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Date: **23 February 2018**

**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 Redacted Document with Confidential Annexes 1-3**

**Application for Judicial Review by the Government of the Union of the Comoros**

**Source:**                    **Rodney Dixon QC, and Stoke & White Ltd (London) on behalf of the  
Government of the Union of the Comoros**

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

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## **I. INTRODUCTION: OVERVIEW OF GROUNDS OF REVIEW**

1. Counsel for the Government of the Union of the Comoros ('the Comoros') submits this Application for judicial review to Pre-Trial Chamber I pursuant to Article 53(3)(a) and Rules 107-108 in respect of the two Decisions that the Prosecutor rendered on 29 November 2017 in which she declined in both to open an investigation in the present Situation,<sup>1</sup> namely (i) the Prosecutor's Reconsideration Decision issued at the direction of the Pre-Trial Chamber I in its Decision of 16 July 2015 in accordance with Articles 17(1), 53(1) and 53(3)(a), and Rule 108(3) ('OTP Reconsideration Decision');<sup>2</sup> and, (ii) the Prosecutor's Decision on new facts and information received in accordance with Articles 17(1), 53(1) and Article 53(4) ('OTP Decision on New Evidence').<sup>3</sup> The Prosecutor has made clear that the OTP has handed down each of these separate decisions, and has accordingly set them out in two distinct sections in the OTP's filing: Parts I and II for the OTP Reconsideration Decision and Part III for the OTP Decision on New Evidence.
  
2. Pre-Trial Chamber I requested<sup>4</sup> the Prosecutor to reconsider her first decision not to open an investigation of 6 November 2014 ('First OTP Decision')<sup>5</sup> because of the errors committed by the Prosecutor in her assessment of the gravity of the alleged war crimes that the Prosecutor found there was a reasonable basis to believe had been perpetrated by the Israeli Defense Force (IDF) against civilians. The Chamber found in its Decision, by a majority, that the Prosecutor's reasoning and findings in respect of the relevant factors under Article 17(1)(d) for determining whether the case is grave enough to warrant investigation were erroneous as a matter of law, and were irrational and unreasonable under applicable and well-established principles of judicial review ('Chamber's Decision to Reconsider').<sup>6</sup> As a result the Prosecutor was required to address and rectify these particular errors.

<sup>1</sup> Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017.

<sup>2</sup> Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017, paras. 1-170 (hereinafter "OTP Reconsideration Decision").

<sup>3</sup> Notice of Prosecutor's Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017, paras. 171-331 (hereinafter "OTP Decision on New Evidence").

<sup>4</sup> Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015 (hereinafter "Chamber's Decision to Reconsider").

<sup>5</sup> Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, Annex A - Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014 (hereinafter "First OTP Decision").

<sup>6</sup> The Comoros submits that the composition of Pre-Trial Chamber I should remain as presently constituted in full to consider and decide the present Application, and not be changed in any way, given that the present Chamber has considered the Prosecutor's first Decision and the relevant evidence, and has directed reconsideration on the

3. In both OTP Decisions of 29 November 2017, the sole issue that is again relied on by the Prosecutor to refuse to open an investigation into the war crimes that the Chamber confirmed were committed by the IDF is that of *gravity*. The Prosecutor in both Decisions found that it has not been established that the crimes are sufficiently serious to warrant further investigation by the ICC, and that they could instead be investigated by domestic courts. There is no evidence, and none cited by the Prosecutor, that these same crimes are in fact being investigated by the Israeli national authorities. The perpetrators of the crimes are thus not subject to any criminal investigation and there is realistically no prospect of them ever being investigated for the same crimes as those before the ICC.
  
4. It is for this reason that the Comoros referred the matter as a State Party to the ICC Prosecutor for investigation. As the Pre-Trial Chamber noted in its Decision to Reconsider, the attack by the IDF on the Mavi Marmara, a civilian vessel with only civilian passengers, was an international controversy of great significance and concern which threatened diplomatic relations and peace in the Middle East, and thus which engaged the UN at the most senior level including through two particularly high-level inquiries and reports.<sup>7</sup> There has understandably been a reasonable expectation that the world's criminal court would at least conduct further investigations into this matter when the Israeli national jurisdiction has completely failed to act, and instead exonerated the alleged perpetrators.
  
5. The sole test for the Pre-Trial Chamber is whether the OTP has committed errors in the new Decisions that are reviewable by the Chamber. It is certainly irrelevant whether the

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basis of the specific errors *it* found to have been committed. It would not be appropriate for any newly constituted Chamber to assess whether these particular errors have now been rectified by the Prosecutor, and whether any new related errors have been committed. It would not be open to any newly constituted Chamber to adjudicate whether the Decision of the Majority of Pre-Trial Chamber I as presently constituted, and the errors identified therein, were wrongly decided. That would be a matter solely for the Appeals Chamber, if the Decision had been appealed. The Prosecutor has also leveled particular accusations against the present Chamber and claims that it has made patently incorrect and unjustified rulings that she can disregard. It is thus only appropriate that the Chamber as constituted can consider and respond to the criticisms of its ruling. For all these reasons, the necessary arrangements should be made by the Court to ensure that the Chamber as presently constituted in full can decide this Application. This is a unique situation that is particular and limited to judicial review proceedings in respect of a referral by a State Party (that would not necessarily arise in other contexts) in which *continuity* is essential for the interests of justice, and for justice to be seen to be done.

<sup>7</sup> 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 Human Rights Council, A/HRC/15/21, 27 September 2010, paras. 38, 54 (hereinafter "UNHRC Report"); Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, paras. 116-117, 126-127 (hereinafter "Palmer Report").

