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The limits of discretion in the investigation and prosecution of war crimes at the international level: The Mavi Marmara saga

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1. Introduction

(Re-)Defining the objectives and setting realistic goals of criminal procedure, guaranteeing impartiality and objectivity in the commencement of prosecution, as well as overcoming complex practical obstacles while preserving traditional criminal law principles constitute main challenges for both national and international criminal justice. By focusing beyond national legal orders, but without leaving the distinctive particularities of national and international systems out of sight, this article explores a core issue of international criminal investigation and prosecution. Under study are, in particular, the procedural features and basic criteria determining the selection of situations to be investigated and cases to be prosecuted before the International Criminal Court (ICC). As elaborated below, the provisions of the ICC Statute concerning matters of jurisdiction, preliminary examination, investigation, and criminal prosecution form a rather complex normative system. The present analysis deals with the interpretation and implementation of these norms by the ICC organs particularly with respect to the rules and limits of prosecutorial discretion in the investigation and prosecution of such grave misconduct as war crimes. The relevant issues are examined in conjunction with the concrete and wider goals of international criminal justice as well as the structural and evidentiary difficulties that judicial mechanisms of international mission and composition are faced with. Considering the principle of complementarity and the obligation of the states parties to the ICC Statute to contribute effectively to the prevention of mass atrocities on a global scale, such questions

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are also important for any national legal order that may be called upon to deal with conduct defined under international criminal law.[1]

The analysis starts out by looking at the examination by the ICC authorities of the 'Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia (ICC-01/13)', also known as the *Mavi Marmara* ship incident.[2] The way the prosecuting and judicial authorities handled this incident may well set an example, in the positive or in the negative, for how to deal in the future with similar situations of a comparatively medium scale (at least in terms of the number of immediate victims), but with potentially large-scale transnational and international legal-political[3] and socio-political implications.[4] The conflicting decisions of the Office of the Prosecutor (OTP) and the competent Pre-Trial Chamber of the ICC raise important issues regarding the reasonable allocation of investigative and prosecutorial resources and, at the same time, the achievement of the criminal justice goals normatively set by the international community.

After discussing the main facts and legal decisions related to the preliminary examination of the *Mavi Marmara* incident by the ICC authorities (2), the article continues with the analysis of the mandatory and the discretionary methods for initiating

1 Cf. Delmas-Marty, Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law in *The Oxford Companion to International Criminal Justice,* ed. Cassese (Oxford University Press 2009) p. 97.

2 On the *Mavi Marmara* saga, see previously Longobardo, Everything Is Relative, Even Gravity, 14 *JICJ* (2016) pp. 1011–1030; Meloni, The ICC Preliminary Examination of the Flotilla Situation: An Opportunity to Contextualise Gravity, 33 *Questions of International Law* (2016) pp. 3–20. See also Rashid, *Prosecutorial Discretion in the International Criminal Court. Legitimacy and the Politics of Justice* (Routledge 2022) pp. 144–149; Heller, The Pre-Trial Chamber's Dangerous Comoros Review Decision, *OpinioJuris* (2015). Available at <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/>. All weblinks in the text were last accessed on 6 april 2022.

3 On the legal-political foundations and implications of prosecutorial decisions to commence international criminal proceedings in general, see Knoops, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, 15 *Criminal Law Forum* (2004) pp. 365–390.

4 On the importance of the questions at issue from a legal perspective, see also *Situation on Registered Vessels of Comoros, Greece and 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-01/13-34), ICC-01/13-35, OTP, 27 July 2015. Available at https://www.icc-cpi.int/CourtRecords/CR2015_13302.PDF §§ §§ 4–5 with further references. On transnational and international legal, political, and diplomatic implications, see *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report of 6 November 2014, OTP, 6 November 2014. Available at https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf §§ 10–13. For a media report on the incident, the subsequent national and international inquiries and trials, the diplomatic rift, and the final compensation agreement between Turkey and Israel, see 'Mavi Marmara: Why Did Israel Stop the Gaza Flotilla?', *BBC* (27 June 2016). Available at http://www.bbc.com/news/10203726.

a criminal investigation and commencing a prosecution. The concepts and factors of 'legality' and 'discretion' are examined, first in general (adopting for this purpose an ideal-typical approach) and then in particular within the legal framework of the ICC Statute, along with the relationship between discretionary prosecutorial decisions and the (fulfilment of the) goals of international criminal justice and procedure (3). The next section of the article focuses, with the *Mavi Marmara* incident as a key point of reference, on the rules and policies applied by the OTP with respect to the 'selection' of situations and cases to be brought before the ICC. To this end, the analysis deals more particularly with the criterion most frequently invoked in theory and practice: the concept of 'gravity', which is perceived in the present study not only as an admissibility rule but also as a factor of prosecutorial discretion (4). The article concludes with evaluative remarks concerning the nature and justification of the relevant categorisations and factors applied to the situation and case selection at the international level; this is done specifically in light of the goals of international criminal justice and the normative imperative derived from it, namely to set further limits to prosecutorial discretion (5–6).

2. The Mavi Marmara ship incident

The *Mavi Marmara* incident involves violent acts allegedly committed by the Israeli Defence Forces against the passengers of this ship, which was part of a humanitarian aid flotilla (the 'Gaza Freedom Flotilla') bound for the Gaza Strip, during the Israeli raid on the flotilla on 31 May 2010. The raid resulted in the death of ten activists, Turkish nationals, on board the Mavi Marmara and the injury of many more. The Mavi Marmara vessel was registered in the Union of the Comoros, a state party to the ICC Statute since 2006. On 14 May 2013, the Government of the Comoros submitted to the OTP a referral requesting the Prosecutor of the ICC to initiate an investigation into the crimes committed within the Court's jurisdiction during the Israeli raid on the humanitarian aid flotilla. Under Articles 12(2)(a) and 13(a) ICC Statute, the ICC's jurisdiction over referred conduct listed in the ICC Statute and committed on the territory of the Comoros includes jurisdiction over vessels registered to the latter.

On the same day the referral was received, the Prosecutor of the ICC announced the opening of a preliminary examination on the referred situation, in order to decide whether or not to initiate an investigation. The pertinent standard of proof to be met for proceeding with an ordinary investigation is 'reasonable basis', while the Prosecutor must also consider matters of jurisdiction (temporal, material, territorial/personal), admissibility (complementarity and gravity), and the interests-of-justice criterion.[5] After having received additional communications regarding the Flotilla

[5] See Policy Paper on Preliminary Examinations, OTP, November 2013. Available at https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

incident, the Prosecutor announced, on 6 November 2014, her decision that these legal requirements for opening an investigation into the situation had not been met. The reason given was that the potential case(s) likely arising from an investigation into this incident would not be of *sufficient gravity* to justify further action by the ICC as required by Articles 17(1)(d) and 53(1)(b) ICC Statute. Thus, the Prosecutor concluded the preliminary examination.[6]

On 16 July 2015, however, following an application for review of this decision filed by the Government of the Comoros on 29 January 2015,[7] Pre-Trial Chamber I (by majority) requested the Prosecutor, mainly on the basis of five identified problematic issues, to reconsider her decision not to initiate an investigation regarding the attack against the Humanitarian Aid Flotilla according to Article 53(3)(a) ICC Statute. The Chamber argued that the Prosecutor had committed material errors in her determination of the *gravity* of the potential case(s).[8] Two years later, on 29 November 2017, responding to the Pre-Trial Chamber's request to reconsider, the Prosecutor published what she then considered to be her 'final' decision on the incident.[9] With this decision, the Prosecutor remained of the view that the information available (including information newly made available in 2015-2017) did not provide a reasonable basis to proceed with an investigation and concluded the preliminary examination by reaffirming her previous decision of 6 November 2014. The Prosecutor *inter alia* argued that there were no material errors in her assessment of the facts and especially regarding the gravity of the incident. She specifically stated that, while there is a rea-

6 See the Statement of the Prosecutor on concluding the preliminary examination, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, OTP, 2 November 2014. Available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-06-11-2014. See the entire decision of the Prosecutor (Article 53(1) Report of 6 November 2014, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, OTP, 6 November 2014) at https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf

7 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Public Redacted Version with Confidential Annexes 1, 2 and 3, 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, ICC-01/13-3-Red, Government of the Union of the Comoros, 29 January 2015. Available at https://www.icc-cpi.int/CourtRecords/CR2015_00576.PDF

8 See *Situation on Registered Vessels of Comoros, Greece and 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, Pre-Trial Chamber I, 16 July 2015. Available at https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF See also Rules 108(2) and 108(3) ICC RPE, and *Situation on Registered Vessels of Comoros, Greece and 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, Appeals Chamber, 6 November 2015. Available at https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF.

