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PRE-TRIAL CHAMBER I

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Cuno Tarfusser
Judge Péter Kovács

SITUATION ON REGISTERED VESSELS OF THE UNION OF THE COMOROS, THE HELLENIC REPUBLIC OF GREECE AND THE KINGDOM OF CAMBODIA

Public with Public Annex

Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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Introduction

1. The Government of the Union of the Comoros ("Comoros") seeks review[1] of the Office of the Prosecutor's ("Prosecution") determination not to proceed with an investigation into the situation on registered vessels of the Union of the Comoros, the Hellenic Republic of Greece, and the Kingdom of Cambodia.[2] These vessels, the *Mavi Marmara*, the *Eleftheri Mesogios* or *Sofia*, and the *Rachel Corrie* (together, "Three Vessels"), formed part of an eight-ship flotilla which sought to reach the coast of Gaza in 2010, breaching the naval blockade established by the Israel Defence Forces ("IDF"). These vessels were intercepted and boarded by the IDF.[3] Among the Three Vessels (over which the Court has jurisdiction), the boarding of the *Mavi Marmara* and the *Sofia* was opposed to varying degrees by the passengers and crew.[4] The *Rachel Corrie* was boarded peacefully, at another time and place, and was not the scene of any crime.[5]

2. The Prosecution has determined that there is a reasonable basis to believe some IDF troops committed war crimes during and after boarding the *Mavi Marmara* and in the course of sailing her to port.[6] These included the wilful killing of ten passengers and the injury of up to fifty to fifty-five others,[7] and outrages upon the personal dignity of detained passengers[8] ("Identified Crimes").[9] These appear to be

[1] ICC-01/13-3-Conf ("Request"). A public redacted version was also filed as ICC-01/13-3-Red.
[2] ICC-01/13-6-AnxA ("Report").
[3] *See* Report, paras.11-14.
[4] *See* Report, paras.40-41, 78, 80-82, 94.
[5] *See e.g.* Report, paras.81-82, 95.
[6] Report, paras.132, 149. This view is based on an analysis of the facts presented to the Prosecution, and is not the product of an independent investigation. The Prosecution also emphasises that it has taken no position at this preliminary examination stage on the question of self-defence, which is material to any individual criminal responsibility: *see* paras.56-57.
[7] *See* Report, paras.13, 38-39, 42, 53, 58-61, 75-77. *See* Rome Statute ("Statute"), arts.8(2)(a)(i) (wilful killing), 8(2)(a)(iii) (wilfully causing great suffering, or serious injury to body or health).
[8] *See* Report, paras.64-65, 69, 71-72, 138. The information provided to the Prosecution suggests a reasonable basis to believe that some detained passengers were subject to unlawful treatment such as overly tight handcuffing for extended periods, beating, denial of access to toilet facilities and personal medication, limited access to food and drink, enforced kneeling, exposure to the elements, blindfolding, threats or intimidation, or physical or verbal harassment. *See* Statute, art.8(2)(b)(xxi) (outrages upon personal dignity).
[9] For the purpose of this response, the Prosecution uses the term "Identified Crimes" to refer to any crime in respect of which it concluded that there was a reasonable basis to believe that that crime had been committed, consistent with article 53(1)(a) of the Statute.

serious crimes which merit investigation and, potentially, prosecution by the appropriate authorities.[10] This holds true notwithstanding the Prosecution's conclusion that it cannot initiate such an investigation itself. Any potential case would be inadmissible before this Court due to its lack of gravity.[11]

3. The Prosecution further determined, conditionally, that there is a reasonable basis to believe that the forcible boarding of the *Mavi Marmara* and the *Sofia* would have constituted unlawful attacks on civilian objects *if* the blockade imposed by the IDF had been unlawful.[12] The Prosecution refrained, however, from determining the legality of the blockade,[13] a matter of international dispute.[14] Although the lack of international consensus does not—and did not—fetter the Prosecution's independent assessment of the law and facts, it was unnecessary in the specific facts of this situation to resolve the matter further.[15]

4. The Prosecution's decision not to initiate an investigation, for the reasons set out in the Report, in no way lessens the seriousness of the Identified Crimes. Nor should it lead to impunity.[16] The duty to investigate and, potentially, prosecute such crimes is vested not only in the Prosecution, as a minister of justice for the Court, but

[10] *See* Report, para.134 (*citing* Statute, Preamble, para.4, and arts.1, 5)
[11] *See* Report, paras.134-148, 150.
[12] *See* Report, paras.92, 96, 132, 142, 149. *See* Statute, art.8(2)(b)(ii) (unlawful attack on a civilian object).
[13] *See* Report, paras.30, 32-34.
[14] *See* Report, para.30, fn.42.
[15] *See* Report, para.142 (considering expressly whether the Prosecution's gravity assessment, which controlled its decision not to initiate an investigation in this situation, would be significantly altered even if it found a reasonable basis to believe offences under article 8(2)(b)(ii) had been committed, and concluding that it would not).
[16] *Contra* Request, paras.7, 58, 135. Not only does the Comoros confuse considerations of complementarity and gravity, but it is incorrect to assert that "no alleged perpetrators are being prosecuted in Israel or any other jurisdiction for the crimes that were committed". As the Comoros subsequently notes (para.87), Turkish courts have commenced *in absentia* proceedings concerning these alleged crimes. *See e.g. Al Jazeera*, 'The case for Mavi Marmara: slingshots vs. helicopters', 14 April 2014. Attempts have also been made to initiate proceedings in States party to the Statute, including the United Kingdom (civil and criminal proceedings), the Federal Republic of Germany, and Sweden. A number of these proceedings have been dismissed or discontinued by prosecutorial authorities. *See e.g. The Independent*, 'British activists launch lawsuit over deadly raid on Gaza 'peace flotilla'', 4 January 2015; *The Jerusalem Post*, 'Israel praises German prosecutor for rejecting Mavi Marmara complaint', 29 January 2015; *Haaretz*, 'Swedish prosecutor drops probe into IDF seizure of Gaza flotillas', 9 December 2014. Israel has prosecuted some junior IDF troops for property offences associated with the incident: *see* Report, para.85, fn.156.

also *inter alia* in States Parties to the Statute.[17] The Prosecution notes that there is no legal impediment to the initiation of criminal proceedings by the Comoros, or other States with jurisdiction, should their authorities so determine.[18]

5. Nevertheless, the Request should be dismissed. It variously misunderstands or disagrees with the Prosecution's analysis and conclusions, and confuses the matters central to the Prosecution's preliminary examination in this situation. The fact that the Comoros may take a different view of the facts is insufficient to justify the Pre-Trial Chamber's review, provided that the Prosecution's appreciation is not irrational, absurd, or so unreasonable that no reasonable person could have made it.

Confidentiality and procedural matters

6. This response is filed confidentially to reflect the confidential status of the Request, in accord with regulation 23*bis*(2) of the Regulations of the Court ("Regulations"). The Prosecution simultaneously files a public redacted version.

7. The Prosecution recalls the Pre-Trial Chamber's decision authorising it to file this response not exceeding 100 pages.[19] To the extent deemed necessary, the Prosecution requests authorisation to exceed in this response the average number of words per page, as governed by regulation 36(3).[20] The Prosecution notes in this regard that it fully complies not only with every other requirement of regulation 36(3), but also that it is well within the total number of words available to it as a consequence of the Pre-Trial Chamber's decision.[21]

[17] *See* Statute, Preamble, para.6 ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").
[18] *See* ICC-01/13-3-Conf-Anx1, p.7, para.23 ([REDACTED]).
[19] ICC-01/13-5, para.6.
[20] This response averages approximately 337 words per page.
[21] This response is approximately 17,870 words in length. If the Prosecution had employed the full page limit available, it could have filed a response up to 30,000 words in length.

Submissions

8. In the Report, the Prosecution applied the law correctly,[22] and reasonably assessed the information presented to it.[23] The Request shows no facts which were not taken into account by the Prosecution.[24]

9. Although some of the submissions in the Request are framed as matters of law, all of the key arguments actually turn upon matters of fact. In particular, the Request challenges the Prosecution's identification of the facts relevant to its determination, the Prosecution's analysis of those facts, and the Prosecution's conclusions based on its analysis. Those arguments must fail, however, because they demonstrate merely that the Comoros misunderstands key aspects of the reasoning in the Report or disagrees with it.

10. The Prosecution reiterates that the preliminary examination conducted in this situation concerned possible crimes arising out of the interception and subsequent boarding of the Three Vessels on the high seas. The question of possible crimes committed in Palestine (including Gaza) is the subject of a separate preliminary examination, within the scope of the distinct temporal jurisdiction conferred upon the Court.[25]

11. In its submissions, the Comoros tends, inappropriately, to confuse the situation aboard the Three Vessels and the situation in Gaza.[26] Nothing in the legal or factual analysis conducted by the Prosecution supports such an approach, and this pervasive misapprehension undermines many of the Comoros' arguments. Whereas

[22] *Contra e.g.* Request, paras.6, 8-12, 61, 140.
[23] *Contra e.g.* Request, paras.8, 141.
[24] *Contra e.g.* Request, paras.20-23, 61, 140-141.
[25] *See below* fn.111. The Court's temporal jurisdiction in the Palestine situation commences from 13 June 2014, almost four years after the events relevant to this situation.
[26] *See e.g.* Request, paras.13-16, 18-19, 59. The Comoros also appears on occasion to confuse the distinct character of events aboard the different vessels of the flotilla: *see below* paras.89-93.

the Report does take account of circumstances beyond the Three Vessels, it does so only to the extent that those circumstances are relevant to its analysis.

12. Throughout its submissions, the Comoros manifestly disagrees with the Prosecution's analysis, and the prevailing law, while failing to show any error. The Prosecution will address each of the issues raised by the Comoros in turn, within the context of the appropriate standard of review. The arguments of the Request are reordered in part, to group related issues together.

A. The Pre-Trial Chamber should adopt a deferential standard of review

13. When a situation is referred to the Court by a State Party or the UN Security Council, the Prosecution is obliged to open an investigation unless there is "no reasonable basis to proceed" under the Statute. In "*decid[ing]* whether to initiate an investigation" (emphasis added), the Prosecution must consider whether the factors enumerated in article 53(1)(a) to (c) of the Statute are established.[27] In its evaluation of those factors, the Prosecution must necessarily evaluate and weigh the information available.[28] The deference due to the Prosecution's assessment in this regard is reinforced by the fact that even the Pre-Trial Chamber, when reviewing the Prosecution's determination not to initiate an investigation pursuant to article 53(1)(a) or (b), may only "request" the Prosecution "to reconsider that decision".[29]

14. The Prosecution agrees with the Comoros that the Pre-Trial Chamber should adopt a deferential standard of review to the Prosecution's determination under

[27] Statute, art.53(1).
[28] *See e.g.* Statute, arts.17, 53(1). *See also* Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: OUP, 2010) ("Schabas"), pp.347-348 ("Special Rapporteur James Crawford said that grounds for admissibility 'might include, say, […] the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level. Failing such power, the court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free.' […] Eventually, as the negotiations evolved, the Prosecutor was given discretion not to proceed with a situation or case that is not of sufficient gravity. Prosecutorial discretion should provide an adequate bulwark against the concerns expressed by Professor Crawford").
[29] Statute, art.53(3)(a).