Chamber disagrees with the OTP's Decisions. As the Chamber ruled in its Decision to Reconsider, its powers are limited to errors that justify the Chamber's intervention under well-known principles of judicial review. The OTP is wrong to assert in its Decision on Reconsideration that the Chamber merely disagreed with the conclusions reached by the OTP. The Chamber very carefully and rightly only focused on the legal errors in the First OTP Decision. As submitted herein, the OTP has again committed fundamental errors that are subject to review in its two new Decisions (see Parts IV and V below), namely:

- The OTP erred in arguing as its first position that the OTP is not required to address the errors the Chambers found committed in the First OTP Decision. The Prosecutor as a party to proceedings is plainly not at liberty to refuse to comply with a decision of the Court. Moreover, it is beyond dispute that the Court decides the applicable law – it is not the Prosecutor nor the Defence nor the Victims who define the applicable legal standards (i.e. the meaning of the 'reasonable basis' standards), legal elements of offences, and the procedural requirements. The parties are bound to apply the law and procedure as decided by the Judges.
- The OTP has erred throughout her Decisions in misapplying the 'reasonable basis' standard in respect of the factors under Article 17(1)(d) relevant to the gravity assessment. The OTP consistently applies the wrong standard in respect of gravity for opening an investigation, and one akin to the highest standard of beyond reasonable doubt.<sup>8</sup> This is an error peculiar to the present case. In other cases, the Prosecutor has correctly applied the lower threshold to determine if she should initiate an investigation or even charge persons. Indeed, the OTP has applied the right standard for finding a reasonable basis that war crimes were committed by the IDF, by excluding another reasonable inference that the IDF acted in self-defence, as this is a matter that would be considered during an actual investigation. Yet, in respect of gravity, the Prosecutor specifically relies on the possible inferences that could be drawn in defence of the IDF and those in command (such as that the crimes were individual, 'rogue' acts and not planned) to conclude that the crimes were not sufficiently serious.
- The Prosecutor erred in the OTP Reconsideration Decision as she failed to apply her mind to, and address, the errors identified by the Chamber; and indeed committed the same errors again and new errors. The OTP completely failed to grasp the errors it had committed in its first Decision, and in particular the clear evidence which shows at least to a 'reasonable basis' standard that very serious and especially cruel offences were committed, leaving aside of course that there could be defences available to the IDF and its command which would have to be inquired into and considered as part of the investigation itself.
- The OTP erred in its Decision on New Evidence in failing to take into account or give any weight to the new evidence which concerned the particular factors relevant to the

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<sup>8</sup> *Situation in The Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, paras. 102-111. See, footnote 76 and 194 below.

gravity assessment pursuant to Articles 17(1)(d) and 53(1); the Prosecutor misapplied the law, and acted irrationally and unreasonably in the determination of gravity including in respect of those most responsible for the alleged offences, and the scale, nature, manner of commission, and impact of the offences. On any reasonable view, there is significant body of new evidence consistent with heightened gravity (including two independent expert reports – see below) which any reasonable prosecutor would regard as showing a reasonable basis to investigate further. Many of the same kinds of errors were merely repeated by the OTP which are subject to judicial review.

6. By way of background, it bears emphasis that no State referral has ever been refused by the Prosecutor entirely without any investigation at all, which makes the Prosecutor's latest two Decisions in this particular case highly unusual, especially given the discrete errors that had been identified by the Chamber, and the wealth of evidence provided to the Prosecutor which on any view at least highlight a reasonable basis that very serious crimes could have been committed against defenceless civilians (see Part II below for summary of evidence). The Comoros has only asked that these allegations are investigated by the Prosecutor. It is thus distinctly surprising that the Prosecutor has resisted resolutely every step of the way. So much time and effort has been expended by the Prosecutor and her office to hold that the OTP need not fulfil the Prosecutor's primary role and mandate to investigate allegations fearlessly that on their face appear grave and of international concern, and certainly to be of equal magnitude to other cases the Prosecutor has decided do warrant her attention.
7. The Prosecutor has taken nearly 5 years to decide (with hundreds of pages of OTP findings) that she will not investigate this case, without actually investigating it. The Prosecutor could have in that number of years, having applied herself diligently, indeed investigated the case and decided whether to prosecute on the basis of the evidence the OTP had in fact been able to assemble, analyse and verify itself.
8. The OTP has instead relied considerably on the findings of the report of the Turkel Commission, the Israeli appointed commission of inquiry, which essentially found that no crimes had been committed by the IDF. The comprehensive body of evidence provided by the Comoros has been overlooked or given no weight by the OTP. In particular, two expert reports which were commissioned by the Comoros – one from a renown international military expert and another from a very senior and experienced pathologist – which are both consistent with an assessment that could reasonably show the case to very

serious in light of live ammunition being used against civilians from the outset, have been completely dismissed or not taken into account at all in respect of key aspects relevant to gravity. The OTP has instead selectively and unreasonably picked out only parts of these reports that suit its conclusion that no investigation should be commenced. It is blatantly wrong to find that there is no evidence reasonably consistent with a deliberate attack on civilians. Of course, the defences that will be raised by the IDF will be investigated as part of the investigation to determine whether the case could be proved beyond reasonable doubt. But that is not the stage yet reached. The Prosecutor should not be relying on – and substantially so – potential IDF defences to refuse to open an investigation into the allegations in the first place.

9. It is undeniable that there are competing versions of events. The IDF maintain that they were attacked by civilians and had to defend themselves, while the passengers testify that they came under live fire and sought to defend themselves against heavily armed soldiers. They say their ‘resistance’ (as it is repeatedly labeled by the OTP and by the IDF) was self-defence as they sought in vain to prevent themselves being killed and to protect their fellow passengers from the determined assault by soldiers who were undoubtedly using live ammunition. The Prosecutor’s heavy reliance on the argument that lay persons, like the civilian passengers, may not have known the sound of live ammunition and confused it with less lethal weaponry is a wholly unreasonable view to adopt, contrary to the witnesses own evidence about actually recognising and seeing live fire, and especially given that there is no dispute that civilians were shot and died because of live ammunition being fired into them.
  