9 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Final decision of the Prosecution concerning the Article 53(1) Report (ICC-01/13-6-AnxA), dated 6 November 2014 with Public Annexes A-C, E-G and Confidential Annex D, ICC-01/13-57-Anx1, OTP, 29 November 2017. Available at https://www.icc-cpi.int/RelatedRecords/CR2017_07028.PDF.

sonable basis to believe that 'war crimes were committed' by some members of the Israel Defence Forces during and after the boarding of the Mavi Marmara, 'no potential case arising from this situation can, legally speaking, be considered of sufficient gravity under the Rome Statute to be admissible before this Court, therefore barring the opening of an investigation.'[10]

On 15 November 2018, following another application for judicial review by the Union of Comoros, Pre-Trial Chamber I once again directed the Prosecutor to reconsider her decision not to investigate the attack in light of the specific directions of the Pre-Trial Chamber's decision of 16 July 2015.[11] The Prosecutor appealed against the Pre-Trial Chamber's decision.[12] On 2 September 2019, the Appeals Chamber rejected the Prosecutor's appeal, confirmed the Pre-Trial Chamber's decision of 15 November 2018 by noticing, *inter alia*, that the Prosecutor failed to follow the Pre-Trial Chamber's previous legal interpretations and requested the Prosecutor to reconsider her decision on the Comoros' referral in light of the specific directions (particularly the interpretations of the law) included in the Pre-Trial Chamber's decision of 16 July 2015 as well as the directions included in the Appeals Chamber's own judgment. Among other things, the Appeals Chamber stated that the only authoritative interpretation of the relevant law is the one adopted by the Judges of the Court and that the Prosecutor must comply, if directed by the Pre-Trial Chamber, to consider certain available information when determining whether there is a sufficient factual basis to initiate an investigation. However, the Appeals Chamber found (by majority) that it is not for the Pre-Trial Chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach. Consequently, the Appeals Chamber maintained that the 'ultimate decision' as to whether or not to initiate an investigation is that of the Prosecutor.[13]

Subsequently, on 2 December 2019, the Prosecutor, having considered the directions of the Appeals Chamber and the Pre-Trial Chamber, re-filed her final decision on the matter. By acknowledging that the Prosecution is only bound by the legal inter-

10 See the Prosecutor's full statement (30 November 2017) at https://www.icc-cpi.int//Pages/item.aspx?name=171130_OTP_Comoros

11 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Decision on the Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-68, Pre-Trial Chamber I, 15 November 2018. Available at https://www.icc-cpi.int/CourtRecords/CR2018_05367.PDF

12 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Prosecution Appeal Brief, ICC-01/13-85, OTP, 11 February 2019. Available at https://www.icc-cpi.int/CourtRecords/CR2019_00715.PDF

13 *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's Decision on the Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-98, Appeals Chamber, 2 September 2019. Available at https://www.icc-cpi.int/CourtRecords/CR2019_04886.PDF. See the summary of the legal reasoning and the dissenting opinions of Judges Eboe-Osuji and Luz del Carmen Ibáñez Carranza (2 September 2019) at https://www.icc-cpi.int//Pages/item.aspx?name=pr1477.

pretations of the Pre-Trial Chamber and not by the Chamber's factual conclusions or its view of the weight to be assigned to certain factors for the purpose of a gravity assessment under Article 53(1)(b) ICC Statute, the Prosecutor stated that the binding reasoning (*ratio decidendi*) of the Court's aforementioned decisions in the *Mavi Marmara* incident neither concerns the particular facts at issue in this situation nor the weight to be assigned to those facts for purposes of Articles 17(1)(d) and 53(1)(b) ICC Statute. Accordingly, and on the basis of the previous factual analyses conducted by the OTP, she maintained her view that there is no reasonable basis to proceed with an investigation, because there is no potential case arising from this situation that is sufficiently grave within the meaning of Articles 17(1)(d) and 53(1)(b) ICC Statute.[14]

On 2 March 2020, the Government of the Comoros filed yet another application for judicial review, requesting the ICC Pre-Trial Chamber, pursuant to Article 53(3)(a) ICC Statute, to direct the Prosecutor to reconsider her decision of 2 December 2019.[15] In its decision of 16 September 2020 on this last application for judicial review, Pre-Trial Chamber I once again found that the Prosecutor committed a series of errors in her assessment of the gravity of the potential cases arising from the situation and that she did not genuinely reconsidered her decision not to initiate an investigation. Notwithstanding, the Pre-Trial Chamber this time decided *not* to request the Prosecutor to reconsider her decision, as it was unclear, based on the previous guidance received from the Appeals Chamber (in its judgment of 2 September 2019), whether and to what extent the Pre-Trial Chamber had the power to direct the Prosecutor to correct the identified errors.[16] On 22 September 2020, the Government of the Comoros sought for leave under Article 82(1)(d) ICC Statute to appeal the Pre-Trial

14 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Final decision of the Prosecutor concerning the Article 53(1) Report (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019, ICC-01/13-99-Anx1, OTP, 2 December 2019. Available at https://www.icc-cpi.int/RelatedRecords/CR2019_07299.PDF.

15 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Application for Judicial Review by the Government of the Comoros, ICC-01/13-100, Government of the Union of the Comoros, 2 March 2020 at https://www.icc-cpi.int/CourtRecords/CR2020_00762.PDF See also *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Prosecution's Consolidated Response to the Third Application for Judicial Review by the Government of the Comoros (ICC-01/13-100), and the Observations of Victims (ICC-01/13-107 and ICC-01/13-108), ICC-01/13-109, OTP, 11 May 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_01867.PDF

16 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Decision on the Application for Judicial Review by the Government of the Comoros, ICC-01/13-111, Pre-Trial Chamber I, 16 September 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_05261.PDF.

Chamber's decision.[17] Pre-Trial Chamber I issued its decision on this request for leave to appeal on 21 December 2020, finding (by majority) that the issues raised by the Government of the Comoros in its application are not appealable issues and/or do not arise from the impugned decision; it rejected, thus, the request for leave to appeal.[18]

With this latest decision of the Pre-Trial Chamber, which denies a further re-examination of the Prosecutor's decision not to initiate an investigation, the *Mavi Marmara* saga appears to have finally come to an end. Before continuing with the exploration of the core issues at hand, i.e., the factors and limits of prosecutorial discretion in the investigation and prosecution of grave misconduct before the ICC, it must be noted that the present article does not provide a detailed examination of procedural and technical matters concerning the legally binding nature of conflicting decisions issued by the Prosecutor, the Pre-Trial Chamber, and the Appeals Chamber with respect to the *Mavi Marmara* incident. It also does not deal extensively with the assessment of the particular incident's facts by the ICC's Prosecutor and Judges. Rather, the analysis focuses on identifying the merits and limits of legality and discretion at the level of international criminal justice, and uses, for this purpose, the *Mavi Marmara* example as a key point of reference.

17 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Application on behalf of the Government of the Union of the Comoros for Leave to Appeal the Decision on the Application for Judicial Review by the Government of the Comoros of 16 September 2020, ICC-01/13-112, Government of the Union of the Comoros, 22 September 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_05384.PDF. See also *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Victims' Response to the Application on behalf of the Government of the Union of the Comoros for Leave to Appeal the Decision on the Application for Judicial Review by the Government of the Comoros of 16 September 2016, ICC-01/13-113, Office of Public Counsel for Victims, 29 September 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_05445.PDF, and *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Prosecution Response to Request for Leave to Appeal the Decision on the Application for Judicial Review by the Government of the Union of the Comoros of 16 September 2020, ICC-01/13-114, OTP, 29 September 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_05446.PDF.

