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ICC Proceedings and the Elements of International Crimes  
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## Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes

Marco Longobardo\*

*Non domandarci la formula che mondi possa aprirti.*<sup>1</sup>

### 1. Introduction

The question of the assessment of ‘sufficient gravity’ for the purpose of cases and potential cases before the International Criminal Court (ICC) has been increasingly debated over the last decade.<sup>2</sup> The relevant ICC case law – which this paper will examine briefly – is not explicit as to which elements are relevant for this gravity assessment. Accordingly, an analysis of this issue is of practical relevance and has some theoretical allure since the gravity assessment may lead to the decision not to open an investigation or to consider inadmissible a case. The present paper suggests that only factors that are not elements of international crimes should be taken into consideration. In order to advance this argument, this paper examines the recent proceedings on *Mavi Marmara*, in which there was strong disagreement between the Office of the Prosecutor (OTP) and the Pre-Trial Chamber I (PTCI) in regards to the gravity of the potential cases arising from that situation.

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<sup>1</sup> E Montale, ‘Non chiederci la parola’ in *Ossi di seppia* (Piero Gobetti 1925).

<sup>2</sup> Generally on this topic see eg MM deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 *Fordham Intl L J* 1400; MM El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’ (2008) 19 *Criminal L Forum* 35; R Estupiñan Silva, ‘La “gravité” dans la jurisprudence de la Cour pénale internationale à propos des crimes de guerre’ (2011) 82 *Revue internationale de droit pénal* 541; WA Schabas, MM El Zeidy, ‘Article 17 – Issues of Admissibility’ in O Triffterer, K Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn, CH Beck-Hart-Nomos 2016) 781.



## 2. *The Mavi Marmara affair before the ICC*

In 2010, the Israeli Defense Forces (IDF) boarded three vessels of the Gaza Aid Flotilla – the *Mavi Marmara*, the *Eleftheri Mesogios*, and the *Rachael Corrie* – killing nine passengers on board the *Mavi Marmara* and causing the subsequent death of another some days later.<sup>3</sup> This interception was not the first Israeli boarding of vessels trying to enforce the blockade imposed on the Gaza Strip,<sup>4</sup> and at that time it was difficult to predict any role for the ICC since the Court lacked jurisdiction over crimes allegedly committed in the Occupied Palestinian Territory – a situation that in part changed in 2015 when Palestine joined the ICC Statute and issued a declaration of acceptance of the ICC jurisdiction.<sup>5</sup>

However, in 2013 the ICC jurisdiction in relation to the *Mavi Marmara* boarding was triggered by a referral issued by the Comoro Islands (Comoros), a state party to the ICC Statute that was directly involved in

<sup>3</sup> The legality of the boarding received a great deal of attention by scholars. See eg A Sanger, ‘The Contemporary Law of Blockade and the Gaza Freedom Flotilla’ (2010) 13 *Yb Intl Humanitarian L* 397; A Annoni, ‘L’abbordaggio della Gaza Freedom Flotilla alla luce del diritto internazionale’ (2010) 94 *Rivista di Diritto Internazionale* 1203; R Buchan, ‘The International Law of Naval Blockade and Israel’s Interception of the *Mavi Marmara*’ (2011) 58 *Netherlands Intl L Rev* 209; D Guilfoyle, ‘The *Mavi Marmara* Incident and Blockade in Armed Conflict’ (2011) 81 *British YB Intl L* 171.

<sup>4</sup> See eg the *Dignity* incident of 30 December 2008 (commented on by 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* episode of 29 June 2009 (on which see UNHRC, ‘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) para 77).

<sup>5</sup> For the Palestinian accession, see UN Secretary-General, Depositary Notification: Rome Statute of the ICC, Palestine accession (6 January 2015) <[www.treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf](http://www.treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf)>. In addition, Palestine presented a declaration of its acceptance of ICC jurisdiction over the crimes committed during the 2014 Gaza war (Office of the Prosecutor, ‘Palestine declares acceptance of ICC jurisdiction since 13 June 2014’ (5 January 2015)) – a situation that is currently under the OTP’s scrutiny. On the Israeli-Palestinian conflict and the ICC, see generally, C Meloni, G Tognoni (eds), *Is There A Court For Gaza? A Test Bench for International Justice* (TMC Asser Press 2012); I Stegmüller, ‘Palästinas Aufnahme als “Mitgliedstaat” des Internationalen Strafgerichtshofs’ (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 435; MM El Zeidy, ‘Ad hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny’ in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 179.



the boarding since the *Mavi Marmara* was flagged as a Comoros vessel.<sup>6</sup> Accordingly, the OTP opened a preliminary examination into the *Mavi Marmara* boarding;<sup>7</sup> this examination was terminated after two years with the OTP's decision not to open an investigation due to an alleged lack of gravity of the situation at hand (hereinafter 'Decision Not to Investigate').<sup>8</sup> The Comoros challenged this conclusion before the PTCI,<sup>9</sup> which decided, by a majority, in favour of the Comoros and ordered the OTP to reconsider its findings pursuant to Article 53(3) ICC Statute (hereinafter 'PTCI Decision').<sup>10</sup> Since the OTP's appeal against this decision<sup>11</sup> was dismissed as inadmissible,<sup>12</sup> the OTP is under an obligation to reconsider its gravity assessment – although it may reconfirm its original position.<sup>13</sup>

The *Mavi Marmara* affair offers a poignant opportunity to study the issue of the sufficient gravity test in situations and cases within the scope of the ICC Statute. This topic was the battleground for the OTP

<sup>6</sup> 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' (14 May 2013).

<sup>7</sup> Office of the Prosecutor, '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).

<sup>8</sup> Office of the Prosecutor, 'Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report' ICC-01/13-6-AnxA (6 November 2014).

