[24]](#footnote-25) Although the OTP stressed that these numerical considerations were not an absolute bar to investigation, it looked instead for other factors which might affect the scale analysis. As an example, it recalled the *Abu Garda et al.* case, when a smaller attack was nonetheless considered sufficiently grave due to the ‘spill-over’ effects of attacking peacekeepers.[[25]](#footnote-26) By contrast, the OTP found no similar circumstances applicable to the *Mavi Marmara* boarding.

With regard to the nature of the crimes, the OTP recalled the serious offences in question, but observed that the available information did not indicate that the mistreatment of passengers (characterised as outrages upon personal dignity) rose to the level of torture or inhuman treatment.[[26]](#footnote-27) Likewise, although the OTP acknowledged that the IDF’s use of force appeared excessive in some instances, it did not find a reasonable basis to believe the crimes were committed in a systematic manner (based, at least in part, on the fact that the crimes appeared to follow the initial resistance of the passengers), or as part of a deliberate plan or policy.[[27]](#footnote-28) Finally, although the OTP recognised that the alleged crimes had a ‘significant impact’ on the victims and their families, it noted that the boarding had no further relevant effects since, despite the Israeli operation, the humanitarian supplies on board the vessels were later distributed in the Gaza Strip.[[28]](#footnote-29)

For these reasons, and to the disappointment of some scholars,[[29]](#footnote-30) the OTP concluded that no potential case arising from the situation would be admissible before the ICC, due to a lack of sufficient gravity.

**4. PTC I’s Position regarding the Gravity Issue**

PTC I’s decision of 16 July 2015 addressed two complaints issued by the Comoros. The first complaint related to the alleged failure to take into account other facts that did not occur on board the three vessels over which the ICC has jurisdiction *ratione loci*, while the second complaint pertained to alleged errors in addressing the factors relevant for the assessment of sufficient gravity under article 17(1).[[30]](#footnote-31) While the first claim was dismissed by PTC I,[[31]](#footnote-32) the second argument was considered well grounded. Consequently, PTC I requested the OTP to reconsider its decision not to open an investigation.[[32]](#footnote-33) In its reasoning, PTC I criticised many findings of the Decision Not to Investigate.

First, PTC I considered that the OTP should have taken into account the fact that an investigation would have considered those who bear the greatest responsibility for the commission of the alleged crimes; according to PTC I, a just evaluation of this element would have been relevant for the assessment of the requirement of sufficient gravity of the potential case.[[33]](#footnote-34) The PTC’s criticism is grounded not in a dispute with the OTP about whether this element is relevant for the gravity assessment, but rather on disagreement about the actual meaning of the words ‘those who bear the greatest responsibility for the commission of the alleged crime’. Whereas the OTP conceives the issue as whether potential defendants are sufficiently ‘important’, PTC I considered it sufficient if individuals most responsible for committing the crimes — the perpetrators — can be prosecuted.[[34]](#footnote-35)

Second, PTC I challenged the OTP’s conclusion based on its quantitative analysis of the victims of the alleged crimes. According to PTC I, ten killings, fifty to fifty-five injuries, and potentially hundreds of instances of outrages and mistreatments were ‘a compelling indicator of sufficient, and not insufficient gravity’.[[35]](#footnote-36)

Third, PTC I found that the legal distinction between the crimes of outrages upon personal dignity and torture envisaged by the OTP was premature since it was grounded only on the information available at the preliminary examination stage. PTC I interpreted the Decision Not to Investigate to mean that the distinction between these two crimes led the OTP to conclude against the sufficient gravity of the potential case. According to PTC I, this conclusion was erroneous.[[36]](#footnote-37)

Finally, PTC I considered the OTP’s conclusions regarding the manner of commission of the crimes to be poorly grounded. Regarding the allegation of IDF live fire *before* resistance was encountered during the boarding, PTC I criticised the OTP’s concern about ‘significantly conflicting accounts’, making it ‘difficult to establish the exact chain of events’; in answer to this, the majority considered that the OTP should not ‘disregard available information other than when that information is manifestly false’. Where events are unclear or conflicting accounts exist – as with regard to the use of live fire– this called for an investigation.[[37]](#footnote-38) Regarding the other allegations, PTC I further considered that the OTP had erred by reaching an ‘unreasonable’ conclusion concerning the abuse of detained passengers,[[38]](#footnote-39) and failed to recognise reasonable alternative explanations regarding brutality and the concentration of crimes aboard the *Mavi Marmara*.[[39]](#footnote-40)

In light of these remarks, PTC I considered the OTP’s assessment of gravity to be flawed, and requested the OTP to reconsider its Decision Not to Investigate.

**5. On Some Points of Disagreement between the OTP and PTC I**

PTC I’s analysis of the OTP’s assessment of the gravity issue in the Decision Not to Investigate has led to a number of criticisms; in particular, its scrutiny has been considered inconsistent with its powers pursuant to Article 53(3)(a), and thus a violation of the independence and discretional power of the OTP.[[40]](#footnote-41) This paper does not explore the correctness of the standard of review applied by PTC I; moreover, the issue of procedural fairness is dormant because the appeal has been dismissed as inadmissible, and the OTP has no further judicial recourse. Yet, this author shares some of the doubts concerning PTC I’s approach,[[41]](#footnote-42) although it may be an exaggeration to claim that there has been a violation of prosecutorial independence.[[42]](#footnote-43) Indeed, the Appeal Chamber emphasised that although the OTP must reconsider its decision, it retains the last word on whether to open an investigation or not.[[43]](#footnote-44)

In this light, however, two aspects of the competing approaches to the gravity threshold taken in the OTP’s Decision Not to Investigate and PTC I’s decision may benefit from further consideration.

In particular, although both the OTP and PTC I agreed that gravity encompasses both qualitative and quantitative elements,[[44]](#footnote-45) they disagreed on their proper application.[[45]](#footnote-46) However, the Decision Not to Investigate appears not to have evaluated some elements properly, particularly regarding the scale and nature of the alleged crimes.

First, according to the Decision Not to Investigate (which concluded, *inter alia*, that the scale alone of the alleged crimes did not demonstrate sufficient gravity), ten passengers were killed, around fifty injured, and the number of victims of outrages upon personal dignity was unclear.[[46]](#footnote-47) In two footnotes, however, the OTP also acknowledged that there were 546-591 passengers aboard the vessel,[[47]](#footnote-48) and that according to the Palmer-Uribe Panel many passengers had suffered mistreatment.[[48]](#footnote-49) It is thus unclear whether, by these references, the OTP really intended to convey that it considered ‘many’ of the passengers aboard to have been potential victims of outrages, not least as it made no endorsement of the Palmer-Uribe Panel’s opinion regarding the scale of the alleged mistreatments. Only later, in the Response to the Application for Review, did the OTP affir that the references to the Palmer-Uribe Panel’s assessment of the number of victims had been taken into account in the assessment of the scale of the alleged crimes, even if the precise number of victims was unclear.[[49]](#footnote-50) This may or may not represent a subtle shift of position.