18 See *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Decision on the Request for Leave to Appeal the Decision on the Application for Judicial Review by the Government of the Comoros, ICC-01/13-115, Pre-Trial Chamber I, 21 December 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_07650.PDF.

3. Discretion in the investigation and prosecution before the ICC

3.1. The concepts of legality and discretion

For systematisation and analysis purposes, the present article adopts an ideal-typical definition of the concepts of 'legality' and 'opportunity or discretion' in the investigation and prosecution of crimes. [19] When identifying and comparing in a functional[20] manner the various types of decisions involved in the formal initiation of the criminal process in different legal orders and traditions,[21] particularly in terms of commencing criminal prosecution and 'selecting' the cases to be brought to justice, a significant number of factors and variables need to be considered. These are directly associated with the problem of simultaneously preserving core rule-of-law values and principles, such as the separation of powers, the effective prevention and suppression of unlawful conduct, the truthful dispute resolution, procedural economy, the preservation of social peace, and the respect for human dignity in conjunction with the principles of

[19] On the theory of ideal types and their application to comparative legal research, see Damaška, Models of Criminal Procedure, 51 *Zbornik Pravnog Fakulteta U Zagreb* (2001) pp. 477, 482. See also Billis, On the Methodology of Comparative Criminal Law Research: Paradigmatic Approaches to the Research Method of Functional Comparison and the Heuristic Device of Ideal Types, *Maastricht Journal of European and Comparative Law* (2017) p. 864, at pp. 872–881 with further references.

[20] On the legal comparison as research method, see, *inter alia*, Jescheck, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (Mohr 1955) pp. 36–37. See also Engelhart, *Sanktionierung von Unternehmen und Compliance* (Duncker & Humblot 2012) pp. 12–13; Hage, Comparative Law as Method and the Method of Comparative Law in *The Method and Culture of Comparative Law*, eds. Adams and Heirbaut (Hart Publishing 2014) pp. 44–49. For a detailed analysis of the functional comparison as fundamental method of criminal law research, see Sieber, Strafrechtsvergleichung im Wandel in *Strafrecht und Kriminologie unter einem Dach*, eds. Sieber and Albrecht (Duncker & Humblot 2006) pp. 111–125. See also Billis 2017 pp. 867–872 with further references.

[21] On the concepts and functional importance of legal traditions and legal cultures, see, *inter alia*, Bell, English Law and French Law – Not So Different?, 48 *Current Legal Problems* (1995) pp. 63-64 and 69–70; Ehrmann, *Comparative Legal Cultures* (Pearson College Div 1976) pp. 6–13; Glenn, A Western Legal Tradition?, 49 *Supreme Court Law Review* (2010) p. at 601, at pp. 609 and 619; Legrand, Comparative Legal Studies and Commitment to Theory, 58 *Modern Law Review* (1995) p. 262, at 263–264; Merryman and Pérez-Perdomo, *The Civil Law Tradition* (Standford University Press 2007) p. 2; van Hoecke and Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine, 47 *ICLQ* (1998) p. 495, at pp. 498–516 and pp. 532–536. See further, with reference also to the (mixed/hybrid) procedural system of the ICC, Billis, *Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren* (Dunker & Humblot 2015) pp. 13ff. and pp. 417ff., and, with reference to the procedural system of the ICTY, Carlson, *Model(ing) Justice. Perfecting the Promise of International Criminal Law* (Cambridge University Press 2018) pp. 71ff.

proportionality and leniency. Unavoidably, in many cases, it all comes down to the balancing of multiple conflicting interests and objectives.[22]

One of the questions raised in this context is what should be given priority: a criminal justice system that operates flexibly and less formally but may not always be in the position to fully guarantee the prosecution of every person suspected to have violated substantive penal rules? *Or* a system operating in a strictly retributive and formal, inflexible manner, which is associated with the risk of logistical complications of procedural and institutional overload occasionally leading to severe, nonproportional results, unjust decisions or even denial-of-justice phenomena?

With these considerations in mind, and based mainly on observations and the identification of central ideas behind the structure and the normative organisation of various real procedural systems (especially those with traditionally considerable impact on other legal orders), we can conceive of at least two pure (extreme) types of methods for formally initiating a criminal investigation and commencing a prosecution: the mandatory and the discretionary.[23] These ideal types, which may include known (easily identifiable) procedural elements and goals, do not need to mirror actual legal systems. Rather, they provide a purely theoretical framework of independent standards and hypotheses regarding potential forms of criminal prosecution as well as the possible positions along a spectrum of procedural extremes for actual legal systems to adopt.

In this sense, prosecutorial decisions in systems based on the mandatory investigation and prosecution of crimes are governed by strict procedural legality. This means that, given a sufficient legal and factual basis in terms of conduct fulfilling the constitutive aspects of a legally defined crime, the competent authorities (the prosecution officers

[22] See, e.g., Beale, Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control in *Discretionary Criminal Justice in a Comparative Context,* eds. Caianiello and Hodgson (Carolina Academic Presss 2015) p. 27, at pp. 28–31. See also Billis and Knust, Alternative Types of Procedure and the Formal Limits of National Criminal Justice: Aspects of Social Legitimacy in *Alternative Systems of Crime Control. National, Transnational, and International Dimensions,* eds. Sieber et al. (Duncker & Humblot 2018) p. 39, at pp. 40–48; Brants, Prosecutorial Sanctions in the Netherlands in *Alternative Systems of Crime Control. National, Transnational, and International Dimensions*, eds. Sieber et al. (Duncker & Humblot 2018) pp. 59–76; Mou, Beyond Legitimate Grounds: External Influences and the Discretionary Power Not to Prosecute in the People's Republic of China in *Discretionary Criminal Justice in a Comparative Context,* eds. Caianiello and Hodgson (Paperback 2015) pp. 115–137; Mylonopoulos, Bargain Practices and the Fundamental Values of the ECHR in *Alternative Systems of Crime Control. National, Transnational, and International Dimensions*, eds. Sieber et al. (Duncker & Humblot 2018) pp. 89–105.

[23] For comparative remarks, see Kuczyńska, *The Accusation Model Before the International Criminal Court* (Springer 2015) pp. 94–110. See also Nsereko, Prosecutorial Discretion before National Courts and International Tribunals, 3 *JICJ* (2005) p. 124, at pp. 126–134. For a brief historical overview of prosecutorial discretion at international level, see Schabas, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, 6 *JICJ* (2008) pp. 731-733.

in particular) are always required to conduct an official investigation and commence prosecution. By contrast, in discretion-based systems, selection and 'opportunity' decisions of the competent authorities are at the epicenter. Even if the law initially requires investigation and prosecution, these systems always allow for the possibility of avoiding the strict application of substantive criminal provisions by refraining *in concreto* from setting the criminal process in full motion; discretionary decisions are usually based on specific pre-defined criteria such as the gravity of the act and the level of guilt of the perpetrator, sometimes also in combination with specific conditions to be fulfilled by the suspect within a probation period (e.g., paying an administrative fine, providing social services or compensating the victim).

3.2. Legality and discretion before the ICC

At the level of international criminal justice, and in particular with respect to the determination of the 'situations' to be investigated and the 'cases' to be prosecuted before the ICC, the ICC Statute and the Rules of Procedure and Evidence (ICC RPE) contain a complex system of provisions.[24] These norms concern primarily matters of:

– jurisdiction and referral of situations;[25]

– preliminary examination, investigation and criminal prosecution;[26]

and

– the judicial confirmation of the charges before trial.[27]

[24] While the more general term 'situation' is defined in terms of 'territorial, temporal and possibly personal parameters', the concept of a 'case' has been defined by Pre-Trial Chamber I as including 'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects', see *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Anx2, Pre-Trial Chamber I, 10 February 2006. Available at https://www.icc-cpi.int/RelatedRecords/CR2008_04250.PDF §§ 21, 31. See also *Situation in Libya, in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11 OA 4, Appeals Chamber, 21 May 2014. Available at https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF §§ 60–62. For a detailed account on ICC's examination and case selection processes 'that entail fundamental questions on the choices of defendants and charging processes as well as negotiating justice through plea agreements', see Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart Publishing 2020).