<sup>9</sup> Union of the Comoros, 'Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation into the Situation' ICC-01/13-3-Red (29 January 2015).

<sup>10</sup> 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' ICC-01/13-34 (16 July 2015).

<sup>11</sup> Office of the Prosecutor, '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"' ICC-01/13-35 (27 July 2015).

<sup>12</sup> Appeals Chamber, '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"' ICC-01/13-51 (6 November 2015).

<sup>13</sup> *ibid*, para 42. See also G Turone, 'Powers and Duties of the Prosecutor', in A Cassese, P Gaeta, JRWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP 2002) 1137, at 1157.



and PTCI – which had extremely different views on the determination of the gravity threshold in the instant case, as will be further explored in the subsequent subsections. Moreover, this episode raised some debate about the relationship between the OTP and PTC, particularly in relation to the independence granted to the OPT by the ICC Statute.<sup>14</sup> Finally, this is the first occasion in which the OTP and a PTC have had to deal with the gravity of crimes, allegedly committed on board a vessel or aircraft.

However, a comprehensive study of all these complex legal issues is beyond the purview of this paper. The analysis herein focuses only on the factors that should be regarded and disregarded in the determination of sufficient gravity, on the basis of the OTP and PTCI's findings regarding the gravity of the crimes allegedly committed during the *Mavi Marmara* boarding.<sup>15</sup>

### 3. *Sufficient gravity in the law and practice of the ICC*

The assessment of sufficient gravity is a part of the test for the admissibility of a case pursuant to Article 17(1)(d) ICC Statute, according to which, 'the Court shall determine that a case is inadmissible where: [...] (d) [t]he case is not of sufficient gravity to justify further action by the Court'. The gravity threshold was introduced following a proposal

<sup>14</sup> For different opinions on this issue, see KJ Heller, 'The Pre-Trial Chamber's Dangerous Comoros Review Decision' (*Opinio Juris*, 17 July 2015) <[www.opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/](http://www.opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/)>; M deGuzman, 'What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation' (*ASIL Insights* 11 August 2015) <[www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber](http://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber)>. According to an authoritative commentator, PTCI's approach was consistent with the past Appeals Chamber's case law on gravity – which will be discussed in the subsequent subsections (WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 467).

<sup>15</sup> I discussed other issues regarding the threshold of sufficient gravity in the instant case – in light of the role of the treaty interpretive criteria, the differences between the gravity assessment at the preliminary examination stage and during an actual investigation, and the role of the spatial scope of the alleged crimes – in a companion article (M Longobardo, 'Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair' (2016) 14 *J Intl Criminal Justice* 1011).



by Professor James Crawford at a meeting of the International Law Commission in May 1994. The underpinning idea was that an international court should not waste its scarce resources on prosecuting minor offenders; with only the most serious offences deserving of an international trial.<sup>16</sup> This idea was discussed, endorsed and adopted in the text of Article 17(1)(d) at the Rome Conference.<sup>17</sup>

The assessment of gravity is a cornerstone of the ICC system. An evaluation of sufficient gravity must be performed by the OTP during the preliminary examinations pursuant to Article 53(1)(b), and during the investigations as a condition to begin the actual prosecution pursuant to Article 53(2)(b). Moreover, the Chambers may even evaluate the admissibility of a case solely on the basis of sufficient gravity.<sup>18</sup>

It has been suggested that the gravity assessment plays two distinct roles, providing a basis for the ICC jurisdiction under the admissibility test, and guiding the OTP's discretionary selection of situations and cases to prosecute.<sup>19</sup> Indeed, the important role played by gravity in the OTP's selection of cases and situations is uncontroversial;<sup>20</sup> however, there is not any hint in the ICC Statute that the OTP may apply, as a matter of prosecutorial policy, a gravity threshold higher than that required for the admissibility of a (potential) case.<sup>21</sup>

Despite the centrality of the gravity assessment, the ICC Statute does not provide a definition of gravity, nor does it contain any clue as

<sup>16</sup> See ILC, 'Summary Record of the 2330th Meeting' (1994) YB Intl L Commission vol I, 9.

<sup>17</sup> See Bureau Discussion Paper, art 15(1)(d) UN Doc A/CONF.183/C.1/L.53 (6 July 1998); Bureau Discussion Paper, art 15(1)(d) UN Doc A/CONF.183/C.1/L.59/Corr.1 (11 July 1998); Report of the Committee of the Whole, art 17[15](1)(d) UN Doc A/CONF.183/8 (17 July 1998). For more on the draft history of the gravity clause, see S SáCouto, K Clearly, 'The Gravity Threshold of the International Criminal Court' (2008) 23 *American U Intl L Rev* 807 at 817-823; deGuzman (n 2) 1416-1425.

<sup>18</sup> See arts 15(3), 19 and 53(3) ICC Statute.

<sup>19</sup> See deGuzman (n 2) 1405-1416.

<sup>20</sup> For an overview, see WA Schabas, 'Prosecutorial Discretion and Gravity' in C Stahn, G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 229. The same author argued that the OTP's gravity assessment in the selection of situations and cases might be influenced by political pressures (see WA Schabas, 'Victors' Justice: Selecting "Situations" at the International Criminal Court' (2010) 47 *The John Marshall L Rev* 535).

<sup>21</sup> The OTP expressed this opinion in its Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (15 September 2016) para 36.



to when a case is of sufficient gravity. However, the ICC case law may provide some useful insights on the issue.