Nevertheless, PTC I appears to have taken a narrow view of the Decision Not to Investigate, and made no reference at all in this respect to the Response to the Application for Review. PTC I thus concluded that the OTP wrongly failed to take into account the fact that hundreds of passengers could have been victims of outrages upon personal dignity,[[50]](#footnote-51) and as a result underestimated the actual number of victims.[[51]](#footnote-52)

On this issue, there is room to argue that the OTP failed to express its position clearly in the Decision Not to Investigate, while, on the other hand, PTC I erred in not paying attention to the clarification provided by the OTP in documents produced after the Request for Review. However, the OTP position would have been more solid if it had expressed its opinion more clearly in the Decision Not to Investigate.

Second, the nature of the alleged crimes was not sufficiently explored by the OTP. According to the Decision Not to Investigate,

[t]here is a reasonable basis to believe that the following war crimes have been committed: wilful killing and wilfully causing serious injury to body and health under article 8(2)(a)(i) and article 8(2)(a)(iii) – both of which are grave breaches of the Geneva Conventions – as well as the war crime of committing outrages upon personal dignity under article 8(2)(b)(xxi). With respect to this latter crime, the available information suggests that following the takeover of the *Mavi Marmara*, there was mistreatment and harassment of passengers by the IDF forces and that such humiliating or degrading treatment lacked justification or explanation. It is noted, however, that the information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment.[[52]](#footnote-53)

This paragraph says very little regarding the nature of the alleged crimes; it merely enumerates the crimes that the OTP considered likely to have occurred. It does not provide any guidance regarding the specific character of those facts, which are the basis of the evaluation of the nature of crimes,[[53]](#footnote-54) even according to the OTP’s own policy.[[54]](#footnote-55)

Strangely enough, the OTP included in the evaluation of the nature of crimes – and, consequently, in the assessment of gravity – the consideration that these facts did not amount to torture, but merely to outrages upon personal dignity. This unusual reference to the legal qualification of the facts in a paragraph about gravity appears to have misled the majority of PTC I, which considered that the legal qualification of the facts as outrages upon personal dignity and not torture, had influenced the OTP’s evaluation of the gravity.[[55]](#footnote-56) However, this was probably not the OTP’s intention, and PTC I read too much into the Decision Not to Investigate, as confirmed by the OTP in the Response to the Application for Review, wherein it stated that a different qualification of the facts would not have changed the outcome regarding the gravity issue.[[56]](#footnote-57)

However, with respect to the nature of the crimes, only two alternatives are possible: 1. the OTP considered the difference between tortures and outrages to be relevant in order to assess the gravity of the potential case (and this would be wrong and is contradicted by the Response to the Application for Review); or 2. a plain enumeration of the crimes is not relevant in order to assess the gravity, and thus there is no reference at all to the nature of the crimes in the Decision Not to Investigate.

Either way, the OTP should have better explained its assessment of the element of the nature of the crimes.

**6. Gravity as a Relative Concept**

***A. Preliminary Observations***

This sub-section attempts to demonstrate that the word ‘gravity’, embodied in different provisions of the ICC Statute, should not be interpreted in the same way in all circumstances. While the *concept* of gravity is always the same, its *application* is fact-sensitive. The ICC Statute does not provide a definition of gravity; consequently all the relevant rules on treaty interpretation should be taken into account in order to provide guidance in the assessment of whether a potential case has sufficient gravity.

The ICC Statute is subject to the international rules on treaty interpretation codified by the 1969 Vienna Convention on the Law of Treaties (‘VCLT’), according to which a treaty must be interpreted in good faith and in light of its text, context, object and purpose.[[57]](#footnote-58) The ICC case law has constantly endorsed the application of the VCLT rules on treaty interpretation to the ICC Statute,[[58]](#footnote-59) notwithstanding the fact that the definitions of the crimes in the ICC Statute, as a criminal law, must in case of ambiguity be construed strictly (as affirmed in Article 22).[[59]](#footnote-60) Every ICC organ, including the OTP, must interpret the ICC Statute in light of the Vienna criteria.

Using these principles as a foundation, it is possible to advance two novel arguments regarding the assessment of gravity that may be relevant in the *Mavi Marmara* affair. These arguments are not definitive, but merely a proposal for further analysis and judicial confirmation in the future.

***B. The Assessment of Sufficient Gravity during Preliminary Examinations***

The gravity analysis in the Decision Not to Investigate did not perhaps take sufficient account of the fact that the OTP was assessing the admissibility of a potential case at the stage of preliminary examination. There is room to argue that, at this stage, the assessment of sufficient gravity is partially different from the assessment that the OTP or the Court must perform subsequently.

Although the OTP is independent from the Court,[[60]](#footnote-61) its prosecutorial powers regarding the opening of an investigation are not arbitrary, but rather discretionary.[[61]](#footnote-62) This means that the OTP’s *espace de manoeuvre* is shaped by the rules and principles embodied in the Statute. Article 53 describes the legal conditions which must be met for the OTP to open an investigation (paragraph 1) and to commence a prosecution (paragraph 2). The OTP’s assessments on the basis of Article 53(1) and Article 53(2) comprise three elements: an evaluation of the existence of a reasonable / sufficient basis regarding the commission of crimes within the ICC jurisdiction; an evaluation of the admissibility of the ‘potential case(s)’ / ‘case(s)’ in light of the principles of complementarity and sufficient gravity; and respect for the interests of justice.