[25] See Arts. 1, 5–12, 13–17 ICCSt., and Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2013) pp. 655ff.

[26] See Arts. 5–20, 25–29, 53–61 ICCSt., and Rules 44–62, 104–130 ICC RPE.

[27] See Art. 61 ICCSt.

Specifically, the factors the Prosecutor of the ICC must consider when deciding whether to initiate an investigation into a situation referred to the OTP by a state party or the Security Council (the general standard being the existence of a 'reasonable basis to initiate investigation')[28] and, upon investigation, whether to commence prosecution (general standard: 'sufficient basis for a prosecution') are as follows:

> (1) – regarding *investigation*: the existence of a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, and
>
> – regarding *prosecution*: the existence of a sufficient legal or factual basis to seek a warrant or summons under Article 58 (Article 53(1)(a), (2)(a) ICC Statute);
>
> (2) the requirement of admissibility according to the rules of complementarity and the criterion of sufficient gravity of the case (Articles 17 and 53(1)(b), (2)(b) ICC Statute);[29]
>
> and (even if the first two criteria have been met)
>
> (3) – regarding *investigation*: the gravity of the crime and the interests of victims in conjunction with the (non-)existence of substantial reasons to believe that an investigation would nonetheless not serve the interests of justice, and
>
> – regarding *prosecution*: the consideration whether or not a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime (Article 53(1)(c), (2)(c) ICC Statute).

Furthermore, as already demonstrated by the conflicting decisions of the Prosecutor and the Pre-Trial Chamber in the *Mavi Marmara* saga, Article 53(3)(a) ICC Statute allows the Pre-Trial Chamber, at the request of the state party making a referral of a situation to the Prosecutor or of the Security Council, to review a decision of the

[28] The requisite standard of proof of 'reasonable basis' has been interpreted by the Chambers of the Court to require 'a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed', see *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-Corr, Pre-Trial Chamber II, 31 March 2010. Available at https://www.legal-tools.org/doc/f0caaf/pdf/, § 35.

[29] On complementarity, see, *inter alia*, Policy Paper on Preliminary Examinations 2013 pp. 11–15. For Pues 2020 p. 190, 'the principle of complementarity is more than merely a rule to regulate the admissibility of cases before the ICC. It is a limitation on prosecutorial discretion through the need to respect state sovereignty and allow deference to the domestic exercise of jurisdiction.' For details on the gravity criterion, see, *inter alia*, Policy Paper on Preliminary Examinations 2013 pp. 15–16. For a comprehensive analysis, see Rashid 2022 pp. 123ff.

Prosecutor not to initiate investigation or not to commence prosecution according to the aforementioned criteria and to request the Prosecutor to reconsider that decision. In addition, according to Article 53(3)(b) ICC Statute, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on interests-of-justice considerations as defined in Article 53 paragraph (1)(c) or (2)(c). In this latter case, if the Pre-Trial Chamber indeed decides to exercise judicial review, the decision of the Prosecutor not to initiate investigation or commence prosecution shall be effective only if confirmed by the Pre-Trial Chamber. In any case, the Prosecutor of the ICC may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information (Article 53(4) ICC Statute).[30]

In addition, the international community of states has set further 'constitutional' limits on the Prosecutor and his/her decision-making powers regarding specifically the prosecutorial obligations to impartiality, objectivity, the search for the truth, and the effective prosecution of crimes. [31] These factors must be taken into account when initiating an investigation or prosecution. The normative system of the ICC specifically sets out that the Prosecutor shall always act and decide independently as a separate organ of the Court.[32] In this capacity, the Prosecutor is required, in order to establish the truth, to extend investigations to all facts and evidence relevant to an assessment of criminal responsibility under the Rome Statute, and, in doing so, to investigate incriminating and exonerating circumstances equally. The prosecutor shall also take all appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, and take into account the nature of the crime, particularly where it involves sexual violence, gender violence, or violence against children.[33]

30 Regarding the possibility of the Prosecutor to amend or withdraw the charges, see Art. 61(4, 9) ICCSt.

31 Rather critical, DeGuzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court, 33 *Mich. J. Int'l L* (2012) p. 265, at pp. 289–99.

32 See especially Art. 42 ICCSt.

33 See Art. 54 ICCSt. For details, see Policy Paper on Preliminary Examinations 2013 pp. 7–8. See also Policy Paper on Case Selection and Prioritisation, OTP, 15 September 2016. Available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, pp. 7–9, and the Policy on Situation Completion, OTP, 15 June 2021 pp. 7-9. Available at https://www.icc-cpi.int/itemsDocuments/20210615-Situation-Completion-Policy-eng.pdf. See further *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Appeals Chamber, 5 March 2020. Available at https://www.legal-tools.org/doc/x7kl12/pdf/, § 60: 'The Prosecutor's duty, according to article 54(1) of the Statute, is "to establish the truth". Therefore, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor must carry out an investigation into the situation as a whole.'

3.3. Discretion and the goals of international criminal justice

In actual practice, things may be more complicated than the normative blueprint suggests. Certainly, the OTP's task of 'selecting' situations to be investigated or investigating and prosecuting specific cases within a situation is not an easy one. Especially so because prosecutorial discretion is a subject of debate linked to the purposes of international criminal justice. Bearing in mind the significance and special nature of the Court's overall mandate and mission, the overarching goals of international criminal justice – even if not fully and clearly defined yet – as well as the concrete procedural goals set by the normative system of the ICC may provide valid standards for evaluating the effectiveness of the methods and policies applied by prosecutors and judges to the investigation and prosecution of international crimes.[34]

In legal doctrine, especially with regard to the system of the ICC and the *ad hoc* international tribunals, the following overarching goals of international criminal justice are discussed in this context:[35]

[34] See Damaška, Problematic Features of International Criminal Procedure in *The Oxford Companion to International Criminal Justice,* ed. Cassese (Oxford University Press 2009) p. 175. Cf. Carlson 2018 p. 7.

[35] See, e.g., Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (Oxford University Press 2016) chapter I.C.; Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2014) pp. 28–45; Fernandez de Gurmendi, The Practical Importance of Theories of Punishment in International Criminal Law in *Why Punish Perpetrators of Mass Atrocities,* eds. Jessberger and Geneuss (Cambridge University Press 2020) pp. 12–22; Galbraith, The Pace of International Criminal Justice, 31 *Mich. J. Int'l L* (2009) p. 79, at pp. 84–97; Damaška, What is the Point of International Criminal Justice?, 83 *Chicago-Kent Law Review* (2008) p. 329, at pp. 331–40, and Damaška 2009 pp. 177–184; Eser, Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, eds. Swart et al. (Oxford University Press 2011) p. 108, at pp. 109–117; Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012) pp. 131–140; Jackson and Summers, *The Internationalisation of Criminal Evidence* (Cambridge University Press 2012) pp. 111–112; Knust, *Strafrecht und Gacaca* (Duncker & Humblot 2013) pp. 40–97; Ohlin, Goals of International Criminal Justice and International Criminal Procedure in *International Criminal Procedure*, eds. Sluiter et al. (Oxford University Press 2013) pp. 55–68. See also Jackson, Finding the Best Epistemic Fit for International Criminal Tribunals, 7 *JICJ* (2009) p. 17, at pp. 17-22; Rauxloh, *Plea Bargaining in National and International Law* (Routledge 2012) p. 204; Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) pp. 58–60; Schrag, Lessons Learned from ICTY Experience, 2 *JICJ* (2004) pp. 427-428. See also DeGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law* (Oxford University Press 2020) pp. 27ff. Regarding, specifically, the theories/purposes of punishment within international criminal justice and prosecutorial discretion in the selection of situations/cases, see Whiting, Prosecution Strategy at the International Criminal Court in Search of a Theory in *Why Punish Perpetrators of Mass Atrocities?,* eds. Jessberger and Geneuss (Cambridge University Press 2020) pp. 285ff. and van der Wilt, Selectivity in International Criminal Law. Asymmetrical Enforcement as a Problem for Theories of Punishment in *Why Punish Perpetrators of Mass Atrocities?*, eds. Jessberger and Geneuss (Cambridge University Press 2020) pp. 305ff.