10. Any objective review of the Prosecutor’s Decisions would find that the Prosecutor has largely concluded – prematurely – in favour of the IDF’s version and defences (as also espoused by the Turkel Commission) without having investigated the case. The Prosecutor has taken the view that there was no deliberate attack on civilians; there could not have been any plan to do so; the passengers resisted and rioted (like at the airport in Israel when they were flown out<sup>9</sup>), and there were no executions or killings after the IDF had ‘calmed’ the situation and seized control of the ship. The OTP’s position is that a few rogue soldiers may have killed civilians in the melee and confusion (but this is without

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<sup>9</sup> OTP Decision on New Evidence, para. 228.



considering self-defence for the soldiers – not the victims – at this stage). In addition, the OTP has found that the treatment of the hundreds of passengers who were detained after the killings, was not cruel and inhuman; none could have amounted to torture; none were discriminatory. And the OTP concludes that there was no connection between these crimes and the interrogations and mistreatment of the passengers when they were taken by the IDF to Ashdod in Israel – no reasonable inference can be drawn that these actions could have been coordinated and part of a plan. The Comoros submits that such a conclusion is perverse; no reasonable prosecutor could come to such a conclusion at this stage, before an investigation, that these events unfolded by pure accident and were unconnected without any overall oversight and command.

11. The OTP will likely argue that there is no right to review the Prosecutor's Decisions. Narrow-minded and overly technical arguments may be deployed by the OTP to attempt to stamp out any scrutiny over the Prosecutor's view that the Preliminary Examination is now finally closed, and nothing more can be done by those aggrieved, even if major errors remain. The Chamber should firmly dismiss these assertions, if raised (see Part III below). It cannot be correct that only the Prosecutor has the right to decide whether errors she has committed have now been rectified, and that her decisions in this regard are entirely beyond judicial review. Fundamental principles of justice, fairness and integrity would demand that the Prosecutor cannot be the judge in her own cause. It also cannot be right that when the Prosecutor reconsiders a previous decision based on new evidence and facts, that this decision is somehow free from any judicial review given that the same legal requirements as set out in Articles 17 and 53 are the subject of any reconsideration. This is not what the provisions of the Statute and Rules provide, it is not what States Parties intended, and it would be contrary to the overall object and purpose of judicial review in the context of referrals by State Parties.
  
12. The Prosecutor goes so far as to claim in the OTP Reconsideration Decision that she is only obliged to correct an error identified by the Chamber if she agrees that she has committed such an error.<sup>10</sup> If she disagrees with the Chamber, the Prosecutor can then ignore the Chamber. This thinking strikes at the heart of the judicial review regime that States explicitly incorporated into the Statute specifically for State referrals, and is plainly

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<sup>10</sup> OTP Reconsideration Decision, paras. 4, 51.

at odds with all well-established principles of judicial review throughout the world. No court could ever accept that if it referred a decision back to an authority to rectify certain errors that it would be up to that body to second-guess the court and decide whether it need do so or not. Very often decisions that have been sent back for reconsideration are judicially reviewed a second time because the same errors have been made or not addressed by the authority concerned, including prosecutors' offices. Any justice system would break down if the decisions of courts could be ignored when authorities did not like the outcome. The issues thus raised in the present Application are crucial constitutional ones for the ICC that require the Court unambiguously to confirm its powers to review the Prosecutor's decisions in respect of State referrals in accordance with the deep-rooted and entrenched principles of judicial review. It is vital for the legitimacy, reputation and transparency of the Court.

## **II. PROCEDURAL BACKGROUND**

13. The background to this Application is important as it shows the several steps that the Comoros has taken to provide the OTP with evidence directly relevant to establishing the gravity of the potential cases. The Comoros has annexed to this Application certain of the correspondence and key new evidence for the record and so that the Chamber can itself see the breadth and scale of the evidence showing the alleged crimes to be sufficiently serious, and to assist in understanding the Applicant State's submissions.<sup>11</sup> It also shows the countless opportunities the OTP has been given to interview witnesses, visit and inspect the ship, and to request any further information if that was required. Instead, on many occasions in its Decisions the OTP says that it needed further information, which then wrongly becomes a reason to refuse to investigate.
14. On 6 November 2014, the OTP issued the First OTP Decision finding that there was no reasonable basis to proceed with an investigation.<sup>12</sup> On 29 January 2015, the Comoros submitted an Application to the Pre-Trial Chamber asking the Chamber to review the Prosecution's decision not to open an investigation. On 16 July 2015, Pre-Trial Chamber

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<sup>11</sup> These annexes do not contain any argumentative submissions. They are purely materials that have been exchanged between the parties which it is necessary for the Chamber to view in order to have the full background for the record and to understand the dispute between the parties. See Regulation 36(2)(b).

<sup>12</sup> Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, Annex A - Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014.

I issued its decision on the Application of the Comoros for review finding that the Prosecution should reconsider its decision not to investigate in light of the specific errors identified.<sup>13</sup> On 6 November 2015, the Appeals Chamber dismissed the Prosecution's appeal of the Pre-Trial Chamber's decision of 16 July 2015 finding that "the Impugned Decision was not one 'with respect to [...] admissibility' within the meaning of article 82 (1) (a) of the Statute."<sup>14</sup> The OTP only appealed directly to the Appeals Chamber without seeking the leave of the Pre-Trial Chamber in the alternative, or at any later time.

15. Following this decision, on 3 December 2015, Counsel for the Government of the Comoros met with the Prosecutor. The Prosecutor was informed that new evidence had been collected by the Comoros that concerned the issue of gravity that would be submitted to the OTP.<sup>15</sup> On 28 January 2016, the legal representatives of Comoros submitted this new evidence.<sup>16</sup> The OTP was provided with a list of all materials and documents that had been provided to the Prosecution up until the Decision of 6 November 2014. A separate list was also submitted to the OTP that set out the new evidence collected. The letter noted that the legal team would soon submit further evidence for the Prosecution's consideration, and offered to assist in organising interviews with the passengers, and providing any further information that may be needed.
16. On 31 March 2016, further new evidence was submitted to the OTP by the Comoros.<sup>17</sup> The new witness statements provided evidence including that: (i) passengers were shot before any soldiers boarded the Mavi Marmara; (ii) initial shooting from the zodiac boats caused the passengers to fear for their lives and believe their lives were threatened; (iii) gratuitous violence and cruelty was perpetrated by the IDF; (iv) IDF soldiers picked off passengers with live ammunition on the decks below who presented no danger to the soldiers; and (v) wounded passengers were shown no mercy. The Comoros' letter

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<sup>13</sup> Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

<sup>14</sup> Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", ICC-01/13-51, 6 November 2015, para. 66.