Article 53(1).[30] However, in doing so, the Pre-Trial Chamber should take into account the primary role of the Prosecution in the preliminary examination procedure, which is distinct from that of a Chamber in judicial proceedings.[31] For the purpose of article 53(3), the Pre-Trial Chamber is not in the position of a higher court reviewing the decision of a lower court, even upon a matter of discretion, but is more akin to a court reviewing a decision by a governmental body. Although the terminology commonly used may be similar,[32] the necessary deference required may be greater. For example, consistent with the approach of this Court,[33] the ICTY Appeals Chamber has asserted that a decision taken by a non-judicial organ may be quashed only if the decision-maker:

> (i) failed to comply with the legal requirements […]; (ii) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).
>
> Unless unreasonableness has been established, there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled. The party challenging the administrative decision bears the burden of demonstrating that: (i) an error of the nature described has occurred; and (ii) such error has significantly affected the impugned

[30] *See* Request, paras.48-53 (citing *inter alia* ICC-02/04-01/05-408 OA3, para.81, quoting with approval the ICTY Appeals Chamber that "the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision'".

[31] *See also* Request, para.111 (referring to the Prosecution as "[t]he Chamber").

[32] In the context of the Appeals Chamber's review of discretionary decisions of the Pre-Trial or Trial Chambers, *see e.g.* ICC-02/05-03/09-632-Red OA5, paras.30 (quoting with approval the standard for interfering with a discretionary decision, "(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion"), 32; ICC-02/04-01/05-408 OA3, paras.79-81. *Compare below* fn.34.

[33] *See e.g.* ICC-Pres-RoC72-02-05, para.16; ICC-01/05-01/08-310 (made public by ICC-01/05-01/08-501), para.12.

> decision to his detriment. Only when both matters are shown, may the administrative decision be quashed.[34]

15. Furthermore, although the Prosecution agrees that it must exercise its duties in a rational, fair, and reasonable way, the Pre-Trial Chamber should be reluctant to engage in its own comparisons of different situations before the Court in conducting any review.[35] Likewise, the Pre-Trial Chamber should not interfere with the Prosecution's assessment merely on the basis that the Judges have a "responsibility for upholding the underlying core values and principles of the ICC",[36] or to encourage deterrence.[37]

16. The Prosecution agrees with the Comoros that the latter must show that any error in the Report materially affected the Prosecution's determination.[38] However, not only does the Comoros fail to show error in the Report; its arguments in any event mistake the Report's reasoning and therefore do not materially affect it.

B. Key premises of the Request are ill-founded

17. The Request misunderstands key aspects of the Report with regard to the nature and purpose of a preliminary examination, the international humanitarian law regime governing the attack on the *Mavi Marmara* and the *Sofia*, and the

[34] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.13, Public Redacted Version of the 25 July 2014 Decision on Appeal from Decision on Indigence, 2 December 2014, paras.4-5. *See also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para.10; England and Wales, *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223, 229 ("It is true the discretion must be exercised reasonably. […] For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. […] Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."), *per* Lord Greene M.R. *See further* Canada, *Dunsmuir v. New Brunswick* [2008] 1 SCR 190 (Supreme Court of Canada), paras.46-51, 53, 55-56, *per* Bastarache and Lebel, JJ., for the majority; England and Wales, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (House of Lords), 410, *per* Lord Diplock; USA, *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (U.S. Supreme Court), 843-844, *per* Stevens, J., for the Court.
[35] *See* Request, para.55.
[36] *Contra* Request, para.57.
[37] *Contra* Request, para.59.
[38] *See* Request, para.56.

structure of the Prosecution's analysis set out in the Report. The Request also mistakes the relevance of the separate preliminary examination concerning events in Palestine.

1. The Request misunderstands the nature and purpose of a preliminary examination

18. A number of the Comoros' complaints appear to result from a misunderstanding of the nature and purpose of preliminary examinations conducted by the Prosecution. Consistent with the Statute, the Rules of Procedure and Evidence ("Rules"), the Regulations of the Office of the Prosecutor, and the Prosecution's published policy,[39] three considerations are cardinal.

- First, an investigation *will* be opened if a preliminary examination shows: a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed; that any resulting prosecutions would be admissible (with reference to consideration of complementarity and gravity); and, that there are no substantial reasons to believe the initiation of an investigation would not be in the interests of justice.[40]

- Second, a preliminary examination is an *analysis* of information made available by multiple reliable sources, and not an investigation in which active measures are undertaken to obtain primary evidence to determine the truth.[41]

[39] ICC, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013 ("Policy Paper").
[40] *See* Statute, art.53(1); *also* Policy Paper, paras.36, 42, 67. Concerning investigations under article 15 of the Statute, *see below* fn.42.
[41] *See* Rules, rule 104; Policy Paper, para.85; Report, para.4. *See also below* fn.55.

- Third, it is implicit that the Prosecution's analysis of information requires and entitles it to weigh and to evaluate the content and reliability of the information available to it, in order to determine whether there is a "reasonable" basis to proceed and not merely *any* basis. Otherwise, any referral or other submission pursuant to article 15, supported by even the barest information asserting a crime in the jurisdiction of the Court, would automatically trigger prosecutorial action to initiate an investigation.[42] Both as a matter of principle and practicality, the drafters of the Statute can never have intended such a system.

19. The reasoning of the Comoros is contrary to the logic of the preliminary examination process in a number of respects, both in substance and in the procedure reasonably adopted by the Prosecution for this purpose.

20. In order to restrict the Report to a length reasonable for its purpose,[43] and bearing in mind the nature of the preliminary examination process, the Prosecution did not consider it appropriate to include a 'statement-by-statement' analysis in its written reasons. Indeed, as this response makes plain, the Prosecution accepted much of the witness information provided to it. Moreover, as the Comoros

[42] For investigations under article 15 of the Statute, the authorisation of the Pre-Trial Chamber is in any event also required. But article 15 likewise manifestly contemplates Prosecution analysis of the information in its possession in order to determine whether to initiate proceedings before the Pre-Trial Chamber: *see e.g.* Statute, art.15(2), (3).

[43] The Prosecution also notes in this respect the implication by the Comoros of delay in the preliminary examination: *see e.g.* Request, paras.25, 39, 42-43, 47. Yet, to the contrary, the preliminary examination was conducted expeditiously and consistent with the Prosecution's published procedure. Just under eighteen months elapsed between the initial referral by the Comoros to the Court, on 14 May 2013, and the publication of the Report, on 6 November 2014. In that time, *inter alia*, the Prosecution sought clarification on the scope of the referral, which was provided on 21 June 2013, invited other interested States to provide information, received further information from the Comoros on 19 May and from IHH on 19 August 2014, and conducted its own analysis. *See* Report, paras.5-10. *See also* Policy Paper, paras.89-92.

concedes,[44] the Prosecution has no obligation to cite or to expressly address each piece of information that it receives in the course of a preliminary examination.[45]

21. Yet, by the assertion that "the Prosecutor has not referred to a single witness statement or victim application that was submitted by the Applicant to the Prosecutor",[46] the Prosecution understands the Comoros to complain that the witness statements of specific individuals or victims are not expressly cited in the Report. This does not amount to an error. The Report expressly notes the receipt of the materials accompanying the Comoros' initial referral together with "additional information" provided by it on 19 May 2014 and by IHH on 19 August 2014.[47] It states expressly that:

> The available information which forms the basis of this report is based on open and other reliable sources, which the Office has subjected to independent, impartial, and thorough analysis. The Office has analysed the supporting materials and documentation accompanying the referral along with, *inter alia*, the reports published by the four commissions that have previously examined the 31 May 2010 incident.[48]

22. The approach of the Prosecution in this respect was both correct and reasonable. Furthermore, the Comoros' description in the Request of the materials provided to the Prosecution is in some respects misleading: whereas the Prosecution has taken account of the various materials that it has received, it does not presently

[44] Request, para.38.
[45] Not even a Chamber of this Court is obliged to refer expressly to every submission or piece of evidence before it in rendering a decision: *see e.g.* ICC-01/04-01/06-773 OA5, para.20 ("The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion"). Furthermore, the Prosecution recalls that it is not a 'judicial' body in the same fashion as a Chamber of this Court: *see above* para.14.
[46] Request, para.27.
[47] Report, paras.5, 8.
[48] Report, para.3.

have in its possession "over 230 victim applications that have been filed with VPRS [the Victims Participation and Reparations Section of the Registry]".[49]

23. The Pre-Trial Chamber should not review the Report against the yardstick of whether it has addressed "the arguments put forward by a State Party in a referral".[50] A preliminary examination is not an adversarial, party-driven judicial procedure in which the Prosecution addresses legal submissions or arguments presented to it. Instead, it is a procedure by which the Prosecution makes an independent and objective determination, applying the law correctly and based on its view of the information available to it, as to whether an investigation should be opened in accordance with the Statute. Thus, although the Prosecution welcomes—and may frequently be assisted by—the observations of a State Party (or indeed any other person or organisation) in providing information to the Court,[51] there is no special obligation for the Prosecution to provide a reasoned view on the merits of those observations regarding the interpretation of particular information or the governing law.[52]

24. In any event, however, on the facts of this situation, the Report does address the arguments now re-emphasised by the Comoros.[53]

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[49] *Contra* Request, para.91. The Prosecution expressly advised the representatives of the Comoros of this fact. The Prosecution is not in a position to confirm whether the materials it received from the Comoros and IHH replicate the victim applications in whole or part. Materials received from the Comoros comprise 56 statements and other materials (received May 2013), and summaries or excerpts of other statements (received May 2014). Materials received from the IHH in August 2014 comprise a book containing interviews with 39 persons, and 13 individual statements. *See further* Request, paras.34, 42, 86; ICC-01/13-3-Conf-Anx-1, pp.20-22; ICC-01/13-3-Conf-Anx2, pp.28-37. *See also* ICC-01/13-8, para.6.

[50] *Contra* Request, para.38.

[51] *See e.g.* Statute, art.14(2) ("As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation").

[52] Nor can any inference be drawn from the publication of the Report notwithstanding the assurance by the Comoros that it remained willing to provide any further information sought by the Prosecution: *see* Request, para.44.

[53] *Contra* Request, paras.36 (recalling arguments *inter alia* that i.) events on the flotilla were sufficiently grave in themselves; ii.) the Prosecution could take into account matters beyond the jurisdiction of the Court to determine the intent and actions of the IDF; iii.) the blockade was only a part of the "overall strategy in the armed hostilities"), 38. *See below* paras.53-99.

25. The Comoros' undeveloped assertion that the Prosecution should have interviewed witnesses at the seat of the Court likewise misunderstands the nature and scope of the preliminary examination process.[54] First, rule 104(2) states that the Prosecution "*may* receive written or oral testimony" at the seat of the Court (emphasis added); it does not state that the Prosecution is obliged to do so, or give this measure any broader procedural significance. Second, the oral receipt of information does not permit the Prosecution to give it any greater weight than that same information received in writing; in both cases, the Prosecution is obliged to maintain the distinction between analysis of information received and active investigation.[55] For the same reason, during a preliminary examination, the Prosecution refrains from conducting any investigative activity at actual or potential scenes of crime.[56]

26. In any event, the Prosecution did not dispute in its Report the stated perceptions of the various witnesses whose statements were sent to it and gave them appropriate weight.[57] The determination as to the gravity of the potential cases that would arise from any investigation of the situation resulted from the factual *analysis*, not the manner in which information was received.

27. Finally, in contradiction to the screening function of a preliminary examination, the Comoros appears to contend that the Prosecution should still initiate an investigation in order to disprove its initial reasoned view that there is no reasonable

[54] *Contra* Request, paras.27-29, 45.
[55] *See above* fn.41. The Prosecution notes that the Policy Paper may appear to imply that it enjoys "investigative powers" when it receives testimony at the seat of the Court. However, this refers to the fact that similar *procedures* apply to the recording of such information presented at the seat of the Court (*see* Statute, art.15(2); Rules, rules 47, 104(2), 111-112). The mere location of an information-provider at the seat of the Court does not exempt the Prosecution from its general obligation to refrain from active investigation until such time as it has evaluated the information made available to it and determined that the conditions in article 53(1)(a) to (c) of the Statute are met. *See also* Policy Paper, para.31, fn.17.
[56] *Contra* Request, para.45 (noting that the Comoros offered to facilitate a visit to the *Mavi Marmara*).
[57] *See further above* paras.21-22.

basis to proceed.[58] This is incorrect. Indeed, article 53(1) of the Statute does not permit the initiation of an investigation if the Prosecutor determines that there is no reasonable basis to proceed.