In 2006, after some years during which gravity was not assessed by the OTP, the prosecution focused mainly on a quantitative analysis of the scale of the alleged crimes in order to evaluate whether the sufficient gravity requisite was met,<sup>22</sup> while the PTCI described the gravity test as threefold, requiring the large-scale commission of crimes within the Court's jurisdiction and the social alarm caused in the international community,<sup>23</sup> as well as the fact that the accused is or are the most senior leader(s) in a given situation under investigation.<sup>24</sup> PTCI's position was rejected by the Appeals Chamber, which held that such a formalistic narrow focus on senior leaders' responsibilities would hamper the effectiveness of the ICC's action.<sup>25</sup>

In more recent case law, the Pre-Trial Chambers developed a new twofold approach. On the one hand, the assessment of gravity has to take into account whether the accused are those who bear the greatest responsibility for the commission of the alleged crimes.<sup>26</sup> At the same time, though, gravity must be evaluated on the basis of both qualitative

<sup>22</sup> See Office of the Prosecutor, 'Response to Communications Received Concerning Iraq' (9 February 2006) 9.

<sup>23</sup> Pre-Trial Chamber I, 'Situation in the DRC, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' ICC-01/04-520-Anx2 (10 February 2006) para 46.

<sup>24</sup> *ibid* paras 48-53.

<sup>25</sup> Appeals Chamber, 'Situation in the DRC, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"' ICC-01/04-169 (13 July 2006) paras 73-76, and 82 (para 82 is also quoted in Pre-Trial Chamber I, 'Situation in Darfur, Sudan, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' ICC-02/05-01/09-3 (4 March 2009) para 48, fn 51). For scholarly critical remarks on the seniority criterion, see R Murphy, 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal L Forum* 281, at 312; I Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*' (2009) 9 *Intl Criminal L Rev* 547.

<sup>26</sup> Pre-Trial Chamber II, 'Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' ICC-01/09-19 (31 March 2010) paras 59-60; Pre-Trial Chamber III, 'Situation in the Republic of Côte d'Ivoire, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"' ICC-02/11-14-Corr (3 October 2011) para 204.



and quantitative criteria regarding the alleged crimes.<sup>27</sup> Accordingly, not only should the scale of the alleged crimes be examined, but also their nature, manner of commission, and impact.<sup>28</sup> This list has been endorsed by the OTP,<sup>29</sup> and does not seem to be exhaustive; it is possible to identify other criteria that are relevant for the gravity assessment in certain circumstances as demonstrated by the *Mavi Marmara* affair itself.

The Chambers appear to consider that Article 17(1)(d) of the ICC Statute should be interpreted in light of the rules on treaty interpretation embodied in the 1969 Vienna Convention of the Law of Treaties.<sup>30</sup> However, some interpretive issues have arisen. For instance, the OTP and the Chambers appear to have adopted different approaches regarding who are the most responsible for the commission of the alleged crimes:<sup>31</sup> from a victim-oriented perspective, the most responsible are those who actually played the major role in the crime commission, while as a matter of prosecutorial policy they are those who had the power to

<sup>27</sup> PTC II Situation in the Republic of Kenya (n 26) para 62; PTC III Situation in the Republic of Côte d'Ivoire (n 26) para 203.

<sup>28</sup> Pre-Trial Chamber I, 'Situation in Darfur, Sudan, Decision on the Confirmation of Charges' ICC-02/05-02/09-243-Red (8 February 2010) para 31; PTC II Situation in the Republic of Kenya (n 26) para 188; Pre-Trial Chamber I, 'Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation' ICC-01/15-12 (27 January 2016) para 51.

<sup>29</sup> See art 29(2) of the Regulations of the Office of the Prosecutor (entry into force: 23 April 2009). See also Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (November 2013) paras 9 and 71; OTP Policy Paper on Case Selection and Prioritisation (n 21) paras 37-41.

<sup>30</sup> See eg Situation in the DRC, ICC-01/04-520-Anx2 (n 23) para 43. On the interpretation of the ICC Statute, see generally L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014). The question whether the rules on treaty interpretation are appropriate for the interpretation of a criminal statute is beyond the purview of this paper; for an overview of this issue, see WA Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in LC Vorah et al (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 847; L Gradoni, 'Regole di interpretazione difficili da interpretare e frammentazione del principio di integrazione sistemica' (2010) 93 *Rivista di Diritto Internazionale* 809, at 814-816; LM Sadat, JM Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *Leiden J Intl L* 755.

<sup>31</sup> For an interesting review of the ICC practice on this issue, see M Ochi, 'Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice' 19 *International Crimes Database* (2016).





most influence the commission of the crimes – that is to say the highest echelons.<sup>32</sup> In addition, as confirmed by the ICC case law, even if both paragraphs 1 and 2 of Article 53 ICC Statute refers to Article 17(1)(d), the evaluation of sufficient gravity at the preliminary examinations stage is somewhat different since the OTP has to evaluate the gravity of potential cases, rather than of actual cases.<sup>33</sup> Moreover, the gravity assessment relates to the entire case(s) or potential case(s) arising from a situation, rather than every individual crime or potential crime under scrutiny.<sup>34</sup>

In the *Mavi Marmara* affair, both the OTP and the PTCI affirmed that they would rely on this more recent twofold test.<sup>35</sup> Nonetheless, they had different views on the actual application of these criteria. For instance, the expression ‘those who bear the greatest responsibility for the alleged crimes’ was meant by the OTP as a reference to the early ICC’s seniority doctrine,<sup>36</sup> while PTCI considered that criterion satisfied if the accused were the individuals most involved in the commission of the alleged crimes.<sup>37</sup> However, the most striking point of disagreement between the two organs was about the concrete application of scale, nature, manner of commission, and impact. The disagreement led PTCI to perform an extremely detailed scrutiny of the OTP’s assessment, which, in certain cases, does not appear to be supported by the Pre-Trial Chambers’ powers under Article 53(3)(a).<sup>38</sup>

<sup>32</sup> In support of a victim-oriented approach to this issue, 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* (2012) 525.