<sup>15</sup> Meeting between the Legal Team for the Government of the Comoros and the Prosecutor at the ICC, 3 December 2015.

<sup>16</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution and two annexes, 28 January 2016 (hereinafter "Letter to Prosecution of 28 January 2016"). See, Conf. Annex 3.

<sup>17</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution, 31 March 2016 (hereinafter "Letter to Prosecution of 31 March 2016"). See, Conf. Annex 3.

highlighted that evidence showed that the IDF failed to use non-confrontational alternatives to boarding of the ship and did not seek to de-escalate the situation.

17. On 14 April 2016, the Prosecution sent a letter to the legal representatives of the Comoros confirming receipt of the new evidence submitted.<sup>18</sup> The letter also requested access to victim applications for consideration. On 29 April 2016, the Legal Representatives for Victims informed the OTP that the majority of victim applications were posted to the OTP for confidential consideration, and that the remainder would be submitted shortly.<sup>19</sup> An update was sent on 8 June 2016 also highlighting for the OTP's benefit specific victim applications which demonstrate the gravity of the crimes committed including evidence that (i) victims were targeted and shot from helicopters; (ii) victims were targeted from zodiacs; (iii) victims were severely beaten and mistreated; (iv) victims were assaulted after being wounded; (v) doctors and nurses were prevented from giving treatment; and (vi) victims were shot even after being handcuffed or having surrendered.<sup>20</sup> On 4 July 2016, a letter was sent to the Prosecution from the Legal Representatives for Victims informing the Prosecution that further victim applications were posted to the OTP for consideration.<sup>21</sup> On 21 July 2016, further victim applications were sent to the OTP.<sup>22</sup> On 5 August 2016, the Prosecution acknowledged receipt.<sup>23</sup>
18. On 31 August 2016, further victim applications were sent to the OTP.<sup>24</sup> The letter called the OTP's attention to an annex containing extracts of victim applications that provide evidence that victims were forced into stress positions for prolonged periods of time, and notes that the OTP has formerly found that the use of stress positions could amount to torture and outrages of personal dignity depending on the severity. The letter again notes that Counsel remain available to answer any questions and provide any further information as may be needed.

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<sup>18</sup> Letter from Prosecution to the Legal Team for the Government of the Comoros, Ref: 2016/046/FB/JCCD/er, 14 April 2016.

<sup>19</sup> Email from the Legal Representatives for Victims to the Prosecution, 29 April 2016.

<sup>20</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution, 8 June 2016 (hereinafter "Letter to Prosecution of 8 June 2016"). See, Conf. Annex 3.

<sup>21</sup> Letter from the Legal Representatives for Victims to the Prosecution, 4 July 2016.

<sup>22</sup> Letter from the Legal Representatives for Victims to the Prosecution, 21 July 2016.

<sup>23</sup> Letter from Prosecution to the Legal Representatives for Victims, Ref: 2016/056/FB/JCCD-er, 5 August 2016.

<sup>24</sup> Letter from the Legal Representatives for Victims to the Prosecution, 31 August 2016 (hereinafter "Letter from Victims of 31 August 2016"). See, Conf. Annex 3.

19. On 31 August 2016, Counsel for the Comoros submitted further new evidence to the OTP, highlighting the substantial amount of new evidence concerning the shooting of live fire from the helicopters and drawing attention to specific victim applications that provide direct evidence on this point.<sup>25</sup> Importantly, an expert report from an independent and prominent military expert was submitted addressing the nature of the operation against the Flotilla and the chain of command involved in the decision-making processes and the planning and oversight of the operation.<sup>26</sup> In addition, and of equal significance, on 27 January 2017, Counsel for the Comoros submitted a forensic expert report by a leading pathologist from the United Kingdom.<sup>27</sup> As highlighted in the covering letter, the forensic expert examined the autopsy reports of those killed and wounded on the Mavi Marmara, conducted examinations of the ship and with witnesses present, as well as damage to the ship and other related evidence. It noted that the report provides independent forensic analysis on the “direction of firing from both the helicopters and surrounding boats” and shows that the forensic evidence examined is “consistent with passengers being shot with live ammunition on the top deck from the helicopters above before any soldiers descended onto the Mavi Marmara.”<sup>28</sup>
20. On 21 August 2017, the legal representatives for the Comoros requested a meeting with the Prosecutor to check if any further information was required.<sup>29</sup> On 10 November 2017, the Legal Representatives for Victims requested a similar meeting before the OTP issued its decision in particular to highlight that no national proceedings were underway and that the ICC provided the last avenue for them to pursue accountability and prevent impunity.<sup>30</sup> On 24 November 2017, the Prosecution declined both requests.<sup>31</sup> The OTP’s Decisions followed on 30 November 2017.<sup>32</sup>

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<sup>25</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution, 31 August 2016 (hereinafter “Letter from Comoros of 31 August 2016”). See, Conf. Annex 1.

<sup>26</sup> Expert Military Report of retired Col. Desmond Travers. See, Conf. Annex 1.

<sup>27</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution, 27 January 2017. See, Conf. Annex 2 and Expert Forensic Report of Dr. Peter Jerreat, 24 January 2017 (hereinafter “Expert Forensic Report”).

<sup>28</sup> Letter from the Legal Team for the Government of the Comoros to the Prosecution, 27 January 2017. See, Conf. Annex 2.