2. The Request misunderstands the Report

28. The Comoros appears to misunderstand the structure of the analysis in the Report, and the associated regime in international humanitarian law. Not only does it seem to overlook the expressly conditional findings concerning the attacks upon the *Mavi Marmara* and the *Sofia* as such; it also seems not to appreciate the factual distinction drawn between an attack directed towards a civilian object (in this case, the vessels) and an attack on a civilian (the passengers). Also implicit within the Comoros' arguments are erroneous assumptions concerning the meaning of an "attack" within international humanitarian law, and the means by which such attacks are regulated. The Comoros further misapprehends the proportionality analysis conducted in the Report.

29. By these misapprehensions—and especially by overlooking or disregarding the factual distinction reasonably drawn in the Report between the attacks to enforce the blockade and the Identified Crimes committed aboard the *Mavi Marmara*—the Comoros premises many of its arguments concerning the Prosecution's analysis of the gravity of any potential case(s) on an incorrect analysis.

30. Accordingly, the Prosecution's reasoning in the Report is explained in some detail in the following paragraphs. This reasoning reflected a careful and nuanced

[58] *See e.g.* Request, para.22 (asserting that the Identified Crimes aboard the *Mavi Marmara* "could well have been part of an attack intended from the start to murder unarmed civilians", and on this basis suggesting an "evidence-based investigation" is necessary to disprove the theory that the apparent war crimes "resulted from a plan or policy to target civilians"). Yet to this extent the Comoros ignores the fact that the Prosecution analysis expressly considered, *inter alia*, the existence of a plan or policy to target civilians and determined that there was no reasonable basis on the information available to draw this conclusion. The Comoros does not show that the Prosecution was unreasonable in this respect: *see below* paras.79-93.

consideration of the legal context appropriate to the facts available to the Prosecution, especially concerning the nature of the IDF operation to enforce the blockade (and whether it was criminal as an unlawful attack *per se* pursuant to articles 8(2)(b)(i), (ii), and/or (iv) of the Statute), and the relationship of that operation with the Identified Crimes during and after the operation. The Comoros is incorrect to imply that crimes could not have occurred *incidental* to the boarding operation without the boarding operation being unlawful in its entirety.[59]

a. The boarding operations constituted attacks

31. For the purpose of international humanitarian law, an attack is an "act of violence" against an adversary.[60] As noted by the *Ntaganda* Pre-Trial Chamber,

> the definition of "attack" does not exhaustively list which underlying acts of violence can be considered […] In characterizing a certain conduct as an "attack", what matters is the *consequences* of the act, and particularly whether injury, death, damage, or destruction are *intended* or *foreseeable consequences* thereof. Accordingly, the Chamber considers that, in principle, any conduct […] may constitute an act of violence for the purpose of the war crime of attacking civilians, provided that the perpetrator resorts to this conduct as a method of warfare and, thus, that there exists a sufficiently close link to the conduct of hostilities.[61]

32. The Prosecution considers that this definition includes, in the context of an armed conflict, conduct in which an object or objective is forcibly seized by the

[59] *Contra* Report, para.106 ("If this operation had only been about taking control of the vessels […] there would have been no evidence of the callous treatment and abuse of civilians").
[60] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts ("Additional Protocol I"), art.49(1). *See also* Report, para.32, fn.48.
[61] ICC-01/04-02/06-309, para.46. *See also* Boothby, *The Law of Targeting* (Oxford: OUP, 2012), p.384 ("it is the injurious or damaging effect that they are designed to have on the target of the attack […] that marks out their use as an attack"); Melzer, 'Conceptual distinction and overlaps between law enforcement and the conduct of hostilities' in Gill and Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: OUP, 2010) ("Melzer"), pp.40-41 *mutatis mutandis* ("for the purposes of operational law, the concept of hostilities is best understood as comprising all activities that are specifically designed to support one party to an armed conflict against another, either by directly inflicting death, injury, or destruction, or by directly adversely affecting its military operations or military capacity").

belligerent, including the use of actual or conditional violence against defenders.[62] Accordingly, the Prosecution characterised the IDF's forcible boarding of the *Mavi Marmara* and *Sofia* as attacks.[63] Conversely, although the use of violence against individual civilian passengers could also constitute conduct which could be characterised as an 'attack', the Prosecution did not consider, on the facts of this situation, that use of violence to have been sufficiently closely linked to the conduct of hostilities by the IDF for the purpose of article 8(2)(b)(i) (unlawful attacks against civilians).[64] This was without prejudice to the Prosecution's determination of a reasonable basis to believe that the violence against individual passengers nonetheless constituted other crimes under the Statute.[65]

33. By contrast, regarding the *Mavi Marmara* and *Sofia*, the Comoros appears to consider that only a 'kinetic' (*i.e.* potentially significantly destructive) attack—such as a torpedo attack—could constitute an attack on a vessel.[66] This is not only incorrect but detrimental to the protective principle underlying the law.[67] Although under certain circumstances such an attack may be a lawful means of enforcing a blockade, it is not the only means, nor necessarily always an appropriate one.

34. To the extent the Comoros implies that standards applicable to law enforcement may have been applicable even in the conduct of attacks, it appears to misunderstand the scope of international humanitarian law.[68] International

[62] By analogy, for example, an attack upon a fortification would not be limited solely to bombarding it from a distance; it would also extend to the taking of the fortification by storm, in which the use of violence by individual belligerents may be conditional upon the circumstances they encounter.
[63] Report, paras.93, 98.
[64] *See below* paras.36-37.
[65] *See below* paras.36, 40.
[66] *Contra* Request, para.106 (suggesting that the Report "fails to explain how weapons designed to kill humans could be used to attack a vessel (in the way that, perhaps, a torpedo might").
[67] It would seem consistent with the basic principles of international humanitarian law that a blockade may be enforced, in appropriate circumstances, by means of attack short of those risking the total destruction of the blockade-runner.
[68] *Contra* Report, para.107 (referring to "modern […] policing" methods, as well as military methods). *See also* para.106 (asserting that the "use of firearms" could not be justified "in light of the pre-existing knowledge that the passengers were all unarmed"). This is factually incorrect: at least some passengers aboard the *Mavi Marmara* appear to have been armed with "wooden clubs, iron rods, chains, slingshots (used with metal and

humanitarian law is *lex specialis* for the purpose of the conduct of hostilities (and associated operations),[69] and regulates the conduct of attacks through the principles of distinction and proportionality, among others. To the extent that the blockade was lawful,[70] any apparent adoption by the IDF of an 'international humanitarian law' (rather than a 'law enforcement') paradigm in enforcing the blockade—including with reference to the nature of the arms and tactics employed—did not, in the Prosecution's view, itself establish a reasonable basis to ascribe criminal intent to the IDF in conducting the boarding operation from the outset.[71]

35. For these reasons, the material question was whether the attacks launched by the IDF were lawful. This turned on whether there existed a legal context permitting attacks (on the facts of this situation, a lawful blockade) and an analysis of the object of the attacks by the IDF.

b. The Prosecution reasonably determined the Mavi Marmara *and the* Sofia *to be the object of the attacks*

36. The Prosecution reasonably determined that the *Mavi Marmara* and the *Sofia*, as vessels attempting to breach the blockade, constituted the object of attacks intentionally launched by the IDF.[72] There was no reasonable basis to believe the civilian passengers aboard the vessels were the object of the IDF attacks as such.[73] This conclusion is independent from the Prosecution's determination that there was

glass balls), and knives": Report, para.40. The Comoros does not explain its basis for believing that the IDF had 'knowledge' to the contrary.

[69] *See e.g.* Melzer, pp.43-44 (considering operations against "legitimate military targets, including those likely to cause proportionate incidental harm to protected persons and objects").

[70] *See below* para.43.

[71] *See further* Report, paras.55, 99, fn.171 (although the permissible scope of force intentionally directed against a civilian not taking direct part in hostilities may, even under international humanitarian law, sometimes be circumscribed by reference to 'law enforcement' standards, conversely, no such limitation is imposed where force is directed at a military objective even where civilians may be adversely affected, provided that the incidental casualties are not excessive to the anticipated military advantage).

[72] Report, paras.92-94.

[73] Report, para.99.

a reasonable basis to believe that, in the course of the attack, and its aftermath, civilian passengers were the victims of the Identified Crimes.[74]

37. These conclusions were based on the express contemporaneous statements made by the IDF that they wished to halt the vessels of the flotilla, including the *Mavi Marmara* and the *Sofia*, for the purpose of enforcing the blockade.[75] These statements were consistent with the framework under international humanitarian law which permitted attacks in order to enforce a lawful blockade.[76] Conversely, notwithstanding the commission of violent crimes against some civilian passengers, the information made available to the Prosecution did not appear to support the view that the civilian passengers were the intended object of the IDF attacks. By boarding the vessels, the IDF chose a means of attack which enabled distinction between the various persons aboard the vessels, and between the persons and the vessels themselves.[77] Moreover, IDF conduct aboard the different vessels did not appear to show a unified policy concerning the civilians.[78]

38. Construing the *Mavi Marmara* and the *Sofia* as the objects of the attacks to enforce the blockade in this situation did not deprive the civilian passengers of legal protection. To the extent that such civilians were incidentally harmed in the execution of these attacks, such harm was properly evaluated within the context of the doctrine of proportionality.[79] To the extent that civilians were harmed outside the framework of conduct forming an integral part of the forcible boarding operations, such harm was evaluated within the context of other offences under the Statute.

[74] *See* Report, para.99, fn.172.
[75] *See* Report, paras.40-41, 94-95, 105.
[76] *See* Report, paras.32-33, 91-92.
[77] For example, subject to other applicable rules of the *jus in bello* (including proportionality, etc), a blockade-runner is liable to all legitimate methods and means of attack.
[78] *See* Report, paras.78-80. *See further below* paras.89-93.
[79] *See below* paras.47-50.

39. On this basis, the Prosecution determined that "none of the information available" suggested that the civilian passengers aboard the vessels were the object of the attack for the purpose of enforcing the blockade, and therefore that there was no reasonable basis to believe that a crime under article 8(2)(b)(i) of the Statute (unlawful attacks on civilians) had been committed.[80] As explained further below, the Prosecution likewise determined that there was no reasonable basis to believe that a crime under article 8(2)(b)(iv) (disproportionate attacks) had been committed since, in the circumstances, the anticipated harm to the civilian passengers was not clearly excessive to the anticipated concrete and direct military advantage.[81]

40. These determinations were, manifestly, without prejudice to the separate determination whether individual IDF personnel had committed other crimes against civilian passengers under articles 8(2)(a)(i) and (iii), and 8(2)(b)(xxi) of the Statute (wilful killing and injury, and outrages upon personal dignity).[82] Indeed, in this latter analysis, and significantly, the Prosecution did not exclude from consideration any conduct harming civilians on the basis that it may have been justified as an integral part of the attack to enforce the blockade by seizing the vessels. As such, the Prosecution's analysis under articles 8(2)(b)(i), (ii), and (iv) (unlawful attacks) in no way restricted its analysis of the Identified Crimes.[83]

c. The Prosecution correctly determined that the lawfulness of the attack on the Mavi Marmara *and the* Sofia *depended on the legality of the blockade*

41. Given its conclusion that the *Mavi Marmara* and *Sofia*, as civilian objects, were the object of attack by the IDF, the Prosecution correctly identified the law and facts which controlled whether these attacks constituted a crime under article 8(2)(b)(ii) of the Statute (unlawful attacks on civilian objects).