Article 53(1)(a) may require a somewhat lower threshold than Article 53(2)(a) to establish the commission of crimes. Specifically, Article 53(1)(a) requires ‘a reasonable basis’, while Article 53(2)(a) requires ‘a sufficient basis’. This linguistic distinction was not inadvertent,[[62]](#footnote-63) and suggests that the test for prosecution is more demanding.[[63]](#footnote-64) At the preliminary examination stage, the OTP deals with a situation from which one or more *potential* cases could arise, rather than with an actual case, and this difference is relevant: since the actual prosecution affects the rights of the accused, who should be presumed innocent, the threshold required for Article 53(2)(a) is logically higher than that embodied in Article 53(1)(a) for the preliminary examination stage. As affirmed recently in the ICC’s case law, at the preliminary examination stage the OTP need only find one potential case that is sufficiently grave in order to trigger the investigation, while, later in the proceedings, the OTP must specifically demonstrate that the actual case at hand is sufficiently grave.[[64]](#footnote-65)

Furthermore, since determination of a factual basis for a crime within the jurisdiction of the Court is only the first part of the broader assessment the OTP must perform pursuant to Article 53(1) and 53(2), it is arguable—indeed, it is logical—that the same approach (ensuring a distinct gradient between the standards in Article 53(1) and (2)) should be applied to admissibility.[[65]](#footnote-66) As correctly noted by some authors, the text envisaged in Article 53(1)(b) is less specific than the standard found in Article 53(2)(b) due to the different stages of the proceedings.[[66]](#footnote-67) This idea could also be inferred from a passage of PTC I’s decision, wherein PTC I emphasised that it had to make reference to the ICC case law regarding the gravity assessment particularly at the preliminary examination stage.[[67]](#footnote-68)

Moreover, this view is consistent with the rules on treaty interpretation: Article 53(1)(b) should be interpreted in light of its context, which includes the lower threshold manifest in Article 53(1)(a) compared to Article 53(2)(a). Likewise, as the ICC has emphasised in its case law, the admissibility assessment at this stage ‘cannot be conducted against the backdrop of a concrete case, as prior to the start of an actual investigation it is not possible to define the exact parameters of the case(s) in terms of conduct and identified suspects for the purpose of prosecution’, and, accordingly, ‘determination of admissibility at this stage must be undertaken with respect to ‘potential cases’’.[[68]](#footnote-69)

The fact that both Article 53(1)(b) and Article 53(2)(b) refer to admissibility / inadmissibility under Article 17 does not prevent the application of a different standard between them. It is well established in international law that there is not a hierarchy between the principles of interpretation embodied in the general rule of interpretation, since Article 31 of the VCLT ‘does not describe some hierarchical or chronological order in which [textual, contextual, and teleological] principles are to be applied, but sets the stage for a single combined operation taking into account all the elements simultaneously’.[[69]](#footnote-70) Accordingly, the fact that the texts of Article 53(1)(b) and Article 53(2)(b) are very similar is not a hindrance for a different interpretation on the basis of the relevant context.

Furthermore, these provisions are similar but not identical; an authoritative commentator, affirming that the text under Article 53(1)(a) is less demanding than in the case under Article 53(2)(a), likewise concludes that ‘[t]he language in article 53(2)(b) is slightly different, demanding that the case ‘is admissible’, whereas under article 53(1)(b) the Prosecutor is to consider whether the ‘case is or would be admissible’. This reflects the fact that the Prosecutor is at a different stage in his work under each provision.’[[70]](#footnote-71)

Accordingly, for all these reasons, in the *Mavi Marmara* affair, the OTP should have taken into account the lower threshold required to establish admissibility — including sufficient gravity — at the preliminary examination stage.

In this author’s opinion, there is room to argue that the OTP’s conclusion on the lack of sufficient gravity is the outcome of an assessment affected by a certain degree of doubt regarding relevant circumstances. The existence of this doubt, and its meaning, is itself ambiguous — yet another difference of opinion which seems to have become apparent between PTC I and the OTP concerns precisely this question. As explained in the following paragraphs, PTC I understood the Decision Not to Investigate to reflect the OTP’s view that it could not make determinations on certain circumstances and, because of this, abdicated its duty, overlooking that uncertainty favoured an investigation. Conversely, the OTP, on the other hand, seems to take the view that the information in its possession simply did not meet the required standard of proof for each of the necessary elements. It is certainly true that a preliminary examination is a process.[[71]](#footnote-72) Yet, from a textual analysis of this process, this author considers it to be at least plausible that the OTP may have disregarded certain elements that it considered uncertain, as it can be inferred by some paragraphs of the Decision Not to Investigate.

First, regarding the legal qualification of the mistreatment of the passengers, the OTP affirmed that: ‘[o]verall, based on the information available at this stage, it is *unclear* whether the difficulties that some wounded passengers encountered in receiving medical treatment was (*sic*) due to deliberate acts of the IDF or alternatively was (*sic*) an unintended consequences of logistical and practical difficulties.’[[72]](#footnote-73) The uncertainty regarding this element appears to have influenced the OTP’s conclusion that the denial of medical treatment did not occur.[[73]](#footnote-74) Only later did the OTP I seek to offer a different explanation, affirming that this paragraph of the Decision Not to Investigate did not make a determination against the establishment of the facts regarding the intentional denial of medical treatment, but that the information in the possession of the OTP was not such as to allow a reasonable basis to consider that this allegation was established.[[74]](#footnote-75)

Second, the OTP found that there was not a reasonable basis for the commission of the crime of extensive appropriation of property since ‘there is *insufficient information* available at this stage to ascertain the extent of the appropriation [...] as to indicate whether [it] occurred *in limited, isolated instances or on a more extensive scale*’.[[75]](#footnote-76) Again, this state of doubt led the OTP to discount the ‘existence of a reasonable basis to believe that the alleged theft of passengers’ property by IDF soldiers amounted to the war crime of extensive appropriation of property’.[[76]](#footnote-77) This conclusion has been confirmed by the OTP itself in its Response to the Observations of the Victims.[[77]](#footnote-78)

Following this reasoning, the OTP appears to have adopted a Court-ish attitude[[78]](#footnote-79) and to have applied the Latin maxim *in dubio pro reo*. However, this maxim is not applicable to the activity of prosecution at the preliminary examination stage, since there is no accused, let alone any *reus*, yet.[[79]](#footnote-80)

It has been argued that normally the process followed by the OTP in evaluating whether to open an investigation is not explained in such a detailed manner, and that PTC I had the opportunity to scrutinise the OTP’s decision-making process only thanks to the details embodied in the Decision Not to Investigate.[[80]](#footnote-81) However, this new approach of the OTP should be considered in a favorable light since it enhances the transparency of the Office of the Prosecutor.[[81]](#footnote-82)

In the instant case, PTC I considered that such doubts in the Decision Not to Investigate did exist. If one shares this view, it is possible to conclude that the lower threshold required by Article 53(1) allows (and, maybe, demands) the OTP to open an investigation in case of contradicting circumstances regarding the factual basis and admissibility of the potential case at the preliminary examination stage, especially when at least two out of three of the article’s requirements (in the instant case, the existence of a reasonable basis regarding the commission of the alleged crimes and respect for the interests of justice) are sufficiently assessed. This is the opinion of PTC I, which affirmed that: ‘[f]acts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons *not to start an investigation but rather call for the opening of such an investigation*.’[[82]](#footnote-83)

This conclusion is supported by the fact that the OTP lacks significant investigative powers during preliminary examinations.[[83]](#footnote-84) Initiating a proper investigation would have offered the OTP the chance to dispel those doubts, with no harm to anyone’s rights.