- to prevent the most serious crimes of concern to the international community as a whole, particularly to effectively prosecute and put an end to the impunity of perpetrators, to efficiently search for the truth, and to create a historical record with respect to grave crimes that threaten the peace, security and well-being of the world;[36]
- to provide reparations for victims of such atrocities;
- to facilitate the reconciliation of offenders, victims, and the society as a whole; and
- to restore peace, stability, and the rule of law in post-conflict societies.

These cumulatively proposed overarching goals of international criminal justice, which surpass the goals set in national systems, could be seen as overly ambitious, especially in terms of the jurisdictional scope of the one and only permanent International Criminal Court. That is because the ICC has only limited resources and infrastructure. Additionally, while the Court happens to be widely accepted by the national and international communities, it is still not universally recognised. According to its own constitution, the ICC is neither a legal policy forum aiming at the prevention or transitional resolution of every 'conflict' under international criminal law around the globe nor a worldwide organisation for social justice and peace. After all, the Court decides exclusively within the very specific framework set by substantive international criminal law and is bound hereto, first and foremost, by the principle of legality. Hence, its judgments – irrespective of their (in many cases considerable) length – cannot be equated *per definitionem* to historical records.

Furthermore, the specific procedural goals derived from the ICC Statute provide for a further concretisation of the general aims of international criminal justice, by determining, *inter alia*, the scope of action of the ICC organs. These goals are as follows:

- The goal of establishing the 'truth', particularly of thoroughly investigating the facts of the case within the limits set by substantive and procedural law.[37] It must be noted, however, that, in contrast to at least some civil law systems, the obligation of the judicial authorities to actively investigate all facts on their own initiative is not explicitly enshrined in the ICC Statute as a guiding principle of the evidentiary proceedings.
- The protection of the interests of victims as well as the protection of the interests of justice in terms, *inter alia*, of providing the means for social-

[36] See also the ICCSt.-Preamble, as well as Assembly of States Parties, Strategic Plan of the International Criminal Court (under III.), ICC-ASP/5/6, Fifth session, 4 August 2006.

[37] See, especially, Preamble and Arts. 54(1a), 64(6), 67(2), 69(1, 3) ICCSt. See also *Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, Trial Chamber I, 30 November 2007. Available at https://www.icc-cpi.int/CourtRecords/CR2007_04887.PDF, § 47.

ly adequate 'didactic'[38] depiction of the investigated situations through full public disclosure of the fact-finding procedures.[39] In this context, one main challenge is to achieve the harmonic co-existence of the goals of truth-finding and of a socially adequate resolution of penal conflicts with the provisions of the ICC Statute that allow for discretionary decisions and abbreviated proceedings for the purpose of cost-effective prosecutions. This is especially true in cases of confessions resulting from plea-bargaining practices even for the most serious crimes.[40]

- The preservation of fair-trial guarantees and the effective protection of human rights.[41]

Even though it implements such wide procedural goals and a judicial mechanism of international composition that promotes the active participation of a wider group of interested actors compared to national legal systems, the ICC still remains a criminal court. Therefore, like any court, the ICC operates under clearly defined procedural rules setting out its objectives and jurisdictional limits. It would be difficult to conceive, at least at this time, a different operating method, which could be proven to be effective and, most importantly, could be fully accepted by the international community of states.

As already mentioned, the major pragmatic difficulties in fulfilling the purposes of international criminal justice and, in particular, in thoroughly investigating all situations and prosecuting every case before the ICC, even when the jurisdictional and complementarity criteria are met, are rooted in the fact that the resources and infra-

38 See Damaška 2009 p. 184. Cf. Carlson 2018 pp. 50–51: 'The IMT at Nuremberg established the principle that ICTs can perform a didactic function by modeling, and thereby instilling, liberal values for a targeted audience. […] Ad hoc courts are rather "message" courts, or "teaching courts," designed to show by example that (some) crimes will not be met with impunity (statistically speaking, *most* crimes arising from a situation an ad hoc court is addressing are in fact met by impunity)'.

39 See, e.g., Art. 65(4) ICCSt.

40 See, especially, Arts. 64(8a) and 65 ICCSt. On plea-bargaining practices in international criminal justice, see, e.g., Combs, Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties in *The Prosecutor in Transnational Perspective,* eds. Luna and Wade (Oxford University Press 2012) pp. 332–347; Rauxloh 2012 pp. 204–247; Turner and Weigend, Negotiated Justice in *International Criminal Procedure*, eds. Sluiter et al. (Oxford University Press 2013) pp. 1377–1413. See also Damaška, Negotiated Justice in International Criminal Courts, 2 *JICJ* (2004) pp. 1030–1039; Eser 2011 pp. 129–131; Petrig, Negotiated Justice and the Goals of International Criminal Tribunals, 8 *Chicago-Kent Journal of International and Comparative Law* (2008) pp. 7–31; Pues 2020 pp. 122 ff.

41 See especially Arts. 21(3), 54(1c), 55, 56(1b), 57, 64(2, 8b), 67, 68, 69(4, 7) ICCSt.

structure of the Court are not unlimited.[42] Another reason may be the practical obstacles with legal-cultural background related to the Court's multinational composition and/or its mixed or hybrid judicial and evidentiary structures for uncovering crimes of high state officials that are complex and a challenge to prove; in this context, the absence of fully equipped autonomous operational (investigation and enforcement) mechanisms may also play an important role.

In addition, phenomena of political pressure and diplomatic interference even at the highest levels by powerful actors and states cannot be ruled out, which the normative system of the ICC may not always be equipped to isolate in an effective manner and which may further lead to a selective and unequal treatment of situations, cases, and defendants.[43] Of note in this context is also the criticism raised against certain ICC prosecutorial policies alleged to be constantly 'targeting' countries from specific continents, a development that has already engendered growing scepticism of various national states toward a co-operation with the Court.[44] At the same time, the ICC authorities may be justified, particularly in view of the work overload and the limited resources, in 'deselecting' cases that are hugely complex in terms of logistical and evidentiary obstacles and in focusing instead on simpler cases that are, nonetheless, of a special gravity and impact on the international community.[45] Indeed, international

42 See, e.g., Akhavan, The Rise, and Fall, and Rise, of International Criminal Justice, 11 *JICJ* (2013) p. 527, at pp. 534–35; Meron, *Standing up for Justice. The Challenges of Trying Atrocity Crimes* (Oxford University Press 2021) pp. 91–92. See also Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 *Harvard International Law Journal* (2008) p. 53, at pp. 58–67.

43 See, e.g., Art. 16 ICCSt.; for a detailed analysis, see Schuerch, *The International Criminal Court at the Mercy of Powerful States. An Assessment of the Neo-Colonialism Claim Made by African Stakeholders* (Springer 2017) pp. 219–262. Cf. in this context DeGuzman 2020 p. 6: 'The unequal application of law that results from the unequal distribution of power and wealth in the world is surely the greatest impediment to the legitimacy of international criminal law.'

44 See, e.g., Dugard, Palestine and the International Criminal Court – Institutional Failure or Bias?, 11 *JICJ* (2013) pp. 563–570; Nyawo, *Selective Enforcement and International Criminal Law. The International Criminal Court and Africa* (Intersentia 2017); Pues 2020 p. 1; Schabas, The Banality of International Justice, 11 *JICJ* (2013) pp. 547–551. See also 'African Union Accuses ICC of 'Hunting' Africans', *BBC News* (27 May 2013) available at http://www.bbc.com/news/world-africa-22681894. For the situations currently under investigation by the ICC, see at http://www.icc-cpi.int/situations-under-investigations?ln=en.