<sup>29</sup> Email from the Legal Team for the Government of the Comoros to the Prosecution, 21 August 2017.

<sup>30</sup> Letter from the Legal Representatives for Victims to the Prosecution, 10 November 2017.

<sup>31</sup> Letter from Prosecution to the Legal Representatives for Victims and Legal Team for the Government of the Comoros, Ref: OTP/UK/241117/PM-er, 24 November 2017.

<sup>32</sup> OTP Reconsideration Decision, para. 2.

**III. THE COMOROS AS A STATE PARTY HAS THE RIGHT TO REQUEST THE REVIEW OF THE TWO OTP DECISIONS ON THE BASIS OF THE ERRORS COMMITTED BY THE PROSECUTOR**

21. As noted above, the Prosecutor as issued two separate decisions: (i) the OTP Reconsideration Decision<sup>33</sup> in response to the Chamber’s Decision to Reconsider, and (ii) the OTP Decision on New Evidence which was “independently” initiated by the “Prosecution’s exercise of discretion under Article 53(4)”<sup>34</sup>, and not at the request of the Pre-Trial Chamber. The Prosecution confirms that it has made two separate and distinct decisions, stating that “in determining whether and, potentially, how to ‘reconsider’ a prior decision, in the meaning of article 53(3)(a) and rule 108(2), the Prosecution will analyse the reasoning of that prior decision based on the context of the *information available at the time the prior decision was taken*” and therefore “for the strict purpose of article 53(3)(a) and rule 108(2), the Prosecution is obliged neither to receive or to inquire into additional information which may have come to light since the original article 53(1) decision was taken.”<sup>35</sup> The OTP states that for new information received after her first decision, a separate and new decision must and has been taken by the Prosecutor.<sup>36</sup>
22. The provisions of the Statute and Rules, the intent of States Parties, and the overall object and purpose of the judicial review procedure that has been incorporated into the Statute for the benefit of State Parties, all permit these two Decisions not to open an investigation to be reviewed by the Pre-Trial Chamber at the request of a referring State Party, the Comoros, under Article 53(3)(a).

**1. A referring State Party may request that the Pre-Trial Chamber review the Prosecution’s decision on reconsideration**

23. Article 53(3)(a) stipulates when a Prosecutor’s decision can be reviewed by the Pre-Trial Chamber. It makes clear that a referring State Party may request a review by the Pre-Trial Chamber if the Prosecutor has made a decision pursuant to and in accordance with the criteria set out in Article 53(1) not to proceed with an investigation:

<sup>33</sup> OTP Reconsideration Decision, paras. 95-170.

<sup>34</sup> OTP Decision on New Evidence, Section III, paras. 171-331.

<sup>35</sup> OTP Reconsideration Decision, para. 176.

<sup>36</sup> OTP Reconsideration Decision, para. 177.

*“(a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.”<sup>37</sup>*

24. Article 53(1) defines when a decision by the Prosecutor is to be regarded as “a decision of the Prosecutor under [Article 53] paragraph 1”<sup>38</sup>, and consequently a decision that the referring State Party may request the Pre-Trial Chamber to review under Article 53(3)(a). A decision made pursuant to and in accordance with Article 53(1) is one which “*decid[es] whether to initiate an investigation*” taking into account the three criteria listed in Article 53(1) subparagraphs (a)-(c):

*“1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:*

*(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;*

*(b) The case is or would be admissible under article 17 [i.e. whether the gravity and complementarity requirements are met]; and*

*(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.*

*If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.” [emphasis added]*

25. The governing provisions of the Statute are thus very clear: any decision not to investigate based on these criteria, including gravity, is subject to judicial review. The explicit wording of the Statute does not limit a State Party’s rights to judicial review to only a first decision by the Prosecutor.
26. The relevant Rules do not alter this clear position. Rule 105 provides in relevant part that: “*1. When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform in writing the State or States that referred a situation under Article 14*”. Rule 107 states in relevant part that: “*1. A request under article 53, paragraph 3, for a review of a decision by the Prosecutor not to initiate an*

<sup>37</sup> Rome Statute, Art. 53(3)(a).

<sup>38</sup> Rome Statute, Art. 53(3)(a).

*investigation or not to prosecute shall be made in writing, and be supported with reasons, within 90 days following the notification given under rule 105 or 106. Rule 108 provides that:*

*“1. A decision of the Pre-Trial Chamber under article 53, paragraph 3 (a), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review.*

*2. Where the Pre-Trial Chamber requests the Prosecutor to review, in whole or in part, his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible.*

*3. Once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. This notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion. It shall be communicated to all those who participated in the review.”*

27. None of these Rules expressly or in any way restrict the rights of States Parties who have referred a situation to the Prosecutor under Article 14 to request a review of OTP decisions to refuse to investigate. Even though Rule 108 uses the words “final decision” following a request by the Chamber for reconsideration, the Rules do not state that this “final decision” is itself non-reviewable. It is indeed a “final” decision in response to the Chamber’s request for consideration, but it is not “final” as regards any further review proceedings that may be initiated on the basis of errors committed by the Prosecutor, by referring State Parties (or indeed the Security Council if the situation was referred by the Council).<sup>39</sup> This interpretation of the Rules is the only one that is in conformity with the express language of the Statute that clearly permits a referring State Party to request the review of any OTP decision to refuse to investigate in accordance with Article 53(1). It is the only logical and consistent interpretation of the provisions of the Statute and Rules read together. There can be no doubt whatsoever that the Prosecutor has acted pursuant to Article 53(1) – she clearly states in the Introduction of her Reconsideration Decision that ***“the Prosecution remains of the view that there is no reasonable basis to proceed with an investigation under article 53(1) of the Statute.”***<sup>40</sup>

28. Indeed, Article 53(1) is the only provision the Prosecutor could base her Reconsideration Decision on as it sets out the specific requirements to open an investigation (see above).