However, determining whether the OTP had some doubts in its assessment pursuant to Article 53(1) in the *Mavi Marmara* affair is not an easy task. Even if this author partially shares PTC I’s conclusions regarding the existence of these doubts in the Decision Not to Investigate, the OTP denied them in subsequent judicial documents such as the Response to the Application for Review and the Response to the Observations of the Victims.

Nevertheless, the conclusion that the lower threshold under Article 53(1) requires the opening of an investigation when the OTP has some doubts regarding one of the elements of its assessment seems generally sound.

***C. The Relevance of the Spatial Element***

In assessing the gravity of the events aboard the *Mavi Marmara*, it is also suggested that greater consideration should have been given to the occurrence of events on board a *vessel* (hereinafter: ‘the spatial element’). However, since there is no significant case law specifically addressing the prosecution of international crimes allegedly committed on board vessels, the present argument should be considered *de lege ferenda* rather than reflecting an existing trend in international practice.

According to Article 12(2)(a) of the ICC Statute, crimes committed on board vessels and aircrafts registered in a member state are subject to the same ICC jurisdiction as those that occur on the territory of the State. Yet, although the jurisdictional basis is similar, the underlying facts relating to the characteristics of a vessel or aircraft, will necessarily be different. It must be acknowledged that the preparatory works of the Rome Statute provide no relevant clue on the parties’ intentions regarding crimes that occurred on board vessels, and whether they recognised the distinct factual (and possibly legal) context this might entail.[[84]](#footnote-85)

In dealing with the assessment of gravity, the abovementioned quantitative and qualitative factors (scale, nature, manner of commission, impact) must be applied in the context of the relevant factual circumstances; in other words, the OTP must conduct a fact-specific analysis. Following this reasoning, the spatial element could have influenced the factors under the OTP’s scrutiny.

In the Decision Not to Investigate, the OTP partially assessed the scale of the alleged crimes that occurred on board *the Mavi Marmara* in comparison with the *Abu Garda et al.* case.[[85]](#footnote-86) However, this case regards facts that occurred on the mainland, where the wider territorial scope of the situation examined normally – but not in this case – is matched by the presence of a much greater number of victims.[[86]](#footnote-87) By contrast, there is room to argue that the OTP could have better assessed the gravity issue in the *Mavi Marmara* affair by referring to alleged crimes that occurred on board other vessels.

In order to interpret a generic term that is not defined in a treaty, such as ‘gravity’ in the ICC Statute, it can be useful to make a comparison between different cases and situations.[[87]](#footnote-88) Yet care must be taken in the comparisons which are made, so as to accommodate the fact-sensitive, relative nature of concepts such as gravity. Something has sufficient gravity only in comparison with other facts, thus, the material circumstances of the facts under the ‘gravity scrutiny’ are decisive in order to determine with which other events one should make the comparison. In other words, it is not possible to identify a clear ordinary meaning of the word ‘gravity’, but rather, it must be evaluated in relation to the actual context.[[88]](#footnote-89) The gravity threshold simply identifies a category, something that does not exist *per se*, but only in relation to an idealised cognitive framework that is, in part, internal to the situation to which the provision should be applied, and partly external, i.e. it depends on the empirical elements that the interpreter uses as a comparison.[[89]](#footnote-90) Moreover, since gravity is never defined in the Statute, its interpretation should be related to the material objects and circumstances to which the provision must be applied because of the clear link between the abstract interpretation and the concrete application of a norm.[[90]](#footnote-91) As recently demonstrated with regard to the interpretation of treaties establishing international boundaries,[[91]](#footnote-92) the contingent physical dimensions of the objects to which treaty provisions refer are relevant for their interpretation.

With regard to the boarding of the *Mavi Marmara*, the obvious flaw in this approach is that there is no significant ICC’s case law on crimes committed on board vessels,[[92]](#footnote-93) a topic that is neglected even by academic commentators.[[93]](#footnote-94) The only situation examined by the OTP that included alleged crimes committed on board a vessel was the *ROKS Cheonan* sinking – during which a South Korean corvette was destroyed and 46 men lost their lives; however, this precedent is not relevant since it was an attack against a military vessel, which is a legitimate target under international humanitarian law.[[94]](#footnote-95) Accordingly, the OTP concluded that there were no reasonable grounds to believe that war crimes may have been committed, without an examination regarding the gravity of the potential case.[[95]](#footnote-96)

The case law of other international tribunals and in the state practice regarding crimes committed on board vessels should have been explored by the OTP in search of relevant episodes.

The most relevant precedent regards the case law of the Nuremberg International Military Tribunal, which dealt with war crimes committed during naval warfare, especially regarding unrestricted submarine warfare;[[96]](#footnote-97) similarly, the Tokyo International Military Tribunal passed a judgment regarding unrestricted submarine warfare and attacks against prison ships.[[97]](#footnote-98) The crimes analysed by the two International Military Tribunals are clearly different from those that allegedly occurred on board the *Mavi Marmara*, but a reference to their case law could have strengthened the OTP’s opinion regarding the lack of gravity in the boarding of the *Mavi Marmara*.

By contrast, the UN *ad hoc* tribunals had no occasion to judge crimes committed on board vessels, even if their statutes provided them with jurisdiction for crimes occurred in the airspace and territorial waters of Rwanda and Former Yugoslavia.[[98]](#footnote-99) Similarly, there is no specific state practice regarding crimes committed by states in their efforts to enforce a blockade.[[99]](#footnote-100)

In addition, it could have been useful to explore the case law of international tribunals not directly dealing with international humanitarian law issues. For instance, the European Court of Human Rights in the case *Medvedyev and Others v. France* passed a judgment on the legality of acts committed after the interception and boarding of a vessel.[[100]](#footnote-101) However, this case regarded the arbitrary deprivation of some passengers’ liberty, a scenario that does not provide any significant clue on the gravity of the acts allegedly committed on board the *Mavi Marmara*.

Similarly, the International Tribunal for the Law of the Sea dealt with interception and boarding of vessels only in relation to state responsibility under the UN Convention on the Law of the Sea. Its case law does not regard the commission of international crimes on board vessels, nor does it regard facts that are similar to those that allegedly occurred onboard the *Mavi Marmara*.[[101]](#footnote-102)

In conclusion, even if this author considers 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. The only case law that the OTP could have invoked are the judgments of the two International Military Tribunals of Nuremberg and Tokyo regarding unrestricted submarine warfare. Accordingly, the OTP could have mentioned them in order to strengthen its opinion regarding the lack of sufficient gravity with regard to the alleged crimes that occurred during the *Mavi Marmara* boarding.

