

ZOOM IN

The question:

Assessing the gravity threshold under the ICC Statute: Criteria and methods in the light of the *Gaza Freedom Flotilla Case*

Introduced by Emanuele Cimiotta and Chiara Ragni

On 6 November 2015, the Appeals Chamber of the International Criminal Court (ICC), by 3 votes to 2, dismissed the Prosecutor's appeal against Pre-Trial Chamber I's 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' of 16 July 2015. The decision originated from proceedings started in May 2013, when the Comoros, a State party to the ICC Statute, submitted a referral to the ICC Prosecutor in accordance with Articles 12(2)(a) and 14 ICC Statute requesting that the Prosecutor open an investigation into the 31 May 2010 interception of a humanitarian aid flotilla – bound for the Gaza Strip – by the Israeli Defense Forces (IDF), which resulted in the commission of international crimes. One of the vessels involved was registered in the Comoros.

In a report dated November 6, 2014, the Prosecutor, having evaluated the information made available to her during preliminary examination, announced her decision not to proceed with an investigation under Article 53(1) ICC Statute. In her view, notwithstanding that there was a reasonable basis to believe that war crimes were committed in the context of the interception of the *Mavi Marmara* by IDF soldiers, the situation did not meet the gravity threshold for admissibility required by Article 17(1)(d) ICC Statute. Among the elements taken into consideration, she stressed that the number of victims was not comparable to those in other situations before the Court and that, while war crimes were committed, the treatment inflicted on the passengers did not amount to torture or inhuman treatment, the alleged crimes were not systematic, nor did they result from 'a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty'.

In July 2015, at the request of the Union of the Comoros, Pre-Trial Chamber I, for the first time since the Court's establishment, asked the Prosecutor to reconsider her decision not to initiate an investigation, pursuant to Article 53(3) ICC Statute. That decision – which the Prosecutor appealed – touched upon some fundamental questions regarding both the scope of the ICC's jurisdiction and the broadness of the discretion enjoyed by the Prosecutor in deciding whether to open an investigation.

The ICC Statute is quite vague both about the difference between situational gravity and case gravity and about the definition of sufficient gravity itself, within the meaning of Article 17(1)(d). Thus the questions arise, what is the gravity threshold for an ICC investigation, how it should be assessed and whether ICC preliminary examinations require a similar threshold? To address all these issues, is it sufficient to turn to international rules on treaty interpretation? The scholars asked by QIL for their views in this Zoom-in offer different insights on such issues. According to Chantal Meloni, such a lack of clarity had a significant impact on the controversial interpretation of gravity in the *Flotilla* situation. The analysis of this situation makes clear that some important questions have no answers in the Statute. Marco Longobardo, on the other hand, argues that the assessment of gravity should be based on factual circumstances, in particular only on factors other than the elements of international crimes.