[80] *See* Report, para.99.
[81] *See* Report, para.110. *See further below* paras.47-50.
[82] *See* Report, paras.13, 38-39, 42, 53, 58-61, 64-65, 69, 71-72, 75-77, 132, 149. *See further above* para.2.
[83] *Contra* Report, paras.78-79.

42. The Comoros asserts that there was "arguably no justification to attack the Flotilla, that the attack was unlawful from the beginning".[84] Yet this overlooks the fact that, in the context of a lawful blockade, "[a] vessel breaching or attempting to breach a blockade is subject to attack if, having received prior warning, it intentionally and clearly refuses to stop or resists visit, search, or capture."[85] On the facts of this situation, the *Mavi Marmara* and the *Sofia*—and other vessels of the flotilla—were manifestly breaching or attempting to breach the blockade imposed by the IDF, and failed to stop after prior warnings.[86] The *Mavi Marmara*, among other vessels, further made clear its resistance to visit, search, or capture.[87]

43. Accordingly, in the Report, the Prosecution made clear the link between the legality of the blockade and its determination as to whether the attacks on the *Mavi Marmara* and the *Sofia* constituted crimes under article 8(2)(b)(ii) of the Statute (unlawful attacks on civilian objects).[88] If the blockade was lawful, then the attacks on the vessels did not constitute crimes. Alternatively, if the blockade was unlawful, then there was a reasonable basis to believe that the war crime of intentionally directing an attack against a civilian object had been committed.[89]

44. The Comoros shows no error in this legal analysis. Its apparent further argument—that a "right of freedom of speech or the right to demonstrate" must exist on the high seas—is inapposite.[90] International humanitarian law—the *lex specialis*—acknowledges no such principle as an exception to its more specific legal

[84] Request, para.126. *See also* para.128.
[85] Report, para.91. The Report also notes that "Humanitarian vessels are also subject to this regime if, *inter alia*, they are not innocently employed in their normal role or fail to immediately submit to identification and inspection when required."
[86] *See* Report, paras.94, 105. *See also* para.91, fn.163 (noting that international humanitarian law appears to permit the interception of anticipated blockade runners on the high seas and before they in fact enter the proscribed area).
[87] *See* Report, paras.40, 94, 106.
[88] Report, para.92.
[89] Report, para.96.
[90] *Contra* Request, para.107; *also* para.13, fn.8.

requirement to maintain the effectiveness of a (lawful) blockade.[91] The Comoros does not specify the national or international jurisdiction from which it considers these rights to emanate,[92] or explain how such rights—which in international human rights law are usually qualified to the extent provided by law and as necessary for prescribed purposes[93]—were in fact breached in the specific context of this situation.[94] Nor does the Comoros show how (*arguendo*) success on all these points—which would at the most establish a potential human rights violation—would establish a crime under article 8(2)(b)(ii) of the Statute.

45. On the facts of this situation, the Prosecution reasonably considered that it need not further resolve the question of the blockade's legality. This resulted from:

i) the Prosecution's reasonable view that the harm resulting from any offence under article 8(2)(b)(ii) (unlawful attacks on civilian objects) would to a large extent be subsumed in the Identified Crimes;

[91] *See* Melzer, p.41 ("While human rights law generally remains applicable during armed conflict, its role in regulating the conduct of hostilities is limited because, in this respect, it is generally superseded by the *lex specialis* of humanitarian law"); *also above* para.34. *See also* Heintschel von Heinegg, 'The law of armed conflict at sea', in Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd Ed. (Oxford: OUP, 2008), pp.556-558, mn.1053 (requirement under international humanitarian law to maintain the effectiveness of blockades); Report, para.32, fn.46.

[92] The Prosecution notes that the Comoros has signed but not ratified the International Covenant on Civil and Political Rights ("ICCPR"). The Prosecution takes no position as to the content of the domestic law of the Comoros.

[93] *See e.g.* ICCPR, arts.19(3), 22(2).

[94] *See further* ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para.25 (reasoning, in the context of deprivation of the right to life, "The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life [...] is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself"); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, para.106. *See also* Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: OUP, 2010), pp.242-244.

ii) the Prosecution's reasonable view that there was no reasonable basis to believe that the Identified Crimes were linked other than causally to the blockade;[95] and,

iii) the Prosecution's election, in any event and for the purpose of the preliminary examination, not to assume a combat justification in analysing the Identified Crimes.[96]

46. For these reasons, whether or not the boarding of the the *Mavi Marmara* and *Sofia* constituted unlawful attacks on civilian objects, neither the Prosecution's factual analysis of the Identified Crimes nor its assessment of the gravity of potential case(s) arising from the situation would have been affected.[97]

d. The proportionality assessment turns on the civilian casualties anticipated by the IDF

47. The Comoros wrongly asserts that the Prosecution "applied a flawed legal test and ignored critical evidence" in its proportionality analysis.[98] Yet to the contrary, the test under article 8(2)(b)(iv) of the Statute, properly set out in the Report, is whether the IDF launched the attack "in the knowledge that such attack will cause incidental loss of life or injury to civilians […] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[99]

48. The Prosecution determined that the IDF, subjectively, is likely to have viewed the seizure of the blockade-running vessels as "essential" to maintaining the

[95] *See above* paras.36-37.
[96] In other words, the Prosecution did not analyse whether passengers were killed or injured as an integral part of the conduct of the attack against the vessels, but treated all such incidents as potential instances of the Identified Crimes: *see above* para.40. *See also e.g.* Report, paras.13, 38-39, 42, 53, 58-61, 64-65, 69, 71-72, 75-77, 132, 149. Whereas the Prosecution expressly stated that it did not consider the question of self-defence in the context of this preliminary examination (*see* Report, paras.55-57), it was left implicit that it did not assume combat justifications for any particular incident analysed for the purpose of articles 8(2)(a)(i) or (iii), or 8(2)(b)(xxi).
[97] Report, para.142.
[98] *Contra* Request, para.110.
[99] Report, para.100. *See also* paras.101-103.

effectiveness of its blockade.[100] In this context, therefore, the Prosecution was required to determine whether there was a reasonable basis to believe that the IDF anticipated that the incidental civilian harm would be "clearly excessive" to obtaining that advantage. That was the correct question. The Comoros incorrectly confuses the proportionality test under article 8(2)(b)(iv) with the question whether any use of force was justified at all—in other words the basic legality of the attack under article 8(2)(b)(ii).[101]

49. The Prosecution reasonably determined that the IDF planners anticipated "low level" violence.[102] This was supported by the available information concerning the training of the IDF troops, the rules of engagement issued, and the emphasis on the use of non-lethal weapons.[103] In this context, the Prosecution concluded that the IDF may have anticipated "some degree of civilian casualties or damage to result" but that it was not necessarily anticipated, for example, that it would result in "ten civilian deaths".[104] On this basis, the Prosecution determined that the anticipated harm would not have been "clearly excessive" to the military advantage.[105] The Comoros fails to show how this reasoning was incorrect in law, or unreasonable in its appreciation of the facts.[106] The Prosecution correctly and expressly noted that *ex post facto* determinations as to whether an attack may or may not ultimately have

[100] Report, para.104.
[101] *Contra* Request, paras.111 ("The key issues are whether the IDF planned to use force to attack the vessels and whether this could ever be justified as being proportionate"), 114. To the extent that international humanitarian law justifies an attack on a blockade-runner, it necessarily justifies a use of force (since an attack is an act of violence): *see above* para.31. The question as to whether force will have disproportionate consequences, requiring its restraint or adjustment in order to be lawful (article 8(2)(b)(iv), is a distinct question from the basic legality of any use of force (article 8(2)(b)(i) and (ii)).
[102] *See also* Request, para.111 ("It must at least have been foreseeable that violence may need to be used by the IDF"). To the extent the Comoros may imply that the Prosecution's reasoning was based on the premise that the IDF anticipated *no* violence, it seems to take the Report out of context: *compare* Request, para.111, with Report, paras.105-107,109.
[103] *See* Report, para.107. *See also* para.54. The Prosecution did not consider the arming of the IDF with lethal as well as non-lethal weapons to be inconsistent in these respects. *See above* fn.68.
[104] Report, para.109.
[105] Report, paras.109-110.
[106] *Contra* Request, paras.110-114.

been disproportionate are secondary to the material question of what was *anticipated* in launching the attack.[107]

50. Although the Prosecution agrees that a commander should suspend an attack if it becomes apparent that it "may be expected" to be (or actually is) disproportionate,[108] the Comoros overlooks the facts of the situation when it asserts that the allegedly disproportionate nature of the attack "must have become evident […] when the attack started, and yet the attack was not stopped".[109] This assertion does not show that the Prosecution was unreasonable in its analysis. To the contrary, the approximately 40 minutes of the boarding operation do not appear to have offered an obvious and reasonable opportunity for the IDF to disengage once their troops had first boarded the vessels and encountered resistance.[110] Nor does the information available to the Prosecution make clear at what point, if at all, the IDF commander would have apprehended the danger that civilian casualties might be excessive, even if it was already apparent that the operation was not going to plan. Under these circumstances, the Prosecution was reasonable in its approach.

3. The Request mistakes the relevance of the new preliminary examination concerning Palestine

51. Since the issue of the Report, Palestine has acceded to the Statute and declared its acceptance of the Court's jurisdiction, under article 12(3), over matters "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."[111] However, this development is not relevant to the Report and to the Prosecution's analysis of the referred situation.[112] Furthermore, it would be inappropriate in these

[107] *See* Report, para.109.
[108] *See* Additional Protocol I, art.57(2)(b).
[109] *Contra* Request, para.114. *See also* paras.111-112.
[110] *See* Report, paras.40-41. In this context, it may be relevant to note that during the initial boarding by approximately 15 IDF troops, "three soldiers were attacked and overpowered by a group of passengers and taken to the hold of the ship": Report, para.40.
[111] Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014.
[112] *Contra* Request, paras.30, 136.

circumstances to collapse the distinction between different situations—especially when, as on this occasion, the temporal jurisdictions conferred do not in any event coincide.

C. The Request disagrees with the Report

52. In addition to misunderstanding the Prosecution's analysis in key respects, the Request merely disagrees with many conclusions of the Report, and its reasoning. This is insufficient to show any error. In particular, the Request disagrees with the Prosecution's view that the events aboard the *Mavi Marmara* were not aggravated by events in Gaza, the Prosecution's evaluation of the information relevant to its gravity assessment (especially concerning the likely perpetrators of the Identified Crimes, as well as the crimes' scale, nature, manner of commission, and impact), and the legal standard applied by the Prosecution for characterising conduct as torture or cruel treatment.