<sup>33</sup> See PTC II Situation in the Republic of Kenya, ICC-01/09-19 (n 26) paras 58-60; PTC I Situation in Georgia, ICC-01/15-12 (n 28) para 37.

<sup>34</sup> See Defence for General Mohammed Hussein Ali, ‘Situation in the Republic of Kenya, Defence Challenge to Jurisdiction, Admissibility and Prosecution’s Failure to Meet the Requirements of Article 54’ ICC-01/09-02/11 (19 September 2011) para 58. See also deGuzman (n 2) 1451.

<sup>35</sup> OTP Decision Not to Investigate (n 8) paras 135-136; PTC I Decision (n 10) para 21.

<sup>36</sup> See Office of the Prosecutor, ‘Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Prosecution Response to the Application for Review of its Determination under Article 53(1)(b) of the Rome Statute’ ICC-01/13-14-Red (30 March 2015) para 62.

<sup>37</sup> PTC I Decision (n 10) paras 23-24.

<sup>38</sup> For an interesting analysis of the PTCI’s powers in relation to the OPT’s determination under art 53 ICC Statute, in light of the *Mavi Marmara* litigation, see GA



However, it is useful to analyse which factors are relevant for the gravity assessment and, then, to examine their actual application in the *Mavi Marmara* affair.

#### 4. Gravity as an additional feature of cases and potential cases

In certain paragraphs of the OTP's and PTCI's reasoning about gravity, the two ICC organs appear to have erred in the determination of what is relevant for the gravity assessment.

Every crime embodied in the ICC Statute is a source of utmost concern for the international community and, thus, inherently of high gravity. Accordingly, *prima facie*, as soon as there is a reasonable basis to believe that a crime embodied in the ICC Statute has been committed, the gravity threshold should be considered satisfied. However, this conclusion would render the provision enlisting sufficient gravity as an admissibility criterion useless. Accordingly, the PTCI's opinion that 'the relevant conduct must present *particular features* which render it especially grave'<sup>39</sup> is fully convincing on this point. In other words, 'article 17 (1) of the Statute is *in addition* to the gravity-driven selection of the crimes included within the material jurisdiction of the Court'<sup>40</sup> and 'Article 17 imposes a threshold requirement *above and beyond* the jurisdictional requirements of the Statute.'<sup>41</sup>

These last statements are quite important since they clarify that gravity is an additional feature, and not a constituent element of the crime punishable under the ICC Statute: in other words, gravity is a feature of a case (actual or potential) based on those crimes. Accordingly, the elements of the crimes are unsuitable for evaluation in the gravity assessment since all conduct that constitutes an international crime has an inherent degree of gravity that is not relevant *per se* for the admissibility of a case.

Knoops, T Zwart, 'The Flotilla Case before the ICC: The Need to Do Justice while Keeping the Heaven Intact' 15 Intl Criminal L Review (2015) 1069, at 1073-1081.

<sup>39</sup> PTC I Situation in the DRC (n 23) para 465 (emphasis added).

<sup>40</sup> *ibid* (emphasis added).

<sup>41</sup> Defence for General Mohammed Hussein Ali Situation in the Republic of Kenya (n 34) para 56.



To this end, it is worth mentioning the elements of international crimes: they are the *actus reus*, that is the action or omission that constitutes the behavioural components of every crime, and the *mens rea*, that is the criminal intent at the basis of a criminal act.<sup>42</sup> Moreover, it is not sufficient that an *actus reus* is committed with the relevant psychological element in order to punish conduct as a crime; rather, one has to consider whether the conduct is not in fact unlawful because some relevant defence excuses the act from being a crime. Some of these defences are labelled as justifications and are related to the existence of the crime itself, as the presence of the justification makes the *actus reus* lawful.<sup>43</sup>

It is submitted here that the *actus reus* itself, the required *mens rea* for a specific crime, and the absence of a justification are not relevant for the gravity assessment, since they are not ‘particular features’ of a crime, but, rather, its basic components.<sup>44</sup> Accordingly, gravity must be assessed on the basis of objective factors that are external or additional to the alleged crimes.

It should be noted that, from this perspective, the OTP and the Chambers appear to consider the gravity assessment as a factual issue – since both organs conduct a detailed review of the situations under scrutiny. Accordingly, based on the relevant case law, a (potential) case meets the sufficient gravity threshold only when the alleged crimes are committed under such circumstances that make the conduct worthy of international prosecution; therefore, sufficient gravity is assessed on the existence of such circumstances that should be addressed by the OTP in the context of its prosecutorial activities.

An overview of the ICC case law and practice regarding this factual approach supports the assertion that the gravity assessment is based on factual circumstances surrounding the allegedly criminal conduct.

<sup>42</sup> The literature on the components of international crimes is particularly vast. For a general introduction, see GA Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2<sup>nd</sup> edn, Brill 2016) 94-98. For a more comprehensive study, see I Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Springer 2014).

<sup>43</sup> See S Darcy, ‘Defences to International Crimes’ in WA Schabas, N Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 231.

<sup>44</sup> Accordingly, I do not share the view that the *mens rea* is relevant for the gravity assessment (as suggested eg by deGuzman (n 2) 1455-1456).



First, in 2006 PTCI suggested that ‘*the relevant conduct* must present particular features which render it especially grave’<sup>45</sup> – suggesting that other material elements in addition to the elements of crimes should be assessed. Accordingly, the Chambers, in their case law, have examined some factual elements additional to the elements of crimes as relevant for the gravity assessments. They include: the impact of the alleged crimes on the international community, such as the suspension and reduction of an international peacekeeping operation as consequence of the alleged crimes;<sup>46</sup> the number of victims;<sup>47</sup> the inherent brutality of the means of commission of the crimes (eg the uses of poisonous arrows and machetes, amputations, and so on);<sup>48</sup> and the subsequent impact on victims of sexual crimes (such as the contraction of HIV/AIDS and social stigma).<sup>49</sup>

Second, the most recent case law emphasises that the factors listed in rule 145(1)(c) of the ICC Rules of Procedure and Evidence, which regulates the determination of the sentence,<sup>50</sup> may be relevant in the gravity assessment. Interestingly, PTCI did not refer to the entire text of rule 145(1)(c) as relevant for the admissibility of a (potential) case, but rather, only to those factors that are external to the elements of the crimes, ie, ‘the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.’<sup>51</sup> It is telling

<sup>45</sup> PTC I Situation in the DRC (n 23) para 46 (emphasis added).