It should be noted that the lack of relevant international case law could broaden the OTP’s discretion regarding alleged crimes committed on board vessels. There is the risk that only crimes committed on mainland could fall within the jurisdiction of the Court, given the fact that the obviously restricted dimensions of a ship could not likely be the stage of mass atrocities such as those that normally are the object of the OTP’s activity.

On this basis, this author considers that the OTP’s gravity assessment in the *Mavi Marmara* affair, PTC I’s opinion on the Decision Not to Investigate, and the OTP’s future final decision on the opening of an investigation, will be considered in the future the only direct precedent regarding the gravity of alleged crimes committed on board vessels under the Rome Statute.

**7. Conclusion**

This article attempted to demonstrate that, in relation to the crimes allegedly committed during the *Mavi Marmara* boarding, both the evaluations of gravity embodied in the OTP’s Decision Not to Investigate and in PTC I’s decision are flawed. The OTP should have properly considered that the admissibility threshold at the stage of preliminary examinations is less stringent than the one embodied in Article 53(2). Moreover, there is room to argue that the OTP could have taken into account the narrow spatial element of the *Mavi Marmara* in the evaluation of gravity, even if there is no significant international practice or jurisprudence regarding the commission of crimes under the Rome Statute on board vessels.

This author’s hope is that the OTP will reconsider the gravity conundrum fairly, without considering the instant case as a pretext to engage in a difficult confrontation with PTC I regarding the boundaries of the OTP’s discretionary powers and independence.