1. The Prosecution reasonably considered that the gravity of the Identified Crimes aboard the *Mavi Marmara* was not aggravated by events in Gaza

53. The Comoros is correct to note that, in the Report, the Prosecution stated that it was not entitled to refer to alleged crimes outside the scope of the referral and the Court's jurisdiction in its gravity assessment.[113] By this assertion, the Prosecution intended the common sense proposition that legal and factual analysis for the purpose of a preliminary examination should be confined, where feasible, to the

[113] *See* Request, para.62; Report, para.137. *See also* para.143 (noting that the Court's territorial jurisdiction extends only to events on three of the vessels in the flotilla, and that the Court's territorial jurisdiction does not extend to cover events occurring after the passengers were removed from the vessels). The Prosecution re-emphasises in this respect that, although it did not considered that prosecutions arising from the crimes apparently committed aboard the *Mavi Marmara* would be admissible before this Court, it did not conclude that there was no reasonable basis to believe the crimes themselves had been committed. *See above* para.2; *contra* Request, paras.63-64, 66 (appearing to argue that the Prosecution considered itself unable to take "into account the wider context in order to determine whether the conduct on the three vessels constitute crimes within the ICC's jurisdiction").

territorial parameters of the Court's jurisdiction.[114] However, this is not an absolute rule. The Prosecution recognises that there may be aspects of its analysis where it is appropriate to consider extra-jurisdictional circumstances, and does so when the facts of the situation show a rational link with those broader circumstances. Indeed, the reasoning of the Report, when considered objectively, tends to reflect the Prosecution's approach in this regard.[115]

54. Consistent with this approach, in conducting its gravity analysis on the facts of this situation, such a rational link would have been constituted, either, by:

- information suggesting a reasonable basis to believe that the Identified Crimes were intended to be part of the operation to enforce the blockade (and thus that the Identified Crimes intentionally connected with IDF policy towards the object of the blockade, which was Gaza), or

- some other information sufficiently linking the perpetrators, victims, or circumstances of the Identified Crimes aboard the *Mavi Marmara* and other events in Gaza.

55. The Prosecution's approach, as clarified here, shows no error of fact or law materially affecting the Report.[116] The Prosecution's analysis of the gravity of the potential case(s) arising from the events aboard the *Mavi Marmara* was conducted in the context of its analysis of the situation as a whole.[117] Absent information requiring it to look outside the Court's territorial jurisdiction, the Prosecution was both

[114] The Prosecution notes, in this regard, that the Court does not exercise jurisdiction solely on the basis of territoriality: *see* Statute, art.12(2).
[115] *See* Report, paras.19-29, 35 (considering that, for the limited purpose of the preliminary examination, it could be considered that there was an international armed conflict), 78 (considering the manner in which the IDF boarded other vessels in the flotilla). *See also* Request, paras.13, 64, 67.
[116] *Contra* Request, para.70.
[117] *Contra* Request, para.62 (describing the Prosecution's comment on the jurisdictional point as the "central finding[]" of the Report).

reasonable and correct not to do so. And, even if, *arguendo*, that approach was in error, the available facts show that the apparent war crimes were neither sufficiently proximate to, nor aggravated by, the events in Gaza so as to materially affect the outcome of the Prosecution's analysis in any event. The Comoros disagrees with the Prosecution's view in this respect, but fails to show that it is unreasonable.

56. As previously described, applying the law correctly, the Prosecution reasonably concluded that the war crimes apparently committed aboard the *Mavi Marmara* did not appear to form part of the intentional attacks upon the flotilla, but rather appeared to be incidental to them.[118] Thus, although the war crimes were causally connected to the blockade—in the sense that, but for the blockade, the perpetrators would not have been present aboard the flotilla—the available information did not suggest that the IDF intended the commission of the Identified Crimes as part of the operation to enforce the blockade.[119] Accordingly, the occurrence of the crimes does not suggest any material nexus with events in Gaza and thus did not justify a closer examination of facts outside the Court's jurisdiction. The Prosecution's analysis for the purpose of crimes against humanity reflects this same reasoning.[120]

57. Likewise, no other aspect of the Prosecution's analysis, or the information available to it, suggested that the Identified Crimes were sufficiently linked to events in Gaza by virtue of the perpetrators, victims, or other circumstances. In particular, the Prosecution reasonably determined that:

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[118] *See above* paras.36-37.

[119] *Contra* Request, para.77. For this reason, even assuming *arguendo* that the blockade was an unlawful collective punishment directed at the people of Gaza, the available information still does not show any nexus between the apparent war crimes on the *Mavi Marmara* and the blockade: *see* Request, paras.16, 79.

[120] *See* Report, para.130 (determining that the Identified Crimes did not themselves constitute a widespread or systematic attack against a civilian population, nor form part of such an attack). The Comoros' undeveloped assertion that the requisite nexus is established because the blockade was "part of various IDF operations in the same conflict" fails to show error: *contra* Request, para.80. Rather, the Prosecution applied the established law that isolated acts which appear clearly distinct in their nature, aims, and consequences do not show the requisite nexus: *see* ICC-01/09-19-Corr, para.98. *See also e.g.* ICTY, *Prosecutor v. Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para.100; ICTY, *Prosecutor v. Simić et al*, IT-95-9-T, Judgement, 17 October 2003 ("*Simić* TJ"), para.41; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelac* TJ"), para.55.

- the apparent war crimes did not appear to have been committed in a systematic fashion across the vessels of the flotilla;[121]

- the victims of the apparent war crimes, while opposed to the IDF, were not affiliated to Hamas;[122] and

- the apparent war crimes did not appear to have a significant impact on the civilian population in Gaza,[123] and that indeed measures were taken so that the delivery of aid to Gaza was not prevented.[124]

58. Again, as discussed in the following paragraphs in the context of the specific gravity analysis conducted in the Report, the Comoros disagrees with these conclusions but does not show them to be unreasonable.

2. The Prosecution assessed the available information reasonably in conducting its gravity analysis

59. The Comoros does not demonstrate that the Prosecution "completely failed" to address factors relevant to its gravity analysis, on the basis of the information made available to it, or that it gave "no weight" to "the most relevant" factors.[125] To the contrary, the Prosecution conducted its analysis on the basis of factors including the scale, nature, manner of commission, and impact of the crimes.[126] Rather, the Comoros subjectively disagrees with the Prosecution's analysis. This does not justify

[121] *See* Report, para.140.
[122] *See* Report, para.51 (determining, in the context of a direct participation in hostilities analysis, that the conduct of passengers was not "specifically designed to support Hamas" but rather was designed to further "the flotilla's humanitarian and politically focused objectives […] rather than specifically designed to support a party to the conflict"). Furthermore, the victims were not, in general, residents of Gaza or citizens of Palestine: *see e.g.* Report, para.13. IDF troops appear to have been briefed that the passengers aboard the flotilla were "foreign citizens who, according to the existing information, are *not* combatants" but "peace activists": *see* Report, para.54.
[123] *See* Report, para.141.
[124] *See* Report, paras.141, 146.
[125] *Contra* Request, paras.82-83.
[126] *See* Report, paras.138-144. *See further below* paras.64-99.

judicial intervention. Indeed, rather than the Prosecution failing to consider the events aboard the Three Vessels in light of all of the relevant circumstances, it appears that the Comoros' own analysis is selective and partial in this regard.[127]

a. The Prosecution reasonably analysed the likely perpetrators of the Identified Crimes

60. The Comoros incorrectly asserts that the Prosecution failed to consider the potential perpetrators of the apparent war crimes.[128] To the contrary, the Report shows that the Prosecution expressly considered key indicators in this regard in its gravity analysis—notably, that the available information did not suggest that the Identified Crimes were systematic or resulted from a deliberate plan or policy,[129] having regard especially to the commission of the Identified Crimes on just one of the seven vessels of the flotilla[130] and the manner in which those crimes were committed.[131] These factors suggested that the potential perpetrators of the Identified Crimes were among those who carried out the boarding of the *Mavi Marmara*, and subsequent operations aboard, but not necessarily other persons further up the chain of command. The Prosecution's strategic interest in bringing to justice those who appear to be most responsible for crimes within the Court's jurisdiction cannot detract from the facts indicating who those persons might actually be.

61. The Comoros is incorrect in its argument that the Prosecution was required to address expressly the views of the Comoros regarding possible perpetrators.[132] Yet, in any event, as stated by Pre-Trial Chamber II, the assessment of the gravity of potential case(s) with regard to possible perpetrators involves:

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[127] *Contra* Request, para.84.
[128] *Contra* Request, para.85.
[129] Report, para.140.
[130] Report, paras.140, 143. The Prosecution also recalls its conditional determination regarding crimes under article 8(2)(b)(ii) of the Statute but notes that this would not have significantly affected its analysis: *see below* para.84.
[131] *See* Report, paras.38-41, 45-51, 54-55, 58-59, 64-69, 75, 77-78, 80, 104-106.
[132] *Contra* Request, para.86. *See above* para.23. The Prosecution also recalls, again, that it does not have direct access to victim applications filed with the Registry of the Court: *see above* para.22.

> a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature and compatible with the pre-investigative stage into a situation.[133]

62. As the Report shows, the Prosecution's analysis did not support the view that there was a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the apparent war crimes.[134] The involvement of such persons in "other and related operations to enforce the blockade" was immaterial, especially when the specific events aboard the *Mavi Marmara* appeared to be unique among blockade operations in the violence employed and the harm caused.[135] Nor do the comments attributed by the Comoros to senior IDF commanders and Israeli leaders establish a reasonable basis to believe that they were involved in the Identified Crimes; given the violence which ensued, the admission that "mistakes" may have been made in the boarding operations does not amount to an admission of complicity.[136]

63. The possibility that Turkish courts have taken a different view to that of the Prosecution, a view which the Comoros may indeed share, does not show that the Prosecution's analysis was unreasonable.[137] It is well established that two reasonable finders of fact may reasonably disagree, even in the (much more rigorous) context of a criminal trial.[138] This does not justify judicial intervention related to the Prosecution's determination.

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[133] ICC-01/09-19-Corr, para.60.
[134] *Contra* Request, paras.86, 88.
[135] *Contra* Request, para.86.
[136] *Contra* Request, para.86.
[137] *Contra* Request, para.87.
[138] *See e.g.* ICTR, *Ntawukulilyayo v. the Prosecutor*, ICTR-05-82-A, Judgement, 14 December 2011, para.15 (recalling that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable").

b. The Prosecution reasonably analysed the scale of the Identified Crimes

64. The Comoros disagrees with the Prosecution's conclusion that "the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office".[139] It fails to show that this conclusion was unreasonable.

65. The Comoros leaves a misleading impression by asserting that the Prosecution erred by concluding that "the numbers were less than other cases when she claims that even the approximate number of victims on the Flotilla is unclear"[140] and that the Prosecution stated it could not "even estimate the number of victims."[141] To the contrary, as the Comoros otherwise acknowledges, the Prosecution determined that 10 people were killed aboard the *Mavi Marmara*, and up to 50-55 were injured.[142] Furthermore, although the Prosecution did note that the precise number of persons who suffered outrages upon personal dignity was unclear, it also referred to the finding of the Palmer-Uribe Panel that "many" of the approximately 577 persons aboard the *Mavi Marmara* were affected.[143] It was on this basis that the Prosecution assessed the scale of the apparent war crimes for the purpose of its gravity analysis. The Comoros thus shows no error in this appreciation by reference, for example, to the UN Human Rights Council report or to the materials possessed by the Prosecution.[144]

66. For the purpose of assessing the scale of the Identified Crimes, the Comoros merely disagrees with the analysis in the Report by asserting that "over 700 persons were passengers on the Flotilla and the vast majority of them have complained about

[139] *See* Report, para.138; Request, paras.89, 93.
[140] Request, para.89.
[141] Request, para.90.
[142] *See* Request, para.90. *See also* Report, para.138; *above* para.2.
[143] *See* Report, para.138, fns.238-239 (citing *inter alia* Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 ("Palmer-Uribe Report")). *See also* ICC-01/13-8, paras.5, 12, 19 (supporting participation in these proceedings by victims aboard the *Mavi Marmara*).
[144] *Contra* Request, paras.90-91. *See also above* para.22.

the treatment that they received".[145] In the Report, the Prosecution reasonably determined that there was a reasonable basis to believe that war crimes were committed only aboard the *Mavi Marmara*.[146] It did not find there was a reasonable basis to believe war crimes were committed either aboard the other vessels within the Court's jurisdiction (the *Sofia* and the *Rachel Corrie*), or on other vessels within the flotilla.[147] Accordingly, the Prosecution was reasonable to assess the scale of the Identified Crimes only on the basis of the events aboard the *Mavi Marmara*.