<sup>46</sup> PTC I Situation in Darfur, Sudan (n 28) para 33; PTC I Situation in Georgia (n 28) para 55.

<sup>47</sup> PTC II Situation in the Republic of Kenya (n 26) paras 190-191; PTC I Situation in Georgia (n 28) para 54.

<sup>48</sup> PTC II Situation in the Republic of Kenya (n 26) paras 192-193. See also PTC I Situation in Georgia (n 28) para 54 (with a brief reference to ‘expulsion of civilians [...] sought by brutal means’).

<sup>49</sup> PTC II Situation in the Republic of Kenya (n 26) paras 194-196.

<sup>50</sup> See ICC, Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York ICC-ASP/1/3 and Corr.1, part II.A (3-10 September 2002). On the issue of the role of gravity in the determination of the sentence – a topic outside the purview of this paper – see K Ambos, *Treatise on International Criminal Law, Vol II: The Crimes and Sentencing* (OUP 2014) 292-298.

<sup>51</sup> See eg PTC I Situation in Darfur, Sudan, (n 28) para 32. See also PTC II Situation in the Republic of Kenya (n 26) para 62, where rule 145(1)(c) is not quoted, but rather summarized as comprising scale, nature, means of executions, impact. See also Pre-Trial Chamber I, ‘Situation in the Republic of Kenya, Decision on the

that other factors enlisted in rule 145(1)(c) that directly concerns the *actus reus* or the *mens rea* are deliberately not quoted by PTCI – confirming the idea that they are not relevant for the gravity assessment.<sup>52</sup> Similarly, some authors have argued that factors enlisted in rule 124(2)(b)(iv) – ie the ‘[c]ommission of the crime with particular cruelty or where there were multiple victims’ – should be taken into account in the gravity assessment;<sup>53</sup> again, they are not elements of the crimes, but rather additional factors.

Third, the OTP’s practice focuses on the same external factors. The first time the OTP dealt with sufficient gravity, the office analysed the number of victims in comparison to other situations under its scrutiny.<sup>54</sup> In more recent examinations and investigations, the OTP based its gravity assessment on the number of victims,<sup>55</sup> the cruelty of the manner of commission,<sup>56</sup> the discriminatory intent,<sup>57</sup> and the impact of the alleged crimes on the victims and on the international community as well.<sup>58</sup>

Fourth, a similar fact-based analysis regarding the factors relevant for the gravity assessment is confirmed by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) as well. In

Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’ ICC-01/09-02/11-382-Red (23 January 2012) para 50 (where rule 145(1)(c) is only mentioned).

<sup>52</sup> Other factors listed in rule 145(1)(c) that are not quoted by the Chambers are ‘the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person’.

<sup>53</sup> See Schabas, El Zeidy (n 2) 815.

<sup>54</sup> See OTP Response to Communications (n 22) 9-10.

<sup>55</sup> See eg Office of the Prosecutor, ‘Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15’ ICC-01/09-3 (26 November 2009) para 56; Office of the Prosecutor, ‘Situation in the Republic of Côte d’Ivoire, Request for authorisation of an investigation pursuant to article 15’ ICC-02/11-3 (23 June 2011) para 58; Office of the Prosecutor, ‘Situation in Georgia, Corrected Version of “Request for authorisation of an investigation pursuant to article 15”’ ICC-01/15-4-Corr (16 October 2015) para 330.

<sup>56</sup> OTP Situation in the Republic of Kenya (n 55) para 58; OTP Situation in the Republic of Côte d’Ivoire (n 55) para 58; OTP Situation in Georgia (n 55) para 331.

<sup>57</sup> OTP Situation in the Republic of Kenya (n 55) para 57; OTP Situation in the Republic of Côte d’Ivoire (n 55) para 58; OTP Situation in Georgia (n 55) para 331.

<sup>58</sup> OTP Situation in the Republic of Kenya (n 55) para 59; OTP Situation in Georgia (n 55) paras 332-336.



that context, the determination of the gravity of the cases was required in order to allow the ICTY to refer the prosecution of less grave crimes to national jurisdictions pursuant to rule 11bis of the ICTY Rules of Procedure and Evidence.<sup>59</sup> Notably, the ICTY case law assessed the gravity of those crimes on the basis of factors that are not elements of the crimes, and in particular on the basis of their scale, time period, and geographical scope.<sup>60</sup> Although the ICC Appeals Chamber affirmed that the gravity test developed by the ICTY is too strict to be applicable to the ICC Statute due to the different context of the two regimes,<sup>61</sup> the ICTY's reference to factors additional to the elements of crimes should be taken into proper account in the selection of factors relevant for the gravity assessment.<sup>62</sup>

This approach to the factors relevant for the gravity assessment is in part confirmed by the OTP's and PTCI's evaluations of gravity in relation to the *Mavi Marmara* boarding.

#### 4.1. *The OTP's evaluation of gravity in the Mavi Marmara affair*

In the Decision Not to Investigate, the OTP adopted a mixed approach. In general, it tried to consider external factors relevant for the gravity assessment, but in certain circumstances it referred to the components of the alleged crimes committed during the boarding.