1. \* PhD Candidate (International Law and European Union Law), School of Law, University of Rome ‘Sapienza’; Teaching Assistant (International Law) and Adjunct Professor (EU Law), School of Law, University of Messina; Visiting Researcher, Law school, University of Westminster. Mail: mlongobardo@unime.it. Special thanks to Lorenzo Gradoni, and the anonymous referees and editors of the *Journal of International Criminal Justice* for their comments on previous drafts of this essay; I am also grateful to Marcella Distefano, Marco Roscini, and Yoshifumi Tanaka for having discussed with me the subject of this paper. The usual disclaimers apply. Websites cited were last accessed on 26 March 2016, when the paper was completed. All the official documents of the International Criminal Court are available at www.icc-cpi.int. [↑](#footnote-ref-2)
2. Bernardus Cluniacensis, *De Contemptu Mundi*, I, at 952, la.wikisource.org/wiki/De\_contemptu\_mundi. This author discovered this quote thanks to the novel by U. Eco, *Il nome della rosa* (Bompiani, 1980). Professor Eco passed away very recently, on 19 February 2016; this essay is dedicated to his memory. [↑](#footnote-ref-3)
3. See A. Sanger, ‘The Contemporary Law of Blockade and the Gaza Freedom Flotilla’, 13 *Yearbook of International Humanitarian Law* (2010) 397; A. Annoni, ‘L’abbordaggio della Gaza Freedom Flotilla alla luce del diritto internazionale’, 94 *Rivista di diritto internazionale (RDI)* (2010) 1203; R. Buchan, ‘The International Law of Naval Blockade and Israel’s Interception of the *Mavi Marmara’*, 58 *Netherlands International Law Review* (2011) 209; D. Guilfoyle, ‘The *Mavi Marmara* Incident and Blockade in Armed Conflict’, 81 *The British Yearbook of International Law* (2011) 171. [↑](#footnote-ref-4)
4. S/PRST/2014/13 of 28 July 2014. [↑](#footnote-ref-5)
5. UNHRC Resolution S-21/1 of 21 July 2014. [↑](#footnote-ref-6)
6. Respectively, UNHRC, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, 27 September 2010; The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission Report, 23 January 2011, www.jewishvirtuallibrary.org/jsource/Society\_&\_Culture/TurkelCommission.pdf; Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, 11 February 2011, www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf; Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011, www.un.org/News/dh/infocus/middle\_east/Gaza\_Flotilla\_Panel\_Report.pdf (hereinafter: ‘Palmer-Uribe Panel’). For an evaluation of their findings, see V. Koutroulis, ‘Appréciation de l’Application de Certaines Règles du Droit International Humanitaire dans les Rapports Portant sur l’Interception de la Flottille Naviguant vers Gaza’, 45(1) *Revue belge de droit international* (2012) 90. [↑](#footnote-ref-7)
7. As of January 2015, Palestine is party to the ICC Statute (UN Secretary-General, Depositary Notification: Rome Statute of the ICC, Palestine accession, 6 January 2015, treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf) and has issued a declaration of acceptance of ICC jurisdiction over the crimes committed during the 2014 Gaza war (OTP, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015). On the relationship between the Israeli-Palestinian conflict and the ICC, see generally, D.L. Bosco, ‘Palestine in the Hague: Justice, Geopolitics, and the International Criminal Court’, 22 *Global Governance* (2016) 155; M. Longobardo, ‘Some Developments in the Prosecution of International Crimes Committed in Palestine: Any Real News?’, 35 *Polish Yearbook of International Law* (2015), forthcoming. [↑](#footnote-ref-8)
8. 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, The Hague, 14 May 2013. [↑](#footnote-ref-9)
9. OTP, ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel *Mavi Marmara*, 14 May 2013. [↑](#footnote-ref-10)
10. ICC-01/13-6-AnxA, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014 (hereinafter: ‘Decision Not to Investigate’), §§ 61, 72, 77. [↑](#footnote-ref-11)
11. *Ibid.*, § 96. The OTP reached this conclusion conditionally, as it turned on the legality of the blockade itself, which it did not find necessary to decide. [↑](#footnote-ref-12)
12. ICC-01/13-3-Red, Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015. [↑](#footnote-ref-13)
13. ICC-01/13-34, Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015 (hereinafter: ‘PTC I Decision’). [↑](#footnote-ref-14)
14. ICC-01/13-35, Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, 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”, 27 July 2015 (hereinafter: ‘Appeal’). [↑](#footnote-ref-15)
15. ICC-01/13-51, Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, 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 (hereinafter: ‘Decision on Admissibility’). [↑](#footnote-ref-16)
16. Decision Not to Investigate, §§ 133-147. [↑](#footnote-ref-17)
17. *Ibid*., §139. [↑](#footnote-ref-18)
18. *Ibid*., § 136. [↑](#footnote-ref-19)
19. *Ibid*., § 137 (emphasis added). [↑](#footnote-ref-20)
20. *Ibid.* [↑](#footnote-ref-21)
21. *Ibid*. [↑](#footnote-ref-22)
22. *Ibid.*, §§ 142-143. In the situation of the *Eleftheri Mesogios*, the OTP affirmed that the only possible crime that potentially occurred on board was the unlawful attack on civilian objects, but the OTP did not determined that the attack on the vessels was *per se* unlawful due to the uncertainty regarding the lawfulness of the entire blockade. Moreover, no possible crimes were found to have occurred aboard the *Rachael Corrie*. [↑](#footnote-ref-23)
23. *Ibid*., § 138. [↑](#footnote-ref-24)
24. *Ibid*., § 144. [↑](#footnote-ref-25)
25. *Ibid*., §145. [↑](#footnote-ref-26)
26. *Ibid.*, § 139. [↑](#footnote-ref-27)
27. *Ibid*., § 140. [↑](#footnote-ref-28)
28. *Ibid*., § 141. [↑](#footnote-ref-29)
29. See, e.g., J.J. Piernas López, ‘Estudio sobre la práctica de la Corte Penal Internacional en materia de Investigaciones preliminares a la luz de la reciente remisión de la Unión de Comores’, 29 *Anuario Español de Derecho Internacional* (2013) 327; R. Buchan, ‘The *Mavi Marmara* Incident and the International Criminal Court’, 25 *Criminal Law Forum (CLF)* (2014) 465. [↑](#footnote-ref-30)
30. PTC I Decision, § 3. [↑](#footnote-ref-31)
31. *Ibid*., § 16-19. [↑](#footnote-ref-32)
32. *Ibid*., § 50. [↑](#footnote-ref-33)
33. *Ibid*., §§ 23-24. The OTP acknowledged the necessity to focus on the prosecution of those who bear the greatest responsibility for alleged crimes in the Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, at 7. On this topic, see M. O’Brien, ‘Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold’, 10 *Journal of International Criminal Justice* *(JICJ)* (2012) 525. [↑](#footnote-ref-34)
34. See ICC-01/13-14-Red, Prosecution Response to the Application for Review of its Determination under Article 53(1)(b) of the Rome Statute, 30 March 2015, § 60 (hereinafter: ‘Response to the Application for Review’); PTC I Decision, § 23. For some remarks on this issue, see K.J. Heller, ‘The Pre-Trial Chamber’s Dangerous Comoros Review Decision’, *Opinio Juris*, 17 July 2015, opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/; A.S. Galand, ‘The Situation Concerning the Mavi Marmara at the ICC: What Might the Next Move of the Prosecutor Be?’, *EJIL: Talk!*, 22 March 2016, www.ejiltalk.org/the-situation-concerning-the-mavi-marmara-at-the-icc-what-might-be-the-next-move-of-the-prosecutor/. [↑](#footnote-ref-35)
35. PTC I Decision, § 26. [↑](#footnote-ref-36)
36. *Ibid*., § 30. [↑](#footnote-ref-37)
37. *Ibid*., §§ 31-36. [↑](#footnote-ref-38)
38. According to PTC I, ‘it is incorrect for [the OTP] to conclude that systematic abuse of detained passengers … fits into the theory that the identified crimes occurred as individual excesses … . Rather, such systematic abuse reasonably suggests a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*, at least in the form of tacit acquiescence of the military or other superiors.’ (*ibid.*, § 38). [↑](#footnote-ref-39)
39. *Ibid.*, § 41 (with regard to unnecessarily cruel treatment of passengers). [↑](#footnote-ref-40)