67. Nor in any event was the Prosecution's gravity analysis conducted on the basis of a consideration of the scale of the Identified Crimes in isolation. The Prosecution did not determine that the crimes were of insufficient gravity on the basis of the numbers of victims; indeed, it recognised that even "a single event of sufficient gravity could warrant investigation". Rather, as explained below, it determined that any potential cases appeared to be of insufficient gravity to be admissible before the Court on the basis of the "limited number of victims" considered with the "limited countervailing qualitative considerations".[148]

68. The Prosecution submits that the Pre-Trial Chamber should be cautious in considering any comparison between the relative circumstances of different cases since each case, perforce, presents unique and specific features.[149] Reference may appropriately be made to cases as illustrations of the general criteria which might be applied in assessing their gravity. Thus, in the Report, the Prosecution referred to the Haskanita cases as an illustration of the significance of qualitative considerations, as

[145] *Contra* Request, para.90.
[146] *See* Report, paras.61, 72, 77, 132, 149.
[147] *See e.g.* Report, paras.62-72, 78-82. *See also above* paras.3, 41-46 (recalling the Prosecution's conditional determination under article 8(2)(b)(ii) of the Statute, and its express statement in the Report that its gravity analysis would not have been significantly altered even considering the attacks on the *Mavi Marmara* and *Sofia* as crimes).
[148] Report, para.144.
[149] *See above* para.15.

well as quantitative considerations, in analysing the gravity of any potential case(s) in a situation.

69. Care must also be exercised, furthermore, in comparing the scope of potential case(s) in a situation (as part of the gravity analysis in a preliminary examination) and actual cases selected for prosecution at the conclusion of an investigation.[150] Following an investigation, particular cases for which prosecution is merited and feasible are selected from the various potential cases on the basis of the evidence actually gathered. In this context, it may be that the scope of such cases will be narrower when proceeding to prosecution, compared to what may have been apparent when formerly considered as a 'potential case' for the purpose of the gravity analysis at the preliminary examination stage.

70. In any event, the Comoros' attempt to compare the potential case(s) which may result from any investigation of the present situation with certain cases selected for prosecution in Darfur and the Democratic Republic of Congo does not assist it, nor show that the Prosecution's approach was unreasonable.[151]

71. As the Prosecution expressly noted in the Report, whereas the direct victims of the Haskanita attack were limited in number (the killing of 12 AMIS peacekeepers, and the attempt to kill a further 8), the indirect victims of the attack (comprising the local population) were extensive, suffering as a result of the severe disruption of AMIS operations.[152] By contrast, although the number of victims aboard the *Mavi Marmara* was greater, the number of indirect victims was fewer.[153]

[150] *See also* ICC-01/09-19-Corr, para.58 (Pre-Trial Chamber II noting that, "although an examination of the gravity threshold must be conducted, it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete 'case'. Instead gravity should be examined *against the backdrop of the likely set of cases or 'potential case(s)' that would arise from investigating the situation*", emphasis added).
[151] *Contra* Request, para.92.
[152] *See* Report, para.145.
[153] *See* Report, para.146.

72. Furthermore, the Report emphasised that the Haskanita attack is distinguishable from the facts of this situation also on the basis of the nature and impact of the crimes, resulting from the specific qualitative factors in that case.[154] In particular, the Haskanita crimes targeted peacekeepers, and hence persons who represent not only the international community but also the fundamental interest in maintaining the international peace and security of all humanity.[155] By contrast, although the Prosecution recognised that crimes targeting persons involved in a humanitarian mission could raise similar concerns, on the facts of this situation there was no reasonable basis to determine that the flotilla constituted a humanitarian mission.[156] Furthermore, as has elsewhere been noted, the Report observed that the Israeli authorities did in fact ensure the delivery of the aid carried by vessels of the flotilla to the people of Gaza.[157]

73. Accordingly, the Comoros does not show that the Prosecution was unreasonable to conclude that the potential case(s) arising from the situation on the Three Vessels would not be admissible before the Court, even in comparison to the cases concerning the Haskanita attack. The *Lubanga* case, to which the Comoros refers, is similarly distinguished by its quantitative and qualitative characteristics.[158]

c. The Prosecution reasonably analysed the nature of the Identified Crimes

74. As explained further below, the Comoros appears to disagree with the law applied by the Prosecution in determining that there is reason to believe outrages upon personal dignity were committed aboard the *Mavi Marmara*, but not torture or

[154] *See* Report, para.145.
[155] *See* Report, para.145.
[156] *See* Report, paras.125, 146.
[157] *See above* para.57; *below* para.95.
[158] *See e.g.* ICC-01/04-01/06-2901, paras.37 ("children […] needed to be afforded particular protection that does not apply to the general population"), 49-50 ("during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread").

inhumane treatment.[159] However, it shows no error in this respect.[160] Furthermore, the Comoros disagrees with the Prosecution's analysis of the information made available to it concerning the conduct of IDF troops. Yet it again fails to show that the Prosecution ignored relevant information, or appreciated it unreasonably.[161]

75. In the Report, the Prosecution noted information that some passengers aboard the *Mavi Marmara* were detained while the ship was in transit to port and mistreated, including by overly tight handcuffing for extended periods, beating, denial of access to toilet facilities and personal medication, limited access to food and drink, enforced kneeling, exposure to the elements, blindfolding, threats or intimidation, or physical or verbal harassment.[162] This is the same conduct which the Comoros claims that the Prosecution failed to take into account.[163] The Prosecution emphasises that it considered this conduct to be unlawful.[164]

76. The Prosecution agrees that the accounts of [REDACTED], [REDACTED], [REDACTED], and [REDACTED] appear to reflect serious criminal instances of mistreatment by IDF personnel.[165] The fact that these witnesses are not identified by name in the Report does not show that their accounts were not considered by the Prosecution.[166] However, the gravity of this conduct is not inherently greater than the other serious matters described in the Report such as detainees being beaten and kicked, and was not excluded from the Prosecution's analysis.[167] The Report also expressly referred to detainees suffering threats or intimidation, including from the use of dogs which reportedly bit some passengers.[168] The Prosecution notes further

[159] *See* Report, paras.69-72.
[160] *See* Request, paras.94-95, 97. *See further below* paras.100-104.
[161] *Contra* Request, paras.95-99.
[162] *See above* fn.8.
[163] *See* Request, paras.95-97.
[164] *See* Report, paras.64-65, 69, 71-72.
[165] *See* Request, para.98.
[166] *See above* paras.20-21.
[167] Report, para.64.
[168] Report, para.64.

that the events reported by [REDACTED], a passenger aboard the USA-registered *Challenger I*, occurred on a vessel outside the Court's jurisdiction.[169]

77. Likewise, the humiliating treatment of [REDACTED] was taken into account by the Prosecution,[170] as indicated by the reference in the Report to threats, intimidation, and verbal harassment.[171]

78. Given the violent resistance which ensued aboard the *Mavi Marmara*,[172] the Prosecution does not agree that the only reasonable inference from the IDF's provision of large numbers of plastic handcuffs for its troops was the intent, "at a minimum", to "imprison by humiliating means a very large body of people whose intellectual approach to the Gaza conflict differed from that of the Government of Israel and who needed to be dissuaded by force and humiliation from ever repeating what was done."[173] Whereas the Comoros and others may hold that view, the information in the possession of the Prosecution is insufficient to establish a reasonable basis upon which to draw that conclusion. Certainly, the Prosecution has not been shown to be unreasonable in its analysis in this respect.

d. The Prosecution reasonably analysed the manner of commission of the Identified Crimes

79. The Comoros disagrees with the Prosecution's conclusion that the information made available to it did not establish a reasonable basis to believe that the Identified Crimes were committed systematically or on the basis of a deliberate plan or policy.[174] It fails to show that the Prosecution's analysis in the Report was unreasonable, either with regard to the timing and origin of IDF live fire, the manner

[169] *See* Request, para.98. *See further below* paras.92-93.
[170] *See* Request, para.99.
[171] *See* Report, para.64.
[172] *See* Report, paras.40-41. *See also* paras.54 (discussing the rules of engagement applicable to the IDF troops boarding the *Mavi Marmara*), 106-109.
[173] *Contra* Request, para.96.
[174] *See* Request, para.100; Report, para.140.

in which the boarding was executed, the significance of the treatment of detainees once on Israeli territory, or the degree of violence aboard the vessels of the flotilla.

i. The Prosecution reasonably addressed the issue of live fire before the boarding

80. It is uncontested that, as a result of the IDF boarding of the *Mavi Marmara*, ten passengers died, and up to 50-55 other passengers were injured.[175] IDF troops who conducted the boarding operation used various lethal and less-lethal weapons, including 'live' ammunition, less-lethal ammunition (including 'beanbag' and paintball rounds), tasers, and 'flash-bang' (or 'stun') grenades.[176] IDF troops employed these weapons, variously, to deliver both lethal and non-lethal force.[177]

81. The Comoros states incorrectly that the Prosecution "ignores" and "places no weight at all" on information suggesting that live fire commenced before the boarding operation.[178] To the contrary, the Report expressly noted the evidence of "some" passengers that "live ammunition was fired from both the Morena speedboats and helicopters, including possibly prior to the boarding, resulting in the killing and injuring of some individuals."[179] It also acknowledged the view reached by the UN Human Rights Council ("HRC").[180] After considering the totality of the information made available to it, however, the Prosecution concluded that "the information available makes it difficult to establish the exact chain of events in light of the significantly conflicting accounts of when live ammunition was first used and from where it emanated."[181] In this fashion, the Prosecution did not ignore or "exclu[de]" the evidence of live fire preceding the boarding, nor "give deference" to

[175] *See above* fn.7.
[176] Report, para.41.
[177] Report, para.41.
[178] *Contra* Request, para.104.
[179] Report, para.41.
[180] *Contra* Request, para.103. *See* Report, para.41, fn.72.
[181] Report, para.41.

the Turkel report,[182] but instead recognised that the evidence was highly contested. The Prosecution was entitled to make such a determination in the course of its analysis.[183] The Comoros merely disagrees with its conclusion.