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<sup>39</sup> The Prosecutor is therefore wrong if by submitting that “the Prosecution’s independent reconsideration will constitute the ‘final decision’ on the matter”, she means final for *all time*. It is of course ‘final’ in respect of the present request for reconsideration. See, OTP Reconsideration Decision, para. 3.

<sup>40</sup> OTP Reconsideration Decision, para. 2.



The Prosecutor has obviously considered and applied them in order to come to her new decision on reconsideration, in particular in respect of the gravity requirement. The entire Section II of the OTP's Reconsideration Decision – which details the Prosecution's new decision based on the Pre-Trial Chamber's Rule 108(2) request<sup>41</sup> – re-analyses the evidence considered in the First OTP Decision not to investigate of 6 November 2014 to determine whether there is “sufficient gravity to justify further action by the Court”; the very criteria for admissibility under Article 17(1)(d) which is a requirement under Article 53(1)(b) to open an investigation. This Section is entirely focused on assessing such factors as the nature and scale of the crimes, manner of commission of the crimes, potential perpetrators and impact of the crimes – all factors relevant to determining the gravity of the potential cases under Article 17(1)(d) as required by Article 53(1)(b), and as set out in the Prosecution's own policy on Preliminary Examinations.<sup>42</sup> No matter what the Prosecution chooses to call its Decision, the fact is that it is a decision made pursuant and in accordance with Article 53(1).

29. Accordingly, the OTP's Reconsideration Decision can be reviewed pursuant to Article 53(3)(a) as a decision in accordance with Article 53(1). It is correct that Rule 107(1) for the filing of such a review refers to the decision having been notified under Rule 105(1) and not Rule 108(3), but this is only a provision as to the timing for the filing of a review application. It is not concerned with the substantive point of whether a right of review exists in the first place. Rule 108 is silent on this point, as are all the other relevant Rules. However, as set out above, Article 53 is absolutely clear on this matter – and must govern the position – that any decision pursuant to and in accordance with Article 53(1) is reviewable.
  
30. This reading of the provisions also reflects the intention of States Parties in providing through the adoption of Article 53(3)(a) that they would always have a right of review directly to the Judges when they referred situations for investigation. It would be absurd if this right were strictly limited to only a first decision and no others that could have the same errors, or worse ones. It would defeat the intention of States Parties and the overall object and purpose of incorporating a judicial review procedure specifically and only for

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<sup>41</sup> OTP Reconsideration Decision, Sec. II.1-II.7.

<sup>42</sup> Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, paras. 9, 59-66.

States Party referrals. If it were right that no review is permissible after reconsidering a decision, then if the Prosecutor came back and decided not to investigate on a completely different basis, such as complementarity, that decision would be beyond review even if decided erroneously. Such an outcome cannot be correct, and would undermine the entire purpose of judicial review of such decisions. Moreover, if the OTP decided on reconsideration that the Chamber was correct and changed its decision but decided not to investigate nevertheless in the interests of justice under Article 53(1)(c) and not Article 53(1)(b) (gravity), then if it was correct that this decision as a reconsideration (second) decision was not reviewable, the Chamber's power to review this decision under Article 53(3)(b) would be extinguished (as would the right of review of the State Party). Once again, this outcome is obviously not right, and it shows that a reconsideration decision, following a first judicial review, must itself be subject to review.

31. Of course, the right to review a reconsideration decision, can only be brought in limited circumstances on the basis of specific recognisable errors under well-established principles of judicial review that it is alleged are committed by the OTP in rendering its new decision. Clearly, when the OTP has not properly and reasonably applied its mind to the Pre-Trial Chamber's request, the State Party must be entitled to request a review, otherwise the whole point of judicial review could be defeated by a prosecutor who issued a new decision simply confirming his or her prior decision without any reasons, or only paying lip service to the errors identified by the Chamber. The rights of State Parties would not be effective and would be hollow if the Prosecutor could decide unchecked if she should address the errors identified by the Chamber.
  
32. The OTP tries to rely on the Appeals Chamber's ruling in this case on whether it had jurisdiction over the appeal, to claim that no further review is possible. But the Appeals Chamber did not have to, and certainly did not decide the issue of whether a second review is permissible. The Appeals Chamber statements are all *obiter dictum*, but in any event they are not against the Pre-Trial Chamber having jurisdiction over the present Application. The Appeals Chamber has certainly not decided that there can be no review of the OTP's Reconsideration Decision. On the contrary an academic article cited by the Appeals Chamber specifically notes that "[p]rosecutorial independence" allows the

Prosecution to come to “the same conclusion as before ... ***provided*** the Prosecutor ha[s] properly applie[d] [...] her mind in coming to the conclusion.”<sup>43</sup>

33. The Appeals Chamber has also not decided that the Pre-Trial Chamber’s Reconsideration Decision is “non-binding”. That would be preposterous. Plainly the Prosecutor is bound in good faith to reconsider her decision at the direction of the Chamber. There would be no point of having a review if the Prosecutor could simply ignore the outcome, or not address the errors identified by the Chamber.
34. The Prosecutor has confused two concepts – she is not obliged to change the result, but she is obliged – and bound to – address the errors that the Chamber has identified – that is the very purpose of judicial review before any court.
35. As the OTP has stated the Pre-Trial Chamber’s request under Rule 108(2) “impose[s] an obligation only of *process*, and not of result”<sup>44</sup>, but this process involves addressing the errors made and is itself reviewable. The Chamber cannot order the Prosecutor to investigate but it can require the Prosecutor to address the errors in her reasoning process, as it has done, which she is bound to do. The Prosecutor cannot decide to refuse to address the request of the Chamber. That would undermine the entire justice system, if the Prosecutor could simply brush aside what the Judges have requested and refuse to address the errors identified, or fail to do so in practice. For this reason alone, the Judges should review the Decision so that they can correct this axiomatic error.
36. Furthermore, if the Prosecutor misapplies the law in reconsidering her decision and commits the same or further errors, that must be subject to review. It would be a bizarre result if the Prosecutor could act without regard to the law, and not be subject to any