40. See Heller, *supra* note 33; Id., ‘The Most Distressing Paragraph in the Comoros Review Decision’, *Opinio Juris*, 19 July 2015, opiniojuris.org/2015/07/19/the-most-distressing-paragraph-in-the-comoros-review-decision/; A. Whiting, *‘*The ICC Prosecutor Should Reject Judges’ Decision in Mavi Marmara’, *Just Security*, 20 July 2015, justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/. [↑](#footnote-ref-41)
41. See PTC I Decision, Dissenting Opinion of Judge Kovács, §§ 6–13. For a particularly detailed and convincing analysis on this topic, see G. A. Knoops and T. Zwart, ‘The Flotilla Case before the ICC: The Need to Do Justice While Keeping the Heaven Intact’, 15 *International Criminal Law Review (ICLR)* (2015), 1069, at 1073–1081. [↑](#footnote-ref-42)
42. See M. deGuzman, ‘What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation’, 19:19 *ASIL Insights*, 11 August 2015, www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber; G. Pecorella, ‘The Comoros Situation, the Pre-Trial Chamber and the Prosecutor: The Rome Statute’s System of Checks and Balances Is in Good Health’, *International Law Blog*, 30 November 2015, aninternationallawblog.wordpress.com/2015/11/30/the-comoros-situation-the-pre-trial-chamber-and-the-prosecutor-the-rome-statutes-system-of-checks-and-balances-is-in-good-health/. [↑](#footnote-ref-43)
43. Decision on Admissibility, § 59. See also G. Turone, ‘Powers and Duties of the Prosecutor’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002) 1137, at 1157; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 668-669; M. Bergsmo, P. Kruger and O. Bekou, ‘Article 53, Initiation of an Investigation’, in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn., C.H.Beck-Hart-Nomos, 2016) 1365, at 1378. [↑](#footnote-ref-44)
44. ICC-01/09-19, Situation in Kenya, 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, § 62. The ICC also considered that ‘certain factors that may be of relevance to the assessment of gravity are listed in rule 145(1)(c) of the Rules [such as] the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed’ (ICC-02/05-02/09-233-Red, Pre-Trial Chamber I, Situation in Darfur, Sudan, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, § 32). The OTP expressed the same opinion in the Decision Not to Investigate, § 136; see also Regulations of the Office of the Prosecutor (entry into force: 23 April 2009), Regulation 29(2); Policy Paper on Preliminary Examinations, November 2013; Draft Policy Paper on Case Selection and Prioritisation, 29 February 2016, §§ 29, 35 [↑](#footnote-ref-45)
45. On the concept of gravity, see, among others, R. Murphy, ‘Gravity Issues and the International Criminal Court’, 17 *CLF* (2006) 281; M.M. deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’, 32 *Fordham International Law Journal* (2008) 1400; R. Estupiñan Silva, ‘La «gravité» dans la jurisprudence de la Cour pénale internationale à propos des crimes de guerre’, 82 *Revue internationale de droit pénal* (2011) 541. [↑](#footnote-ref-46)
46. Decision Not to Investigate, § 138. [↑](#footnote-ref-47)
47. *Ibid.*, § 138, fn 238. [↑](#footnote-ref-48)
48. *Ibid.*, § 138, fn 239. This is consistent with the other fact-finding reports. See e.g. UNHRC, Report of the International Fact-Finding Mission to Investigate Violations of International Law, *supra* note 5, §§ 178, 196, 202; Palmer-Uribe Panel, §§ 137, 139. [↑](#footnote-ref-49)
49. Response to the Application for Review, § 65. [↑](#footnote-ref-50)
50. PTC I Decision, § 26. [↑](#footnote-ref-51)
51. Surprisingly, the Dissenting Opinion of Judge Kovács never mentions the victims of outrages upon personal dignity in the evaluation of the scale of the alleged crimes. See PTC I Decision, Dissenting Opinion of Judge Kovács, § 19. [↑](#footnote-ref-52)
52. Decision Not to Investigate, § 139. [↑](#footnote-ref-53)
53. See ILC, Report of the International Law Commission on the Work of Its Thirty-ninth Session, 42 UN Gaor Supp. (no. 10) § 66, art. 1, cmt. 2, UN Doc. A/42/10 (1987): ‘Seriousness can be deduced either by the nature of the act in question (cruelty, monstrousness, barbarity, etc.)’. [↑](#footnote-ref-54)
54. See OTP, Policy Paper on Preliminary Examinations, *supra* note 43, § 63: ‘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, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction’. [↑](#footnote-ref-55)
55. PTC I Decision, § 30. [↑](#footnote-ref-56)
56. Response to the Application for Review, § 102-104. See also Appeal, § 24. [↑](#footnote-ref-57)
57. This is the rule embodied in Article 31. See also Article 32 on subsidiary means of interpretation, and Article 33 regarding multilingual treaties. The literature on treaty interpretation is particularly vast. See, among others, M.K. Yasseen, ‘L’interprétationdes traités d’après la Convention de Vienne sur le droit des traité’, 151 *Recueil des Cours de l’Académie de Droit International (RCADI)* (1976) 9; R. Kolb, *Interprétation et création du droit international. Esquisse d’une herméneutique juridique moderne pour le droit international public* (Bruylant, 2006); U. Linderfalk, *On the Interpretation of Treaties* (Springer, 2007); M. Herdegen, ‘Interpretation in International Law’, *Max Planck Encyclopedia of Public International Law*, online, March 2013; D. Alland, ‘L’interprétacion du droit international public’, 362 *RCADI* (2014) 41; A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015); R. Gardiner, *Treaty Interpretation* (2ndedn., Oxford University Press, 2015). [↑](#footnote-ref-58)
58. See, e.g., ICC-01/04-168, Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 31 July 2006, § 33; ICC-01/04-01/07-3436-tENG, *Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, 7 March 2014, § 43; ICC-01/05-01/08-3343, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, § 75. See also L. Grover, ‘*Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014); A. Bufalini, ‘The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute’, 14 *The Law and Practice of International Courts and Tribunals* (2015) 233. [↑](#footnote-ref-59)
59. The recourse to the VCLT is not automatically in conflict with the domestic principles regarding the interpretation of penal statutes. For a discussion on this issue in the case law of the *ad hoc* Tribunals, see W.A. Schabas, ‘Interpreting the Statutes of the Ad Hoc Tribunals’, in L.C. Vorah et al. (eds), *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003) 847. With regard to the ICC Statute, see L. Gradoni, ‘Regole di interpretazione difficili da interpretare e frammentazione del principio di integrazione sistemica’, 93 *RDI* (2010) 809, at 814-816; L.M. Sadat and J.M. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot’, 27 *Leiden Journal of International Law* (2014) 755. [↑](#footnote-ref-60)
60. See ICCSt., Article 42(1). [↑](#footnote-ref-61)
61. For the difference between discretionary and arbitrary powers in international law, see the entry ‘Discrétionnaire’ in J. Salmon (éd), Dictionnaire de droit international public (Bruylant), at 344. On the discretionary nature of the OTP’s powers, see G. Turone, ‘Powers and Duties of the Prosecutor’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002) 1137, at 1138-1139. More generally, see also H. Olàsolo, ‘The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?’, 3 *ICLR* (2003) 87; W.A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, 6 *JICJ* (2008) 731. [↑](#footnote-ref-62)
62. See Note regarding part 5 and articles 54 and 60 contained in the transmitted letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 26 June 1998, UN Doc a/CONF.183/13(Vol.III), at 292. [↑](#footnote-ref-63)
63. See ICC-01/09-19, Situation in Kenya, *supra* note 43, § 27. See also Schabas, *The International Criminal Court*, *supra* note 42, at 666; K. De Meester, The *Investigation Phase in International Criminal Procedure: in Search of Common Rules* (Intersentia, 2015), at 141. [↑](#footnote-ref-64)
64. ICC-01/15-12, Situation in Georgia, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, § 37. [↑](#footnote-ref-65)