45 On 'operational feasibility' as a non-self-standing factor for initiating investigations, see Policy Paper on Preliminary Examinations 2013 p. 17. Cf. also the findings and recommendations in the Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System [established by the Assembly of States Parties to the Rome Statute for the International Criminal Court], 30 September 2020, pp. 206ff and pp. 211ff. Available at https://www.legal-tools.org/doc/cv19d5/pdf/. See, however, also Moreno-Ocampo, Integrating the Work of the ICC into Local Justice Initiatives, 21 *American University International Law Review* (2005–2006) pp. 497–503. For an interesting interview with Moreno-Ocampo, see at http://www.huffingtonpost.com/katherine-keating/luis-moreno-syria_b_5191565.html.

criminal justice must be done; but it must also be seen to be done.[46] However, this should apply both ways, not only toward the more obvious but also toward the most problematic incidents.

3.4. Classification of the ICC system and factors of discretion

If we were to undertake a general taxonomic[47] classification within the spectrum of the two extreme types of criminal justice, i.e., the mandatory and the discretionary, we could consider the ICC system to be based on the principle of legality[48] in the investigation and prosecution of crimes, but in combination with limited/exceptional,[49] however ultimately decisive, discretionary[50] elements. Normatively, this is well reflected in the general wording of the preamble of the ICC Statute, Articles 53 and 54(1) ICC Statute, especially the interest-of-justice provisions of Article 53(1)(c), (2)(c) ICC Statute, as well as the relevant provisions on judicial review of the prosecutorial decisions.

Obviously, assessments are an integral part in every prosecutorial decision, for example in decisions concerning the standards of a reasonable or sufficient basis for investigation or prosecution, the evaluation of complementarity standards, or the initiation of investigations *proprio motu* (Article 15 ICC Statute).[51] In the present study, and according to the previous definitions of legality and opportunity, our focus is

46 Paraphrasing *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER Rep 233.

47 On the value of taxonomies in general, see Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, 45 *AJCL* (1997) pp. 5–7.

48 See, e.g., Policy Paper on Preliminary Examinations 2013 p. 2: 'The goal {of a preliminary examination} is to collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. If the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation.' See also Decision (ICC-01/13-34) § 13.

49 See, e.g., Policy Paper on Preliminary Examinations 2013 pp. 16–17: 'In light of the mandate of the Office and the object and purpose of the Statute, there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional.'

50 See, e.g., Policy Paper on Case Selection and Prioritisation 2016 p. 12: 'Considerations relating to the interests of justice will continue to be assessed on a case by case basis by the Office as a matter of best practice in the exercise of prosecutorial discretion over case selection.'

51 For a brief overview of the relevant provisions, see Lepard, How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles, 43 *John Marshall Law Review* (2010) p. 553, at pp. 554–55. See also Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 *AJIL* (2003) p. 510, at pp. 518–522. In this context, on the nature of prosecutorial discretion, see also Goldston, More Candour about Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court, 8 *JICJ* (2010) pp. 388–402. For further relevant distinctions and regarding the concept of discretion 'between law and politics', see Rashid 2022 pp. 1ff. and pp. 27ff.

on the policies applied with respect to the 'selection' of situations and/or cases. Specifically, we are interested in the possibility to refrain *in concreto* from setting the criminal process in motion based on pre-defined criteria, even given objectively a sufficient legal and factual basis in terms of conduct fulfilling the constitutive aspects of a legally defined crime.

An important aspect in this context – besides the interests-of-justice-considerations under Article 53(1)(c), (2)(c) ICC Statute, which definitely fall within the scope of prosecutorial discretion[52] – is the 'gravity criterion' of Articles 17(1)(d) and 53(1)(b), (2)(b) ICC Statute. The main point of reference for the following analysis of the 'gravity criterion' is the *Mavi Marmara* incident. Interestingly, the provision of Article 17(1)(d) ICC Statute was the foundation for the Prosecutor's decision not to initiate an investigation into this incident. This raises the following question: is the 'gravity' of potential cases strictly a legal criterion in terms of a technical admissibility issue? Or is it not also a problem of prosecutorial discretion in the investigation and prosecution of crimes before the ICC?

4. Gravity as admissibility criterion and factor of discretion

Without going into the details of the *Mavi Marmara* incident in terms of substantive criminal law, the Prosecutor of the ICC first acknowledged in her preliminary examination report of 6 November 2014 that, based on the information available to the OTP, [53] there is a reasonable basis to believe that war crimes within the jurisdiction of the ICC were committed on board the Mavi Marmara during the interception of the flotilla on 31 May 2010 in the context of the international armed conflict with respect

[52] See, e.g., de Souza Dias, Interests of Justice: Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court, 30 *LJIL* (2017) pp. 731–751. See also Heinze and Fyfe, Prosecutorial Ethics and Preliminary Examinations at the ICC in *Quality Control in Preliminary Examination, Volume 2*, eds. Bergsmo and Stahn (Torkel Opsahl Academic EPublisher 2018) pp. 40–63; Pues 2020 pp. 143ff.; Rashid 2022 pp. 177ff. According to Bitti, The Interests of Justice – where does that come from? Part II, *EJIL:Talk!* 14 August 2019. Available at https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/, the interests-of-justice criterion 'was created first and foremost to introduce prosecutorial discretion as clearly demonstrated by its origins in the preparatory works of the Statute'. Regarding specifically the Prosecutor's discretionary power (not) to initiate investigations based, *inter alia*, on the interests-of-justice criterion and the extent to which judicial review of these powers is permitted under Arts. 15(1–4), 53(1)(c) and (3) ICCSt. and Rule 48 ICC RPE, see Judgment (ICC-02/17 OA4, Appeals Chamber) §§ 19–46; cf. also Decision (ICC-01/09-19-Corr) § 63 and *Situation in the Republic of Côte d'Ivoire*, 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, Pre-Trial Chamber III, 15 November 2011. Available at https://www.icc-cpi.int/CourtRecords/CR2011_18794.PDF, § 207.

[53] See Article 53(1) Report 2014 § 4.

to the blockade of the Gaza strip.[54] Yet the Prosecutor concluded that the case(s) that would likely arise from the investigation into the situation would be inadmissible by force of Articles 17(1)(d) and 53(1)(b) ICC Statute. This is why the Prosecutor decided not to initiate further investigations: Based on the assessment of the information included in the report, because the situation on board the ships within the Court's jurisdiction were not large-scale – in general and in terms of the number of victims in particular – or not pursuant to a plan or policy, any case or cases potentially arising from the incident would not be sufficiently grave to justify further action by the Court.[55]

In her report, the Prosecutor noted that, while she did not want to minimise in any way the impact of the alleged crimes on the victims and their families, the gravity requirement is an *explicit legal criterion* set by the Rome Statute she was required to follow. She also noted that, in her decision, she was 'guided by the Rome Statute, in accordance with which, the ICC shall prioritise war crimes committed on a large scale or pursuant to a plan or policy.'[56] This can be seen as in line with the general prosecutorial strategy of the OTP, according to which, although any crime falling within the jurisdiction of the Court is serious, the Office only assesses the admissibility requirement of 'sufficient gravity' under Article 17(1)(d) ICC Statute regarding the *most* serious crimes alleged to have been committed and those *most* responsible for those crimes.[57] Relevant assessments of the OTP should not be based on excessively 'formulistic grounds' and should include both quantitative and qualitative considerations, with the main factors being the scale, nature, manner of commission of the crimes, and their impact.[58]

The Pre-Trial Chamber I, exercising judicial review over the Prosecutor's decision, re-examined the legal issues as well as the particular circumstances of the situation. In the process of searching for the factors allowing the classification of the situation

54 See Article 53(1) Report 2014 § 19. According to Decision (ICC-01/13-34) §§ 28–30, there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment under Art. 8(2)(a)(ii) ICCSt. were also committed.