First, the rank of the possible perpetrators – considered relevant by the OTP – is not a component of the alleged crimes and, accordingly, it is an element suitable to be considered in the assessment of gravity.<sup>63</sup> However, as mentioned previously, the OTP and PTCI had different

<sup>59</sup> Rules of Procedure and Evidence, IT/32/Rev 39 (22 September 2006) Rule 11bis(c): 'In determining whether to refer the case [...] the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.'

<sup>60</sup> See eg ICTY, 'Decision for referral to the authorities of the Republic of Croatia pursuant to rule 11 bis, Referral Bench' IT-04-78-PT (14 September 2005) para 28; 'Decision on referral of case under rule 11 bis, Referral Bench' IT-96-23/2-PT (17 May 2005) para 19.

<sup>61</sup> See AC Situation in the DRC (n 25) para 80.

<sup>62</sup> On the ICTY's case law regarding gravity and its relevance for the gravity assessment under the ICC Statute, see O'Brien (n 32) 540-542.

<sup>63</sup> OTP Decision Not to Investigate (n 8) para 135.

views on the correct way to identify the individual(s) most responsible for the commission of the alleged crimes.

Second, the OTP was correct in considering that the existence of a plan or policy as well as the large-scale commission of war crimes pursuant to Article 8(1) ICC Statute are not elements of war crimes.<sup>64</sup> Accordingly, the existence of a plan or policy as well as the large scale commission of war crimes are external factors suitable to form part of the gravity assessment. However, the OTP went too far when it affirmed that in war crimes ‘a specific gravity threshold’ exists.<sup>65</sup> This statement, if isolated from the rest of the OTP’s reasoning, is simply incorrect. The words ‘in particular’ in Article 8(1) ICC Statute were adopted in order to offer guidance to the OTP regarding the situations and cases it had to prioritise, and not to create an additional threshold.<sup>66</sup> It is not by chance that the US proposal to limit the ICC jurisdiction on war crimes only in cases of a plan/policy or large-scale commission was rejected during the preparatory works.<sup>67</sup> However, one has to concede that the OTP in dealing with the gravity assessment has not applied its own unfortunate statement regarding a ‘specific gravity threshold’ for war crimes; moreover, its position on the issue was subsequently re-phrased in a more appropriate way.<sup>68</sup>

Third, the OTP correctly addressed the scale of the alleged crimes as an external factor. Similarly, with regard to the manner of commission, the OTP correctly focused on external features – such as the degree of force employed by the IDF, the existence of a plan or policy, as well as the systematic character of the alleged crimes.<sup>69</sup> The OTP’s analysis of the manner of the commission of the crimes was severely criti-

<sup>64</sup> *ibid* para 137.

<sup>65</sup> *ibid*.

<sup>66</sup> AC Situation in the DRC (n 25) para 70.

<sup>67</sup> See M Cottier, ‘Article 8 Para 1: Jurisdiction in Respect of War Crimes’ in O Triffterer and K Ambos (n 30) 321, at 321-322.

<sup>68</sup> See Office of the Prosecutor, ‘Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Public Redacted Version of Prosecution’s Consolidated Response to the Observations of the Victims’ ICC-01/13-29-Red (14 July 2015) para 100: ‘The Report also noted the chapeau to article 8(1) of the Statute which, in a somewhat different context, indicates that information suggesting crimes were committed pursuant to a plan or policy may significantly contribute to showing they are sufficiently grave to be investigated and prosecuted before this Court.’ See also paras 101-104.

<sup>69</sup> OTP Decision Not to Investigate (n 8) para 140.



cised by PTCI;<sup>70</sup> however, the OTP correctly addressed the need to focus not on the *actus reus* but, rather, on additional relevant factors.

Fourth, with regard to the impact of the alleged crimes, the OTP considered both the immediate impact on the victims and on the humanitarian situation of the Gaza Strip.<sup>71</sup> The impact of the alleged crimes on the living conditions in the Gaza Strip is not a component of those same crimes, and thus it is suitable for consideration in the gravity assessment.<sup>72</sup> According to the OTP, since Israel made offers to allow the delivery of the humanitarian supplies on board the *Mavi Marmara* to the Gaza Strip before the boarding, and as those supplies were later distributed in the Gaza Strip, there is no room to argue that the boarding had a relevant impact on the population of the Gaza Strip.<sup>73</sup> This statement is open to criticism – especially since it is not clear why the living conditions in the Gaza Strip are not relevant in the assessment of the scale of the alleged crimes – since the area was outside the ICC jurisdiction –,<sup>74</sup> but at the same time they could be included in the assessment of the impact of the crimes. Perhaps the OTP was correct to distinguish so finely between the *locus commissi delicti* and the spatial dimension of subsequent prospective consequences of some crimes; however, the OTP should have better clarified its reasoning on this point.

Finally, the OTP correctly addressed a further external factor as relevant to the gravity assessment. The OTP mentioned that very small-scale episodes might cross the gravity threshold as long as the crimes allegedly committed are ‘violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community’.<sup>75</sup> As an example, the OTP mentioned the *Abu Garda* case, in which an isolated attack against peacekeepers that resulted in a smaller number of victims was considered of sufficient gravity nonetheless – even in light of the subsequent reduction of the

<sup>70</sup> PTC I Decision (n 10) paras 31-45.

<sup>71</sup> OTP Decision Not to Investigate (n 8) para 141.

<sup>72</sup> See OTP Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia(n 36) para 56.

<sup>73</sup> OTP Decision Not to Investigate (n 8) para 141.

<sup>74</sup> *ibid* para 147.

<sup>75</sup> *ibid* para 145.