65. See G. Bitti, ‘Article 53 – Ouverture d’une enquête’, in J. Fernandez and X. Pacreau (eds), *Statut de Rome de la Cour pénale internationale, Commentaire article par article* (Pedone, 2012) 1173, at 1191. *Contra*, see OTP, Draft Policy Paper, *supra* note 43, § 36, which this author considers to be the OTP’s response to PTC I’s decision on the *Mavi Marmara* affaire. [↑](#footnote-ref-66)
66. K. De Meester, ‘Article 53(1)(b)’, in M. Klamberg (ed), *The Commentary on the Law of the International Criminal Court*, www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-5/#c2064; Bergsmo, Kruger and Bekou, *supra* note 42, at 1376. [↑](#footnote-ref-67)
67. According to the Decision, § 21: ‘The Chamber is attentive to the Court’s previous decisions in relation to the interpretation of the requirement of ‘sufficient gravity’ within the meaning of article 17(1)(d) of the Statute, *in particular with respect of the assessment of the gravity of ‘potential cases’ at the pre-investigative stage* (emphasis added). [↑](#footnote-ref-68)
68. ICC-01/15-12, Situation in Georgia, *supra* note 63,§ 36. [↑](#footnote-ref-69)
69. O. Dörr, ‘Article 31 – General Rule of Interpretation’, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag, 2012) 521, at 541. [↑](#footnote-ref-70)
70. Schabas, *The International Criminal Court*, *supra* note 42, at 666. [↑](#footnote-ref-71)
71. The fact that the power to review a decision of the OTP is not only limited to its outcome but also to its decisional process is acknowledged – albeit in speculative terms – even in PTC I Decision, Dissenting Opinion of Judge Kovács, § 12. [↑](#footnote-ref-72)
72. Decision Not to Investigate, § 68 (emphasis added). [↑](#footnote-ref-73)
73. *Ibid.*: ‘Taking into account these considerations and the available information, it appears that at this stage there is not a reasonable basis to believe that the mistreatment of passengers also included deliberate denial of medical treatment.’ [↑](#footnote-ref-74)
74. ICC-01/13-29-Red, Public Redacted Version of Prosecution's Consolidated Response to the Observations of the Victims, 14 July 2015, §§ 48, 54, 158. [↑](#footnote-ref-75)
75. Decision Not to Investigate, § 138 (emphasis added). [↑](#footnote-ref-76)
76. *Ibid.* [↑](#footnote-ref-77)
77. ICC-01/13-29-Red, Public Redacted Version of Prosecution's Consolidated Response to the Observations of the Victims, *supra* note 73, § 48, fn 94. [↑](#footnote-ref-78)
78. This is particularly strange since the OTP itself emphasised a number of times that it is not a judicial body (see, e.g., Prosecution Response to the Application for Review, § 14). [↑](#footnote-ref-79)
79. Article 22(2) ICCSt. does not refer to preliminary investigations and regards only the definition of the crimes, not also the determination of sufficient gravity at this stage ; gravity is a condition of admissibility of the case and not a component of the crimes. According to Bitti, *supra* note 64, at 1191, ‘Par ailleurs la ‘base raisonnable’ de l’article 53-1 vise exclusivement les crimes et non pas les personnes éventuellement responsables, car à a ce stade de la procédure il n’est pas individuelle’. [↑](#footnote-ref-80)
80. Heller, ‘The Pre-Trial Chamber’s’, *supra* note 33: ‘[T]he PTC’s flawed decision was only possible because the OTP took the ill-advised step of releasing a 61-page document explaining why it had decided not to formally investigate the Comoros situation … Had the OTP not produced such a lengthy declination decision, the PTC would have had nothing to review – and thus nothing to second guess. I’d hate to be the legal officer who sold Fatou Bensouda on the idea that the OTP should explain its reasoning in such detail.’ [↑](#footnote-ref-81)
81. *Ibid.* On the Pre-Trial Chamber’s power to review the Prosecution’s decision not to investigate in light of the principle of transparency, see also S. Zappalà, ‘Il Procuratore della Corte penale internazionale: luci ed ombre’, 82 *RDI* (1999) 39, at 57. [↑](#footnote-ref-82)
82. PTC I Decision, § 13 (emphasis added). See also § 36. [↑](#footnote-ref-83)
83. Decision Not to Investigate, § 4. [↑](#footnote-ref-84)
84. See M. C. Bassiouni (ed), *The Legislative History of the International Criminal Court, Vol 2: An Article-by-Article Evolution of the Statute from 1994–1998* (Transnational Publishers, 2005), at 97-106. [↑](#footnote-ref-85)
85. *Ibid*., §145. For the specific case, see ICC-02/05-02/09-233-Red, *supra* note 43. [↑](#footnote-ref-86)
86. Decision Not to Investigate, § 138: ‘’[It]t has to be acknowledged that the total number of victims of the flotilla incident reached relatively limited proportions *as compared*, generally, *to other cases investigated by the Office*’ (emphasis added). See also §§ 145, 146. [↑](#footnote-ref-87)
87. For more on this point, see Bergsmo, Kruger and Bekou, *supra* note 42, at 1373. [↑](#footnote-ref-88)
88. According to A. Bianchi, ‘Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning’, in P.H.F. Bekker, R. Dolzer and M. Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) 34, at 40: ‘[W]hat makes the meaning of a word ‘plain’, ‘clear’, or ‘unambiguous’ is not any linguistic property the word may have but rather the context in which it is used and the code used for communication in a particular situation by a certain community.’ [↑](#footnote-ref-89)
89. This point is masterfully explicated by Bianchi, *supra* note 87, 45-47. [↑](#footnote-ref-90)
90. Yasseen, *supra* note 56, at 10. [↑](#footnote-ref-91)
91. See M. Starita, ‘L’interpretazione dei trattati che determinano frontiere’, 98 *RDI* (2015) 337. [↑](#footnote-ref-92)
92. The *Mavi Marmara* affaire is the only episode mentioned in the recent academic literature regarding Article 12(2)(a). See W.A. Schabas and G. Pecorella, ‘Article 12 – Preconditions to the Exercise of Jurisdiction’, in Triffterer and Ambos (eds), *Commentary on the Rome Statute*, *supra* note 42, 672, at 683. [↑](#footnote-ref-93)
93. See e.g. the excellent study by M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2014), at 8: ‘The issues of crimes occurring on board vessels or aircrafts and the topic of vessel registration and flag state jurisdiction are excluded.’ [↑](#footnote-ref-94)
94. For this reason, the criminal responsibility of the perpetrators of the sinking has been analysed in light of the crime of aggression, rather than under war crimes allegations. See N.R. Jung, ‘Study on the Efficacy of the Kampala Amendments for Suppression of Aggression: Examined by the Case of Armed Conflicts in the Korean Peninsula’, 10 *Loyola University Chicago International Law Review* (2012-213) 157. [↑](#footnote-ref-95)
95. See OTP, Situation in the Republic of Korea, Article 5 Report, June 2014, §§ 47-57. [↑](#footnote-ref-96)
96. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, at 313–317. [↑](#footnote-ref-97)
97. See N. Boilster and R. Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, 2008), at 561-565. [↑](#footnote-ref-98)
98. ICTY Statute, Article 8; ICTR Statute, Article 7. See W.A. Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006) 131. [↑](#footnote-ref-99)
99. On this issue, no state practice has been collected into the most authoritative non-binding codification regarding naval warfare, L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press), at 176-183. Some practice exists with regard to the enforcement of the Gaza blockade prior to the *Mavi Marmara* incident; see e.g. the *Dignity* incident of 30 December 2008 (E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 94), and the *Spirit of Humanity* incident of 29 June 2009 (UNHRC, Report of the International Fact-Finding Mission to Investigate Violations of International Law, *supra* note 5, § 77). [↑](#footnote-ref-100)
100. *Medvedyev and Others v. France*, App. No. 3394/03 [GC], ECHR 2010. [↑](#footnote-ref-101)
101. Accordingly, one should consider not relevant those decisions of the International Tribunal for the Law of the Sea regarding interception and boarding of vessels – such as The *M/V ‘Saiga’ Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 4 December 1997, ITLOS Reports (1997), 1; *The ‘Arctic Sunrise’ Case (Kingdom of the Netherlands v, Russian Federation)*, Order of 22 November 2013, ITLOS Reports (2013), 230. [↑](#footnote-ref-102)