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<sup>43</sup> See OTP Reconsideration Decision, para 3 footnote 3 (emphasis added), and Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, ICC-01/13-51, 6 November 2015, footnote 134. Furthermore, another article that is cited by the Appeals Chamber and relied on by the OTP is by a senior lawyer in the OTP who was listed by Pre-Trial Chamber I in their Decision as one of the OTP’s own counsel in this case – see OTP Reconsideration Decision, footnote 3. This article can obviously not be regarded as dispositive of the matter. And in any event, the Appeals Chamber was not called on to decide this issue in an appeal that focused solely on the admissibility of the OTP’s appeal as filed under Article 82(1)(a) and whether it should be dismissed *in limine*. The Appeals Chamber heard no submissions from the parties on the reviewability of the OTP’s Reconsideration Decision which had not been rendered at that stage and which was not before the Appeals Chamber.

<sup>44</sup> OTP Reconsideration Decision, para. 3.

scrutiny. The prosecutorial discretion and independence granted over the results of the Prosecution's reconsideration do not give it the power to interpret the law and to overrule the decision of the Pre-Trial Chamber on the proper interpretation and application of the law without any recourse. Therefore, should the Prosecution's decision under Rule 108(3) misapply the law, and if the OTP commits discernable errors, there must be an avenue for this decision to be reviewed by the Judges. It is a fundamentally unsustainable situation for the Prosecutor to challenge and 'overrule' the Chamber's rulings in her subsequent decision, thus setting 'precedent', and for that decision to be non-reviewable.

## **2. The Comoros as a referring State Party has the right to request the Pre-Trial Chamber to review the Prosecution's decision on the new evidence**

37. The Comoros submits that the OTP's Decision on the New Evidence is reviewable by the Chamber under Article 53(3)(a) for all the reasons set out below.<sup>45</sup> This new decision is certainly subject to judicial review, even if the OTPs' Reconsideration Decision is no longer reviewable (which it is for the reasons explained above). The new evidence submitted by the Comoros and the participating victims (summarised above in Part II) included new witness and victim statements, expert evidence, forensic reports, photos and videos of the crime scene and testimony from alleged perpetrators. As accepted by the OTP, this evidence was not available to the OTP to take into account for its first decision. The new evidence was considered by the OTP in light of Article 53(4) that allows it to "at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information."<sup>46</sup>
38. The Prosecution's decision on whether to initiate an investigation based on the new evidence is clearly not a "final decision" under Rule 108(3) (as interpreted by the OTP) or in any other way. It is a new decision based on new evidence. And it certainly is a decision about whether to open an investigation pursuant to and in accordance with Article 53(1) and the specific criteria listed therein. The Prosecutor has confirmed as much in stating that "such [new] material may in principle be considered by the Prosecution as a basis, in its independent discretion under article 53(4), to reconsider its current determination under article 53(1)".<sup>47</sup> In other words, Article 53(4) is the gateway through which the Prosecutor

<sup>45</sup> OTP Decision on New Evidence, paras. 171-331.

<sup>46</sup> Rome Statute, Article 53(4).

<sup>47</sup> OTP Decision on New Evidence, note 309.

can consider new evidence and whether it satisfies the criteria under Article 53(1) in order to render a decision in accordance with Article 53(1). The wording of Article 53(4) points the way by stating that the article permits reconsideration of “*a decision whether to initiate an investigation*”. There is indeed no other provision on which to base a new decision about whether to open an investigation other than in accordance with the specific requirements of Article 53(1).

39. It would be disingenuous for the OTP to try to argue that its new decision was made purely under Article 53(4) and had nothing at all to do with Article 53(1), and thus is non-reviewable. This is genuinely not the case. The OTP’s decision can only have been made in accordance with Article 53(1). Article 53(4) makes clear that its sole purpose is to provide the OTP with the power to consider new evidence, but it includes no criteria under which it should conduct this consideration. It is thus not a *self-contained* provision. The power can only be exercised by the OTP by reference to the requirements and criteria under Article 53(1). The OTP indeed repeatedly states that “nothing requires or justifies departing from the original conclusions in the Report”<sup>48</sup> which plainly shows that it has applied and considered the provisions and criteria in Article 53(1) which were determinative of its first decision in order to reach its new decision about the very same requirements and whether they have been satisfied by the new evidence.
40. As a decision taken pursuant to and in accordance with Article 53(1), this new decision not to initiate an investigation, based on the new evidence, must be reviewable by the Pre-Trial Chamber at the request of the referring State Party under Article 53(3)(a). The Prosecution has made fresh conclusions on new evidence that could not previously have been reviewed by the Chamber, and which must now be subject to review.
41. It would be untenable if a new decision in which the Prosecutor had committed fundamental errors, was free of any judicial scrutiny under proper standards of judicial review when Article 53(3)(a) makes clear that any decision not to open an investigation can be reviewed. It would be illogical for State Parties to be able to seek review only of a first decision, but somehow be refused the same right in relation to a similar decision in

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<sup>48</sup> See for example, OTP Reconsideration Decision, paras. 87, 93, 94, 98, 147, 154, 159, 165, 170; OTP Decision on New Evidence, paras. 247, 252, 259, 276.

substance when new evidence came to light and was provided to the OTP. The Court should reject any attempts by the OTP to artificially restrict the rights of State Parties and the powers of the Judges. There is no legitimate reason in principle, law and practice for the Court unnecessarily and severely to limit the scope of judicial review as included in the Statute in broad and expansive language. As noted above, to rule otherwise, would mean that (i) the Prosecutor would be free, unchecked, to make the same and other fundamental errors when considering new evidence; (ii) if she rejected the evidence on grounds not previously considered in her first decision, such grounds could never be reviewed even though not considered by the Chamber in the first review; and (iii) the Pre-Trial Chamber would be stripped of its power under Article 53(3)(b) to review “on its own initiative” a decision that “an investigation would not serve the interests of justice”<sup>49</sup> if the Prosecutor decided to refuse to open an investigation on this basis upon receiving new evidence. None of these outcomes could ever conceivably be countenanced by the Court. For all of these reasons, the Chamber is urged to find that the new decision not to investigate on new evidence is reviewable.