55 For details, see Article 53(1) Report 2014.

56 See at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-06-11-2014. See also Art. 8(1) ICCSt., and para. 29(2) Regulations of the Office of the Prosecutor.

57 See *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, OTP, 26 November 2009. Available at https://www.icc-cpi.int/CourtRecords/CR2009_08645.PDF, §§ 55 and 78; Decision (ICC-01/09-19-Corr) § 50.

58 See Policy Paper on Preliminary Examinations 2013 pp. 10, 15–16 and 19. On these factors and further sub-factors elaborated and adopted by the OTP and the Court in this context, see the analysis in DeGuzman 2020 pp. 101ff., with special reference to the additional requirement that the gravity threshold is met only if the groups of persons likely to be investigated capture those who bear the greatest responsibility for the alleged crimes committed (see in this respect, e.g., Decision (ICC-01/09-19-Corr) § 60).

as one of 'sufficient gravity'[59] under Article 17(1)(d) ICC Statute, the Chamber arrived at a different assessment of the available information on the facts. In its decision of 16 July 2015, the Chamber identified, *inter alia*, material errors in the Prosecutor's assessment of the possibility to prosecute those persons who may bear the greatest responsibility for the identified crimes committed during the Israeli raid. The Judges also identified errors in the Prosecutor's assessment of the main criteria for establishing the gravity of potential cases, that is:

- the scale (*especially regarding the supposedly limited number of victims*);
- the nature;
- the manner of commission (*especially with respect to the question whether the identified crimes were systematic or resulted from a deliberate plan or policy to attack, kill, or injure civilians*); and
- the impact of the potential crimes.

The Pre-Trial Chamber therefore requested the Prosecutor to reconsider her decision not to initiate an investigation. In its decision-making process, the Chamber took into account, *inter alia*, the scale of the identified crimes and objected specifically to the Prosecutor's assessment of the number of victims – 'ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or

[59] According to the ICC Appeals Chamber in *Situation in the Republic Of Mali, in the Case of the Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance degravité de l'affaire soulevée par la défense', ICC-01/12-01/18 OA, Appeals Chamber, 19 February 2020. Available at https://www.icc-cpi.int/CourtRecords/CR2020_00536.PDF §§ 1–2: 'The gravity requirement under article 17(1)(d) of the Statute aims at excluding those rather unusual cases where the specific facts of a given case technically qualify as crimes under the jurisdiction of the Court, but are nonetheless not of sufficient gravity to justify further action. The gravity assessment under article 17(1)(d) of the Statute must be made on a case-by-case basis. It involves a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person. Quantitative criteria alone, including the number of victims, are not determinative of the gravity of a given case'. On the concept of sufficient gravity under Art. 17(1)(d) ICCSt., see further, e.g., Decision (ICC-01/09-19-Corr) §§ 60–62; Decision (ICC-02/11-14-Corr) §§ 201–205; *Situation in Georgia*, Decision on the Prosecutor's Request for Authorization of an Investigation, ICC-01/15, Pre-Trial Chamber I, 27 January 2016. Available at https://www.icc-cpi.int/courtrecords/cr2016_00608.pdf § 51; *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17, Pre-Trial Chamber II, 12 April 2019. Available at https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF, §§ 80ff. See also Longobardo, Factors Relevant for the Assessment of Sufficient Gravity in the ICC. Proceedings and the Elements of International Crimes, 33 *QIL* (2016) pp. 21–41; 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 *JICJ* (2012) p. 525, at pp. 534–543.

inhuman treatment' – as comparatively relatively limited. The Judges also evaluated the means of force used during the raid by the Israelis, the indications of an unnecessarily cruel treatment of the ship's passengers by the Israeli forces and the subsequent attempts by the perpetrators to conceal the crimes, as well as the significant consequences of the incident for the lives of the direct and indirect victims of the attacks.[60] Finally, the Chamber also noted

> '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.'[61]

Regarding the legal aspects of prosecutorial discretion, the Pre-Trial Chamber I recognised in its decision on the *Mavi Marmara* incident of 16 July 2015 the gravity criterion more as a strict legal requirement than a factor of discretion. Specifically, it stated that while the Prosecutor has discretion to open an investigation under Article 53 ICC Statute,

> 'that discretion expresses itself only in paragraph (c), i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require the application of exacting legal requirements. This is not contradicted by the low evidentiary standard of Article 53(1)(a) of the Statute, or by the fact that an analysis under Article 53(1)(b) of the Statute involves potential and not actual cases.'[62]

Nonetheless, in its judgment of 2 September 2019 the Appeals Chamber noted that 'the assessment of gravity involves, as in the case at hand, the evaluation of numerous factors and information relating thereto, which the Prosecutor has to balance in reaching her decision. In this regard, … the Prosecutor enjoys a margin of appreciation …'.[63] This particular determination by the Appeals Chamber was subsequently invoked by the Prosecutor in her decision of 2 December 2019 to establish a direct link between the gravity assessment and (what she identified as) the 'selective mandate' of the ICC.[64]

60 For details, see Decision (ICC-01/13-34) §§ 21ff. Highly critical Heller 2015.

61 Decision (ICC-01/13-34) § 51.

62 Ibid. § 14.

63 Judgment (ICC-01/13-98, Appeals Chamber) § 81.

64 See Final decision of the Prosecutor (revised) 2019 §§ 95–96.

Moreover, the Policy Paper on Case Selection and Prioritisation of 15 September 2016 drafted by the OTP, which sets out guidelines for the exercise of prosecutorial discretion in the selection and prioritisation[65] of cases for investigation and prosecution,[66] also recognises the important role of 'gravity' when defining the content and limits of prosecutorial discretion. It refers, especially, 'to the Office's strategic objective to focus its investigations and prosecutions, in principle, on the most serious crimes within a given situation that are of concern to the international community as a whole.'[67] This Policy Paper apparently distinguishes between 'gravity as a criterion for admissibility' under Article 17(1)(d) ICC Statute and gravity as a 'predominant case selection criterion' within a situation already under investigation. In the latter sense, gravity is embedded also into considerations regarding the 'degree of responsibility of alleged perpetrators' as well as a truthful and representative 'charging' (with the degree of responsibility of alleged perpetrators and the potential charges forming the other two main criteria of discretion, according to the Policy Paper).[68] This distinction aside, the OTP notes that the assessment of the gravity of crimes as a case selection criterion includes the factors of scale, nature, manner of commission, and impact of the crimes. This means gravity as a case selection criterion 'is assessed similarly to gravity as a factor for admissibility under Article 17(1)(d). However, given that many cases might potentially be admissible under Article 17, the Office may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under Article 17'.[69]

65 On the criteria for prioritisation of the investigation and prosecution of cases that already meet the selection criteria, see Policy Paper on Case Selection and Prioritisation 2016 pp. 15–18. For an in-depth analysis of the case selection process, see Pues 2020 pp. 85ff.

66 Policy Paper on Case Selection and Prioritisation 2016 p. 3.

67 Ibid. pp. 12–13.

68 Ibid. p. 4 and pp. 12–15. According to Rashid 2022 p. 128, '[g]ravity has two different and distinct roles within the ICC regime. On the one hand, where gravity/seriousness is considered in the exercise of prosecutorial discretion, it would be an element […] in selecting among legally worthy situations and cases (i.e. that satisfy jurisdictional and admissibility requirements). On the other hand, and, in fact, prior to that in the prosecutorial decision-making process, "sufficient gravity" (Article 17 (l)(d)) functions as a legal threshold that imposes a standard of gravity higher than the already grave nature of the crimes that fall under the ICC's jurisdiction.'