82. The evidence to which the Comoros refers does not demonstrate that the Prosecution was unreasonable in its evaluation.[184] Even the witnesses cited by the Comoros agree that the IDF employed a variety of weapons and tactics[185]—including weapons which may be hard to differentiate from one another, given the loud noises which might be emitted by lethal and less-lethal weapons alike, the general confusion, the use by the IDF of specific means and methods to confuse and disorient (such as 'flash-bang' grenades), and the poor (pre-dawn) visibility. Furthermore, the information provided by these witnesses is ambiguous in some respects.[186] Nor does the Comoros address the fact that other witnesses to the boarding operation did not state that live fire commenced before the boarding.[187]

83. In any event, even if the IDF had employed live fire immediately prior to the boarding of the *Mavi Marmara*, this still does not show that the Prosecution was

[182] Turkel Commission, The Public Commission to Examine the Maritime Incident of 31 May 2010 – Part I, 2011 ("Turkel Report"). *Contra* Request, paras.115-117. In the Report, the Prosecution referred to the autopsy reports as support for the fact that most of the deceased were shot multiple times: *see* Report, para.58, fn.109. Although the Prosecution did not expressly discuss the autopsy reports further, or the nature of the damage to the *Mavi Marmara*, this does not mean that the Prosecution ignored these materials: *see further above* para.20. Further, since the Prosecution determined that there was a reasonable basis to believe that offences under article 8(2)(a)(i) and (iii) had been committed aboard the *Mavi Marmara*, physical evidence of "excessive force" shows no inconsistency in its reasoning. Such evidence does not, however, necessarily speak to the alleged systematic or planned nature of the Identified Crimes.
[183] *See above* para.18.
[184] *Contra* Request, paras.101-102.
[185] *See* Request, paras.101-102.
[186] *See* Request, paras.101-102. For example, only six of the nine witnesses cited by the Comoros ([REDACTED], [REDACTED], [REDACTED], ELSHAYYAL, TEKIR, and KURC) state in so many words that live ammunition was used. Others refer to firing in general. Of those six, [REDACTED] and [REDACTED] are the only witnesses whose full statement is in the Prosecution's possession, who were aboard the *Mavi Marmara*, and who unequivocally assert that live fire commenced before the boarding operation. [REDACTED]'s account of the order of events appears to be less clear than [REDACTED] and [REDACTED]. [REDACTED] was a passenger aboard the *Sofia* who could "hear" shots only. The Prosecution does not possess statements for ELSHAYYAL, or KURC, which are partially described in a submission on behalf of Richard LIGHTBOWN. The Prosecution reasonably gave the LIGHTBOWN report little weight as a source. The Prosecution further notes that it is only said that ELSHAYYAL, for example, could "almost see" IDF troops in the helicopters firing indiscriminately with live bullets.
[187] *See* Palmer-Uribe Report, para.122; Turkel Report, para.129.

unreasonable in concluding that there was no reasonable basis to believe that the Identified Crimes were committed systematically or pursuant to a plan. There is no information in the Prosecution's possession that any such live rounds were deliberately targeted at passengers, as opposed to warning shots, nor is there information that use of such live rounds in this fashion was authorised or planned.

ii. The Prosecution reasonably addressed the manner in which the boarding was executed

84. As previously explained, the Prosecution determined that there was no reasonable basis to believe the attacks on the *Mavi Marmara* and the *Sofia* were unlawful under international humanitarian law, if the blockade was lawful,[188] and that in any event this question was not determinative of its gravity assessment.[189] Even if the blockade was unlawful, and the attacks on the two vessels were crimes under article 8(2)(b)(ii) of the Statute (unlawful attacks on civilian objects), there was still no reasonable basis to believe the apparent war crimes were committed systematically or as part of a plan.[190]

85. The Comoros' logic appears to presuppose that the Identified Crimes could only have been committed pursuant to a pre-existing plan, and therefore that all evidence of criminality is also evidence of a plan.[191] This assumption not only overlooks the potential significance of the violent resistance of the passengers aboard the *Mavi Marmara*, but also the Prosecution's determination that there was indeed a reasonable basis to believe that war crimes, including wilful killing, were committed. As such, no inconsistency is shown by information that some of the IDF troops aboard the *Mavi Marmara* may have acted in a violent, criminal or otherwise

[188] *See above* paras.3, 46-46.
[189] *See* Report, para.142.
[190] *Contra* Request, paras.105-106, 110-114. *See above* paras.36-37, 56.
[191] *See* Request, para.106 ("If the operation had only been about taking control of the vessels […] there would have been no evidence of the callous treatment and abuse of civilians and no evidence of the use of firearms").

suspicious fashion.[192] The disabling of CCTV cameras aboard the *Mavi Marmara* may have been consistent with such behaviour.[193] This incident shows no fault in the Prosecution's analysis.[194]

86. The Prosecution expressly noted evidence that some of the victims of wilful killing were shot in the course of taking photographs, and this contributed to its determination that there was a reasonable basis to believe war crimes had been committed.[195] The Comoros does not show that this was unreasonable, nor explain convincingly how such incidents could only reasonably be interpreted as evidence of a systematic plan or policy.[196] Likewise, the Prosecution noted information from one witness suggesting that two or more passengers were shot and killed after attempting to surrender.[197] There is no basis for the Comoros' assertion that the Prosecution "fail[ed] to consider" this information,[198] nor is it assisted by reference to the statement of [REDACTED].[199]

87. As expressly stated in the Report, the Prosecution did not consider whether IDF troops may have acted in self-defence during the boarding operation.[200] Notwithstanding this exclusion, it was reasonable for the Prosecution separately to take into account the chaotic and violent context aboard the *Mavi Marmara* in assessing whether there was a reasonable basis to consider that the Identified Crimes were committed systematically or according to a plan. The Comoros does not show the contrary.[201]

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[192] *Contra* Request, paras.106-107.
[193] *See* Request, para.124.
[194] *Contra* Request, para.123.
[195] *See* Report, para.59.
[196] *Contra* Request, para.107.
[197] Report, para.59. *See* Request, para.109.
[198] *Contra* Request, para.109.
[199] *Contra* Request, para.108. The Prosecution does not have information whether [REDACTED]'s effort to send a radio message was effectively communicated to the IDF troops conducting the boarding operation.
[200] Report, paras.56-57. As noted in the Report, such a matter is to be properly addressed at the investigation and trial stages of a case, since it relates to the responsibility of specific individuals.
[201] *Contra* Request, para.118.

iii. The Prosecution reasonably addressed the treatment of passengers once removed to Israeli territory

88. For the reasons previously explained, nothing in the Prosecution's analysis of the situation (or the information made available to it) justified or required taking into account extra-jurisdictional conduct[202]—which included the treatment of the detained passengers after they left the Three Vessels. The Prosecution agrees that the information suggesting further mistreatment of some detainees once they arrived on Israeli territory is concerning, even though the Court does not have jurisdiction over that conduct.[203] However, nothing in this information now suggests that the Prosecution was unreasonable to find there was no reasonable basis to infer that the Identified Crimes aboard the Three Vessels were committed systematically or on a planned basis.[204] Indeed, the information highlighted by the Comoros appears to concern a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who boarded the Three Vessels, or persons in those troops' chain of command.[205] Likewise, even the information highlighted by the Comoros as reflecting a discriminatory element in the treatment of the detainees is equivocal,[206] although it does support the verbal harassment identified in the Report.[207]

[202] *See above* paras.53-57.
[203] *See* Request, paras.118-120.
[204] *Contra* Request, paras.118-120.
[205] *See* Request, paras.118-120 (referring to incidents apparently perpetrated by "soldiers", "immigration officers", and "police" at locations including tents at the dockside in Ashdod, Ben Gurion airport (near Tel Aviv), and Beer Sheva prison).
[206] *Compare* Request, para.120, *with* para.118. The Comoros refers to incidents in which witnesses [REDACTED] and [REDACTED], British citizens, received what they perceived as lenient treatment from the IDF, contrasted with the treatment they saw others receive, including people who were "Arab, Turkish or Muslim". However, the Comoros also refers to [REDACTED]'s account that he felt his "British nationality to be completely disrespected" and that he saw an Italian journalist being "sworn at and insulted". [REDACTED] describes Israeli personnel insulting Queen Elizabeth II of the United Kingdom. [REDACTED] states that he was hit over the head when protesting against the apparent abuse of an American, [REDACTED]. [REDACTED] describes being moved from a cell with Turkish Muslim passengers to a cell with "Caucasian" passengers, including two Swedish citizens, a Greek citizen, and a Palestinian citizen who worked in Greece.
[207] *See above* fn.8.

iv. The Prosecution reasonably addressed the IDF's conduct on other vessels in the flotilla

89. The Comoros fails to substantiate either its assertion that "similar crimes" to those which apparently occurred aboard the *Mavi Marmara* "occurred on other vessels of the Flotilla" or that there was further evidence to this effect "which [the Prosecution] should have reviewed."[208] Rather, the information made available to the Prosecution tended to show that the events aboard the *Mavi Marmara* were distinctive in their nature, gravity, and extent. This tends to militate against the systematic commission of crimes across the flotilla, or the existence of a general pre-existing plan.

90. Contrary to the Comoros' assertion, in the Report, the Prosecution noted that the boarding of the other vessels "was also conducted by the use of force",[209] citing some of the same passages from the HRC report as those cited by the Comoros.[210] It further stated that "[p]assengers on these other vessels offered limited or no violent resistance in response" to the IDF boarding and that, "although some of these passengers also sustained injuries, no significant serious injury or loss of life occurred".[211] The Comoros' reference to three pieces of evidence to the same effect, and consistent with the Prosecution's express observations, shows no error in the Report.[212]

[208] *Contra* Request, paras.121-122.
[209] Report, para.78.
[210] *Compare* Report, para.78, fn.146 (citing *inter alia* 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 ("HRC Report"), paras.137-139, 143-144, 149"), *with* Request, para.122, fns.140-141 (citing HRC Report, paras.112-161, 173).
[211] Report, para.78.
[212] *Contra* Request, paras.121-122. The Prosecution further notes that two of these statements (from [REDACTED] and [REDACTED]) were only provided to it in summarised form. The Prosecution also notes the HRC's observation that the *Challenger I*, following the boarding of the *Mavi Marmara*, attempted to evade the IDF interception: *see* HRC Report, para.136.

91. Furthermore, the HRC report does not support the Comoros' assertion that "abuse and mistreatment" occurred on "each of the seven ships within the Flotilla".[213] To the contrary, the HRC made no adverse findings concerning the boarding of the *Defne*, *Gazze I*, or *Rachel Corrie*.[214]

92. Consistent with the Prosecution's analysis, the HRC emphasised unlawful behaviour by IDF troops aboard the *Mavi Marmara*.[215] Although the HRC found that the force used in intercepting and boarding the *Sofia,* the *Challenger I* and the *Sfendoni* was "unnecessary, disproportionate, excessive and inappropriate",[216] it reached this conclusion in the context of its finding that the interception of the flotilla was *per se* unlawful,[217] and by reference to the standards applicable to civilian law enforcement.[218] By contrast, as explained above, the Prosecution found it necessary only to make a conditional determination of the lawfulness of the interception of the flotilla.[219]

93. Whereas the HRC considered that detainees aboard the *Mavi Marmara* were generally mistreated and in various ways, for other vessels in the flotilla, it raised concern primarily with the use of handcuffing "to an extent" on the *Sofia*, the *Challenger I* and the *Sfendoni*.[220]

[213] *Contra* Request, para.122.
[214] *See* HRC Report, paras.152-153, 159-160.
[215] HRC Report, paras.163-172.
[216] HRC Report, para.173.
[217] HRC Report, para.163.
[218] HRC Report, paras.164, 166, 168.
[219] *See above* paras.3, 46-46.
[220] HRC Report, paras.178-179, 181. Aboard the *Sofia*, the HRC noted evidence that all passengers and crew were restrained, and some were roughly treated or assaulted: HRC Report, para.150. Aboard the *Challenger I*, the HRC noted evidence that passengers were denied access to toilet facilities, in some cases handcuffed, and two women were hooded: *see* HRC Report, para.141. Aboard the *Sfendoni*, although some passengers were restrained for an initial period, most were not. Passengers were permitted access to toilet facilities and to food, and witnesses said nobody was ill-treated or restrained: HRC Report, paras.146-147. There is also some evidence that restraints may have been justified, at least in some cases: one passenger, initially restrained, jumped into the sea as soon as the restraints were removed, and was then recovered: HRC Report, para.145.

e. The Prosecution reasonably analysed the impact of the Identified Crimes

94. The Comoros disagrees with the Prosecution's analysis of the impact of the Identified Crimes.[221] Such disagreement, however, does not show an error in the Report.