African Union Mission in Sudan deployed therein.<sup>76</sup> This conclusion reaffirms the need to find factors relevant for the assessment of gravity outside the components of the alleged crimes.<sup>77</sup>

However, in contrast, the OTP dealt very inaccurately with the nature of the alleged crimes. Paragraph 139 of the OTP's Decision Not to Investigate does not provide any useful clues regarding the nature of those crimes. According to the OTP:

'Nature: there 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.'<sup>78</sup>

This paragraph says nothing on the *nature* of the war crimes allegedly committed by the IDF during the interception of the *Mavi Marmara*. Rather, the OTP merely lists the crimes that it considers likely to have

<sup>76</sup> *ibid.* See also OTP Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia (n 36) para 72; PTC I Situation in Georgia (n 28) para 55.

<sup>77</sup> However, the OTP was perhaps less persuasive when it concluded that the 'alleged crimes committed during the flotilla incident are of a different nature and do not have a corresponding qualitative impact' since, in the OTP's opinion, the main goals of the *Mavi Marmara* were political objectives, rather than humanitarian (see M Kearney, 'Initial Thoughts on the ICC Prosecutor's *Mavi Marmara* Report' (*Opinio Juris*, 8 November 2013) [opiniojuris.org/2014/11/08/guest-post-initial-thoughts-icc-prosecutors-mavi-marmara-report/](http://opiniojuris.org/2014/11/08/guest-post-initial-thoughts-icc-prosecutors-mavi-marmara-report/)). Even less convincing is the emphasis the OTP put on the lack of neutrality and impartiality of the action of the convoy comprising the *Mavi Marmara* since peacekeeping operations – directly compared to humanitarian action for the assessment of gravity by the OTP – are today losing their neutral / impartial character and are in fact sometimes involved as parties to armed conflicts (for more on this, see generally J Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali' 36 *Third World Quarterly* (2015) 40).

<sup>78</sup> OTP Decision Not to Investigate (n 8) para 139.



occurred during the boarding, providing a specific qualification (outrages upon personal dignity rather than torture). In other words, the OTP simply discussed here the *qualification* of the *actus rei* (outrages rather than torture), without any word as to why such conduct was or was not of sufficient gravity to deserve or not deserve an investigation. The analysis of the nature of the alleged crimes for the gravity assessment should not be limited to the legal qualification of the conduct since both torture and outrages are listed as crimes in the ICC Statute (and, accordingly, they are inherently grave enough to fall into the material scope of the Statute). Rather, the OTP should have explained why the potential case arising from that situation had that *quid pluris* of brutality and cruelty that makes these actions worthy of an examination while many other (potential) cases would be inadmissible – even if they are based on acts that fall *in abstracto* into the description of international crimes embodied in the ICC Statute. According to the preparatory works of the ICC Statute, the nature of crimes with respect to their gravity relates to the specific character of those acts<sup>79</sup> – a conclusion confirmed by some aforementioned decisions of the Pre-Trial Chambers.<sup>80</sup> In contrast, in the quoted paragraph of the Decision Not to Investigate on the nature of the alleged crimes there is no assessment of additional or external features of the crimes – thus the analysis lacks rigour as to the gravity assessment.<sup>81</sup>

#### 4.2. *The PTCI's approach to gravity in the Mavi Marmara litigation*

In reviewing the OPT's Decision not to Investigate, the PTCI mainly examined factors that are not components of the alleged crimes in order to address the gravity issue. However, the PTCI's analysis regard-

<sup>79</sup> See ILC, 'Report of the International Law Commission on the Work of Its Thirty-ninth Session' (4 May-17 July 1987) UN Doc A/42/10 (1987) para 66, art 1(2): 'Seriousness can be deduced either by the nature of the act in question (cruelty, monstrousness, barbarity, etc.)'.

<sup>80</sup> See above section 4.

<sup>81</sup> The problem of the qualification of those acts as torture or outrages upon personal dignity was at the centre of a debate between the PTCI and the OTP, with the former considering the latter was misled by this qualification in the assessment of sufficient gravity (PTC I Decision (n 10) para 30). For more on this, see Longobardo (n 15) 1020.

ing the nature of the crimes focused on the qualification of the crimes, and the overall reasoning does not appear entirely convincing.

First, the PTCI focused on the fact that an investigation may regard those who bear the greatest responsibility in the commission of the alleged crimes as an additional factor to the components of the alleged crimes, and thus suitable to be employed in the determination of sufficient gravity.<sup>82</sup>

Second, the PTCI rightly took into consideration other factors that are not components of the alleged crimes, such as the use of live fire under the analysis of the manner of commission,<sup>83</sup> and the impact of the alleged crimes both on the immediate and beyond.<sup>84</sup>

Third, and more interestingly, the PTCI also referred to another factor, namely the impact that the alleged crimes had on the international community, supposedly confirmed by the creation of several fact-finding commissions.<sup>85</sup> This point deserves attention since it may resonate with the aforementioned ICC case law regarding the impact on the international community of crimes against peacekeepers. However, the PTCI went further, and clearly affirmed that:

‘As a final note, 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 events. The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute.’<sup>86</sup>

<sup>82</sup> PTC I Decision (n 10) paras 22-24.

<sup>83</sup> *ibid* paras 33-36.

<sup>84</sup> *ibid* paras 47-48.

<sup>85</sup> *ibid* para 48. However, the overall international community’s reaction was rather limited, with no condemnation from the Security Council through a resolution. For more on this, see M Longobardo, ‘Some Developments in the Prosecution of International Crimes Committed in Palestine: Any Real News?’ (2015) 35 *Polish Yb Intl L* 109, 130 and 133.

<sup>86</sup> PTC I Decision (n 10) para 51.