69 Policy Paper on Case Selection and Prioritisation 2016 p. 13. On the individual material aspects of gravity as case selection criterion, i.e., the scale, nature, manner of commission and impact of the crimes, see at pp. 12–14 of the Policy Paper. See also DeGuzman 2020 pp. 113ff. On gravity as a 'relative concept', see Longobardo 2016 pp. 1021–1030. For a thorough and systematic analysis of the different aspects of the 'gravity' concept, also with extensive references to the Court's earlier practice, see Rashid 2022 pp. 123–156. On 'legal' and 'relative' gravity and the distinction between 'prosecutorial discretion' and 'legal interpretive discretion', see also Rashid, The Hidden Discretionary Capacity of the ICC Prosecutor: Revisiting the Analysis of Legal and Relative Gravity, 24 *The International Journal of Human Rights* (2020) p. 773.

5. Evaluation

The above distinctions and categorisations appear to be somewhat formalistic, at least when examining the limits of discretion in the investigation and prosecution at the international level. Specifically, the gravity requirement of Article 17(1)(d) ICC Statute is indeed labelled as a legal criterion of admissibility. At the same time, the matter of 'gravity', as a criterion under Article 17(1)(d) ICC Statute *and* as an abstract ever-present factor in all prosecutorial considerations, falls essentially within the scope of prosecutorial discretion in the investigation and prosecution of crimes. This is a fact both at the stage of preliminary examinations in order to decide the initiation of an investigation into a situation as a whole (as with respect to the *Mavi Marmara* incident) *and* at the following stage of selecting and prioritising cases to be investigated and prosecuted within an existing situation.[70]

The prosecutorial system of the ICC (as is true also for many national systems) is normatively oriented toward factors such as the general interests of justice and the gravity of the crime when it comes to the question whether or not to initiate an investigation and/or commence a prosecution with respect to incidents for which there is a legally and factually sufficient/reasonable basis to believe that a conduct fulfils, at least initially, the constitutive aspects of a legally defined criminal offence. One major difference between national and international systems is that, while national legal orders usually allow discretionary prosecutorial decisions only for the lighter crimes, the nature of conduct under international criminal law that, once it has crossed the jurisdictional threshold, will be assessed within the framework of prosecutorial discretion, will almost always be serious or grave. Further, unlike in some national legal orders, the approval of the suspect, the victims, and/or the court not to initiate (or to suspend) a criminal investigation or prosecution before the ICC is not presupposed and no special conditions apply thereto for the parties to fulfil. Not investigating a situation or not prosecuting a case on the basis of the interests-of-justice and gravity criteria is a matter to be handled solely and authoritatively by the Prosecutor of the ICC, and subsequently, if necessary, at the level of judicial review by a Pre-Trial Chamber (which is also not completely free of objections, particularly in view of the accusatory principle governing modern rule-of-law systems).

There are, of course, specific rules set by the ICC Statute to guide the actions of the OTP. But – as the conflicting decisions of Prosecutor and Pre-Trial Chamber with respect to the *Mavi Marmara* incident demonstrate – the material scope of these rules can be interpreted very broadly and the (importance of the) facts of each incident can be evaluated very differently by the various organs of the ICC. As a result, it may all come down to the legal subsumption of the available information by the prosecutorial or judicial body examining each specific incident according to their individual views on relevancy and efficiency, and to how these concepts better fit in with the

[70] Regarding differentiations with respect to the material scope of the prosecutorial assessments at the different procedural stages, see Policy Paper on Case Selection and Prioritisation 2016 p. 9.

Court's mission. It must also be pointed out that all these assessments take place at a very early stage of the proceedings and in the absence of a prior, truly thorough and public examination of the situation at hand.[71] In this sense, at least in terms of the gravity criterion, discretion in the investigation and prosecution before the ICC becomes predominantly a matter of procedural or operational economy. (This is a fact not denied in the relevant OTP policy papers, and the Prosecutor's decisions of 29 November 2017 and of 2 December 2019 on the *Mavi Marmara* incident explicitly reaffirm this position.[72]) Thus, the fulfilment of the aforementioned overarching goals of international criminal justice or of other concrete goals such as resocialisation and offender-victim mediation outside the courtroom is not a priority of prosecutorial decisions sharing such views about the selective mandate of the ICC.

6. Concluding thought

It is not easy to dispute the pragmatic aspect of the argument noted in the Policy Paper on Case Selection and Prioritisation that

> it is not the responsibility or role of the Office to investigate and prosecute each and every alleged criminal act within a given situation or every person allegedly responsible for such crimes. This would be both practically unfeasible and run counter to the notion of complementary action at the

71 See in this respect also Decision (ICC-01/13-34) §§ 28–30.

72 See Final decision concerning the Article 53(1) Report 2017 pp. 15–16: 'Any investigation requires considerable investment of limited resources and operational assets which may not otherwise be used for other situations under investigation, where the Art 53(1) standard *was* clearly met. Thus, although the drafters of the Statute did not expressly include the proper allocation of the Court's resources among the Art 53(1) criteria, such considerations cannot be ignored when considering the merits of an expansive reading of Art 53(1). Indeed, it may be in precisely this context, at least in part, that the "sufficient gravity" requirement was included as an express criterion for initiating any investigation.' See also Final decision of the Prosecutor (revised) 2019 §§ 95–96. Cf. also the findings and recommendations in the Final Report of the Independent Expert Review 2020 pp. 206ff., which, having regard to the limited resources available to the OTP and the Court, propose even narrower standards for admissibility and situation/case selection, *inter alia* by applying a higher gravity threshold.

international and national level, as highlighted in the preamble and Article 1 of the Statute.[73]

Nevertheless, the notion of prosecutorial discretion as the *main* tool for securing operational and procedural efficiency should be second-guessed. At a minimum there must be a stricter setting of limits regarding prosecutorial discretion in the ICC system, especially in view of the seriousness and international impact of cases usually handled by the Court.

Not only international but national courts as well are diachronically confronted with work overload and limited resources, which require quick disposals and resolutions. In this sense – notwithstanding all the differences setting international criminal justice apart from national – it is legitimate to ask about the consequences if the prosecutorial mechanisms of national systems were similarly adopting a broad spectrum of discretionary powers in investigation and prosecution based on a vague gravity criterion. Regarding conceptual vagueness in discretionary assessments, it is furthermore important to raise questions such as this: is it possible, for example, to measure the gravity of a crime by how many lives were lost; if so, what is the 'correct' number of lives? Prosecutor and Pre-Trial Chamber of the ICC did not seem to agree on this with respect to the *Mavi Marmara* incident, and the Prosecutor's decisions of 29 November 2017 and of 2 December 2019 have complicated things even more in this regard.[74]

Overall, it could be a step forward to set clear normative limits to decision-making processes involving the aspect of 'gravity', even if that means further restricting prosecutorial discretion. Ultimately, pragmatic reasons and the formalistic adherence to procedural rules should not result in situations where the overarching goals of inter-

[73] Policy Paper on Case Selection and Prioritisation 2016 p. 4. On this particular rationale for prosecutorial discretion within the ICC, see, e.g., Brubacher, Prosecutorial Discretion within the International Criminal Court, 2 *JICJ* (2004) p. 71, at pp. 75–77. Cf. also Policy on Situation Completion 2021 pp. 9-10: '[t]his [objectivity] requirement does not imply that the Office must investigate every case in the situation, but rather ensures that investigations on selected cases are carried out objectively and based on the evidence. The decision whether or not to prosecute a selected case will be determined on its own merits […] it is generally understood that the Office will never be in a position to investigate every potentially admissible case in a situation. In this context, the Office reaffirms that its overall aim in carrying out investigations and prosecutions is to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished'.

[74] See Final decision concerning the Article 53(1) Report 2017 §§ 75–80, and Final decision of the Prosecutor (revised) 2019 §§ 30–36, 44–54, 89–97. Regarding legal-ethical considerations on what standard should be used to measure gravity and seriousness in international criminal justice, see Lepard 2010 pp. 558–563. See also DeGuzman 2020 pp. 14ff. and 98ff. for a thorough study on the gravity concept and – in all its vagueness – on its implications for international criminal law's legitimacy.

national criminal justice and the concrete procedural goals set by the ICC Statute are neglected, and they certainly should not facilitate denial-of-justice phenomena.