95. The Comoros' assertion that none of the vessels in the flotilla was able to deliver aid directly to Gaza shows nothing unreasonable in the Prosecution's reference to the fact that the aid was nonetheless delivered to Gaza by the Israeli authorities.[222] It is a distinction without a material difference. It has no impact on the Prosecution's conclusion that the population of Gaza was not adversely affected (in the sense of not receiving the intended aid) as a result of the IDF interception.[223] Furthermore, by apparently characterising the flotilla purely as a convoy "seeking to deliver humanitarian aid",[224] the Comoros evidently disagrees with the more nuanced analysis in the Report,[225] without showing that it was unreasonable or erroneous. This different underlying premise is central to the Prosecution's analysis, and therefore undermines the Comoros' criticisms of it.

96. The Comoros' disagreement with or misunderstanding of the law and findings concerning the attacks upon the *Mavi Marmara* and *Sofia* does not alter the assessment of the impact of the Identified Crimes.[226] The Comoros is incorrect in asserting that the Prosecution did "not acknowledge[] at all" the possible

[221] *See* Request, paras.125-134; Report, para.141.
[222] *Contra* Request, para.126 ("The Prosecutor failed to recognise that none of the vessels was able to deliver any aid because there is clear evidence that they were violently attacked and everyone on board was forcibly arrested and taken to prison in Israel"). *See* Report, paras.116, 119, 141, 146.
[223] *See* Report, para.141 (concluding, "[i]n these circumstances, the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels in the flotilla").
[224] Request, para.130. The Comoros acknowledges only that "[t]he Flotilla was of course not a UN or AU mission".
[225] *See* Report, para.125 ("Based on the available information […] the flotilla does not appear to reasonably fall within the humanitarian assistance paradigm envisioned under article 8(2)(b)(iii), due to its apparent lack of neutrality and impartiality as evidenced in the flotilla's explicit and primary political objectives (as opposed to a purpose limited to delivery of humanitarian aid), failure to obtain Israeli consent, and refusal to cooperate with the Israeli authorities in their proposals for alternative methods of distributing the relief supplies").
[226] *Contra* Request, paras.126, 128. *See above* paras.3, 45-46.

implications of the question whether attack on the vessels was unlawful as such.[227] Rather, the Prosecution expressly determined that, "even when considering that the IDF might have also committed the war crimes of intentionally directing an attack against the *Mavi Marmara* and the […] *Sofia*, in the case of an unlawful blockade, such a finding would not significantly affect the gravity assessment of the potential case."[228] This is a logical conclusion from the reasonable view that, in the circumstances of this situation, such an additional finding has no impact on the harm resulting from the Identified Crimes.

97. The Comoros shows no error in the Report by its assertion that "the attack on the Flotilla is yet another example of the excessive use of force by the IDF against civilians in their campaign to control the territory and civilians of Gaza."[229] To the contrary, although the Prosecution acknowledges that the Comoros holds a different view, the Prosecution did not determine that the Identified Crimes committed aboard the *Mavi Marmara* were part of the blockade or sufficiently linked to events in Gaza so as to permit consideration of extra-jurisdictional conduct more broadly.[230] The Comoros' disagreement with this conclusion does not make it "artificial", "irrational" or "unjustified".[231] For similar reasons, the Comoros shows no error in the distinction between the situation on the Three Vessels and the cases concerning Haskanita.[232]

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[227] *Contra* Request, para.126.
[228] Report, para.142.
[229] *Contra* Request, para.127.
[230] *See above* paras.53-57.
[231] *Contra* Request, para.132. The comparison with the imprisonment of President Mandela in apartheid South Africa would seem inapposite. In such a context, the nexus between the crime and the context in South Africa could have been inferred on the basis of factors including President Mandela's citizenship, his membership of the targeted group, his personal prominence in the targeted group, the unity of the authorities responsible for the imprisonment and the apartheid, and the inescapable approval and sanction by those authorities of the conduct of the specific individuals responsible both for the imprisonment and the apartheid. On the facts pertaining aboard the Three Vessels, beyond the common involvement of the IDF both in the interception and in Gaza, there is no reasonable basis to infer such similar factors.
[232] *Contra* Request, paras.129, 131, 134. *See above* paras.70-72. By its assertion that, "arguabl[y]", the "acts of the IDF on the flotilla would have sent a clear message to those in Gaza", the Comoros again disagrees with the conclusion in the Report that there was no reasonable basis to believe that the Identified Crimes were committed systematically or as part of a plan. Concerning the Comoros' assertion that "there have been no prosecutions for any of the alleged crimes committed", *see above* fn.16.

98. The Comoros incorrectly implies that the Prosecution failed to consider the controversial legal status of the blockade, asserting that it "should have taken into account that this blockade has been strongly condemned […] as a fundamental breach of international law".[233] This overlooks the express acknowledgement in the Report that "[t]he legality of the blockade has been the subject of controversy", demonstrated by the fact that the Turkel Commission and Palmer-Uribe Panel considered it to be lawful whereas the Turkish Commission and HRC considered it to be unlawful.[234] The Comoros is inaccurate when it states that the Prosecution did "not even mention" the finding of the HRC in the Report.[235] Moreover, notwithstanding the specific question of any offence under article 8(2)(b)(ii) of the Statute (unlawful attacks on civilian objects), the legality of the blockade does not affect the impact of the Identified Crimes. There is no reasonable basis to believe that the Identified Crimes were part and parcel of the enforcement of the blockade; rather, they appeared incidental to it.[236]

99. Having regard to its obligations of objectivity, independence and impartiality,[237] the Prosecution is not required to weigh "the highly controversial nature of the situation" and the amount of "international concern" in assessing the impact of crimes.[238] Such concern may be an indication of the possible impact of crimes, but that must be assessed objectively on the facts, as the Prosecution did in the Report. The Prosecution was not inconsistent in its analysis of those facts.[239]

[233] Request, para.130.
[234] Report, para.30, fn.42.
[235] *Contra* Request, para.130 (citing HRC Report, paras.38, 54). *See* Report, para.30, fn.42 (citing HRC Report, para.58). Whereas the Comoros cites interim observations and conclusions of the HRC, the Prosecution cited the relevant legal conclusion.
[236] *See above* paras.36-37.
[237] *See* Policy Paper, paras.25-33.
[238] *Contra* Request, paras.131, 133.
[239] *Contra* Request, para.133.

3. The Prosecution applied the correct standard for torture or inhuman treatment

100. The Comoros disagrees with the law applied by the Prosecution in characterising the apparent abuse of detainees aboard the *Mavi Marmara* as outrages upon personal dignity, in the meaning of article 8(2)(b)(xxi) of the Statute, rather than torture or inhuman treatment, in the meaning of article 8(2)(a)(ii). The Prosecution was correct, however, in its application of the law on severity.[240] To the extent that the Prosecution correctly applied the law on severity, and reasonably applied that law to the facts as it understood them,[241] the Comoros' argument as to the mental state of some perpetrators is irrelevant.[242]

101. In the Report, the Prosecution concluded that the mistreatment of the detained persons aboard the *Mavi Marmara* did not appear to amount to "infliction of 'severe' pain or suffering so as to fall within the intended scope of inhuman treatment under article 8(2)(a)(ii)".[243] This is consistent with the express inclusion of a requirement for "severe" treatment in the Elements of Crimes.[244] As Dörmann has noted, unlike the *ad hoc* tribunals,[245] the degree of pain and injury required to establish "inhuman" treatment at the Court:

> is qualified in the same way as for torture ('severe') and conduct constituting a serious attack on human dignity is not considered part of the crime. States took the view that such an attack would rather constitute an 'outrage upon personal dignity, in particular

[240] *Contra* Request, paras.94-95, 97.
[241] *See above* paras.74-78.
[242] *Contra* Request, para.97.
[243] Report, para.69.
[244] Elements of Crimes, arts.8(2)(a)(ii)-1, element 1 (for torture, "The perpetrator inflicted severe physical or mental pain or suffering"), 8(2)(a)(ii)-2, element 1 (for inhuman treatment, "The perpetrator inflicted severe physical or mental pain or suffering"), 8(2)(b)(xxi), element 2 (for outrages upon personal dignity, "The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity").
[245] *See e.g.* ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para.256 (defining inhuman treatment as causing "serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity").

humiliating and degrading treatment' in the sense of article 8 para. 2 (b) (xxi) of the Statute.[246]

102. It is well established that determining whether conduct amounts to "severe" pain or suffering is a fact-sensitive inquiry.[247] The requirement does not rise as high as demanding "'extreme pain or suffering' or 'pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'".[248] The Prosecution also stresses that comparisons between different factual circumstances are generally likely to be of little assistance for the purpose of a severity analysis. Yet it notes the types of conduct contemplated by the ICTY Trial Chamber in *Delalić* as likely to meet the severity requirement[249] and other types of conduct which, conversely, have not been found, in the circumstances, to meet the requirement.[250] At this Court, conduct which has been considered to meet

[246] Dörmann, 'Article 8: War crimes, para. 2 (a)', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2008) ("Dörmann"), pp.308-309, mn.20. *See further* Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: CUP, 2003), pp.63-64; Nowak and McArthur, *The United Nations Convention against Torture: a Commentary* (Oxford: OUP, 2008), p.558. *But see* Schabas, p.216.

[247] *See* Dörmann, p.309, mn.20, fn.196 (citing with approval *Krnojelac* TJ, para.131: "The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex, and health. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious."). *See further* ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić* AJ"), para.499 ("torture is constituted by an act or omission giving rise to severe pain or suffering, whether physical or mental, but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required […] Thus, while the suffering inflicted by some acts may be so obvious that the acts *per se* amount to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted").

[248] ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para.249.

[249] ICTY, *Prosecutor v. Delalić et al*, IT-96-21-T, Judgement, 16 November 1998, para.467 (noting that the UN Special Rapporteur on Torture, in his 1986 report, provided an illustrative catalogue of conduct tending to involve the infliction of suffering of the requisite severity, including "beating; extraction of nails, teeth, etc; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions").

[250] *See e.g. Simić* TJ, para.80; *Krnojelac* TJ, para.181 (interrogation of itself; "minor contempt" for physical integrity), 183 (solitary confinement or deprivation of food, but depending significantly on the circumstances); *Prosecutor v. Mrkšić et al*, IT-95-13/1-T, Judgement, 27 September 2007, para.524 (imprisonment). The prolonged duration of such conduct may require a reassessment as to whether the threshold is passed: *see e.g. Naletilić* AJ, para.299; *Krnojelac* TJ, para.182.

the severity requirement includes imprisoning civilians with bound hands for many hours in a room filled with dead bodies,[251] and forcing abducted civilians, under threat of death, to carry plundered property or to march long distances.[252]

103. For reasons of practicality, the Prosecution is obliged to provide some legal characterisation of conduct in a preliminary examination, and selects the characterisation which best fits the facts as it appreciates them.[253] If it did not do that, it could not determine that there was a reasonable basis to believe that a crime had been committed.

104. In any event, even if the Prosecution erred by characterising the mistreatment as an apparent offence under article 8(2)(b)(xxi) rather than 8(2)(a)(ii), this does not materially affect the outcome of the Report. The Comoros does not show that the Prosecution misapprehended the relevant conduct, whatever legal label was applied to it, nor is it established that there is any hierarchy of offences under the Statute. The Comoros thus fails to show that the gravity analysis would have differed in any material respect as a result of a different legal characterisation.

[251] *See* ICC-01/04-01/07-717, para.363. *See also* Report, para.69, fn.133.
[252] *See e.g.* ICC-2/04-01/05-53, p.13 ("Count Seven").
[253] *Contra* Request, para.95 (suggesting that it was "surprisingly premature" to make a determination as to the applicable offence).

Conclusion

105. For the reasons above, the Request should be dismissed.

Fatou Bensouda, Prosecutor

Dated this 30th day of March 2015

At The Hague, The Netherlands