This paragraph met strong criticism since it appeared to be based on the doctrine of social alarm, which was considered irrelevant to the determination of gravity in the previous case law of the ICC Appeals Chamber.<sup>87</sup> In particular, this approach would politicise the ICC's actions, since 'just as crimes the world obsesses over might be insufficiently grave to warrant investigation, crimes the world ignores could be more than grave enough.'<sup>88</sup> These concerns are worthy of attention. However, for the purposes of this paper, it should be acknowledged that PTCI identified an additional factor to the components of the alleged crimes for the assessment of gravity – even if the social alarm test is not based on an objective factor, rather on an highly subjective one that therefore should not be considered relevant in the gravity assessment.<sup>89</sup>

In contrast and in accordance with the OTP's position in the Decision Not to Investigate, the PTCI took into account as relevant for the examination of the nature of the crimes their qualification, which is based on the components of the alleged crimes, rather than on additional factors. According to the PTCI:

[T]he Prosecutor's conclusion that the unjustified mistreatment and harassment of passengers by the IDF forces did not amount to the war crime of torture or inhuman treatment [...] is not just a matter of article 53(1)(a) of the Statute (i.e. of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed). Rather, this is a matter that is equally relevant to the evaluation of the gravity of the potential case(s) [...] as the concept of nature of the crimes (which is indeed a relevant factor in the determination of the overall gravity), revolves around the relative gravity of the possible legal qualifications of the apparent facts, i.e. the crimes that are being or could be prosecuted.<sup>90</sup>

<sup>87</sup> AC Situation in the DRC (n 25) para 72.

<sup>88</sup> KJ Heller, 'The Most Distressing Paragraph in the Comoros Review Decision' (*Opinio Juris*, 19 July 2015) <http://opiniojuris.org/2015/07/19/the-most-distressing-paragraph-in-the-comoros-review-decision/>.

<sup>89</sup> According to the Appeals Chamber, 'the criterion of "social alarm" depends upon subjective and contingent reactions to crimes rather than upon their objective gravity' (AC Situation in the DRC (n 25) para 72).

<sup>90</sup> PTC I Decision (n 10) para 28.

This paragraph of the PTCI Decision is quite unconvincing for at least two reasons. First, the PTCI's reasoning in regards to an assessment of the 'overall gravity' as the sum of the 'relative gravity' of each crime does not appear sound; simply put, this test risks shifting the entire gravity assessment from the (potential) case(s) to each specific alleged crime – hereby contradicting the aforementioned ICC case law<sup>91</sup> and would be extremely premature at the preliminary examinations stage. Second, PTCI considered that outrage upon personal dignity is a crime of an inherently less grave nature than torture, thus envisaging a hierarchy among war crimes that is not based on the ICC Statute. The fact that both outrage and torture are considered to be of a sufficient gravity to be punished in the ICC Statute should have barred PTCI from suggesting such a novel hierarchy. In contrast, considering gravity as an additional element to the components of the alleged crimes – external to the *actus reus*, in the instant case – would have helped PTCI to avoid this unconvincing conclusion. In the opinion of the present writer, the nature of the alleged crime(s) – relevant for the gravity assessment – must be disentangled by the legal qualification of the material facts under scrutiny, ie the fact that they likely were outrages upon personal dignity rather than torture should not be relevant for the gravity assessment. Legal qualifications are irrelevant for the gravity assessment as long as the conduct is punished by the ICC Statute; rather, the gravity assessment is based on external factors, so that acts that may be labelled the same may be of a very different gravity. By way of concrete example, arguably the war crime of wilful killing pursuant to Article 8(2)(a)(i) or Article (2)(c)(i) ICC Statute is inherently of a more grave nature if a civilian is thrown from a building for being gay<sup>92</sup> rather than if that same civilian were to be shot in the forehead during a military operation – even if the legal qualification of the crime is the same in both cases.<sup>93</sup> In the instant example, one could consider the motivation

<sup>91</sup> See above (n 34).

<sup>92</sup> The example is taken by ISIS's practice of killing civilians accused of being homosexual. See eg A Cowborn, 'Isis Has Killed at Least 25 Men in Syria Suspected of Being Gay, Group Claims' *The Independent*, 5 January 2016, [www.independent.co.uk/news/world/middle-east/isis-has-killed-at-least-25-men-in-syria-suspected-of-being-gay-group-claims-a6797636.html](http://www.independent.co.uk/news/world/middle-east/isis-has-killed-at-least-25-men-in-syria-suspected-of-being-gay-group-claims-a6797636.html).

<sup>93</sup> This allegation regarding the killing of one of the *Mavi Marmara* passengers is reported by the Decision Not to Investigate (n 8) para 59.



of the first crime (the hatred against a minority) relevant for the assessment of gravity under the nature of the crime umbrella, while the barbaric method of execution is relevant under the manner of commission's label. Such an approach would be more in line with the aforementioned scant words of the preparatory works regarding the nature of crimes,<sup>94</sup> and it would also have the effect of avoiding the creation of a hierarchy among different war crimes.

## 5. *Conclusions*

From an examination of the ICC case law and the OTP's practice regarding admissibility pursuant to sufficient gravity, it is clear that there is no well-established practice on the topic. It is possible that the recent *Mavi Marmara* affair will lead to a jurisprudential determination of sufficient gravity, hopefully by the Appeals Chamber. Such an outcome would be extremely welcome since it would reduce uncertainty on this point in the future.

This paper suggests that only objective factors that are external or additional to the elements of the crimes may be relevant in the gravity assessment. Although there is no clear jurisprudential dictum on this point, the ICC case law and the OTP's practice, *Mavi Marmara* litigation included, in part reflect this approach – with the notable exception of the consideration of the nature of the alleged crimes that is still erroneously linked to the qualification of the *actus rei* under scrutiny. However, the suggested approach could prove useful in the future in order to narrow and clarify the list of factors that should be assessed, hereby strengthening the credibility of ICC action and the certainty of the law in this field.

<sup>94</sup> See above (n 79).