#### **IV. GROUNDS OF REVIEW FOR THE OTP RECONSIDERATION DECISION**

42. The Prosecutor committed several fundamental errors in the OTP Reconsideration Decision that should be addressed and rectified. The Comoros sets out below each of these identifiable errors, which are all subject to judicial review. The first two grounds concern the binding effect of the Chamber’s Decision to Reconsider – the OTP is not free to disregard the Chamber’s findings – and the applicable standard of proof at this initial stage, which is not that the gravity of the crimes must be proven to a standard approaching anywhere near beyond reasonable doubt. The rest of the grounds concern errors in assessing the key factors relevant to gravity, including those who bear the greatest responsibility for the alleged crimes; and the scale, nature, manner of commission, and impact of the alleged crimes. The Prosecutor has simply disagreed with the Chamber’s findings and repeated the same errors again. She has devoted the majority of her new Decision to arguing that she never erred in the first place and hence has not actually addressed the errors genuinely in order to seek to rectify them.

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<sup>49</sup> Rome Statute, Art. 53(3)(b) and Art. 53(1)(c).

## **1. The Prosecutor erred in law in finding that the OTP does not have to follow the Pre-Trial Chamber's Decision**

43. The first reason the OTP relies on for finding that “there is no reasonable basis under the Statute to proceed with an investigation” is that it “cannot concur with the majority of the Pre-Trial Chamber” because “it respectfully disagrees with the legal reasoning in the Request concerning: the standard applied by the Prosecution under article 53(1), the standard of review applied by the Pre-Trial Chamber under article 53(3), and the considerations relevant to the substantive analysis carried out by the majority.”<sup>50</sup> The Prosecution holds that “[g]iven its disagreement with the majority of Pre-Trial Chamber I’s interpretation” of the law it “cannot concur in the basic premise of the Request” and therefore will not follow the Chamber’s Decision to Reconsider on the interpretation of the law and the errors identified by the Chamber.<sup>51</sup> The Prosecution states that “had the Pre-Trial Chamber correctly interpreted” the law relating to Article 53 it would not have issued its Decision for the OTP to reconsider whether to open an investigation.<sup>52</sup>
44. These findings are manifestly erroneous as a matter of law and basic principle. The Prosecution attempts to justify its decision to overrule the Pre-Trial Chamber by asserting that its independence as a separate organ of the Court and its discretion make it the final arbiter of the law in respect of preliminary examinations: the “Prosecution’s independent mandate” means “it must consider these matters afresh and cannot simply follow the approach” of the Chamber.<sup>53</sup> The OTP wrongly reasons that because the Appeals Chamber stated that the Prosecution “retains ultimate discretion over how to proceed”<sup>54</sup>, the OTP has complete discretion to “act only on the basis of its own independent view of the law and the facts.”<sup>55</sup>
45. However, the Appeals Chamber merely stated that the OTP is not obliged to come to a different conclusion or final decision. The OTP is certainly obliged to address the errors identified and apply the law and legal requirements as determined by the Judges. The

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<sup>50</sup> OTP Reconsideration Decision, para. 13.

<sup>51</sup> OTP Reconsideration Decision, paras. 33, 66,

<sup>52</sup> See, OTP Reconsideration Decision, paras. 33, 66,

<sup>53</sup> OTP Reconsideration Decision, para. 13.

<sup>54</sup> Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, ICC-01/13-51, 6 November 2015, para. 59.

<sup>55</sup> OTP Reconsideration Decision, para. 4.

Appeals Chamber specifically cited to academic writing that states that “a permissible exercise of prosecutorial independence” concerns the ultimate conclusion the Prosecution reaches on reconsideration and that it “would not *strictly speaking* be obliged to come to a different *conclusion*.”<sup>56</sup> That is a correct statement of the law. The OTP’s view however that it need not apply the law as decided by the Chamber and can itself decide what the law is as the Prosecutor, is obviously misguided. In no legal system is the prosecutor (or any party to the litigation) free decide what it thinks the law is and refuse to follow the rulings of the judiciary on the law. If that were permissible, the entire legal system would be rendered futile.

46. The OTP takes the view that it can independently “examine the merits of [the Pre-Trial Chamber’s] reasoning” including the Chamber’s “view of the law governing preliminary examinations” because it was not able to seek the Appeals Chamber’s review of the Pre-Trial Chamber’s ruling on the applicable law and errors.<sup>57</sup> It explains this situation as the Appeals Chamber simply “lack[ing] jurisdiction to hear such an appeal”, and finds that the Prosecution can therefore “assess[] for itself the merits of the Request in undertaking its reconsideration.”<sup>58</sup>
47. This finding is not only demonstrably erroneous but also disingenuous. The OTP knows full well that the Appeals Chamber does not lack jurisdiction to hear appeals from decisions under Article 53(3)(a). The Appeals Chamber dismissed the OTP’s appeal *in limine* because it was filed under the wrong provision of the Statute. It was a mistake by the OTP. The Appeals Chamber would have had jurisdiction to hear the appeal if the Prosecution had correctly applied for leave, and been granted permission by the Pre-Trial Chamber for the appeal to be heard by the Appeals Chamber under the proper and applicable provisions of the Statute. This mistake on the part of the OTP’s can plainly not become a legitimate and lawful basis for the OTP to hold that it can ignore the ruling of the Pre-Trial Chamber, and instead act as though it was the Appeals Chamber sitting in judgment of the Pre-Trial Chamber.

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<sup>56</sup> Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, ICC-01/13-51, 6 November 2015, note 134 (*Emphasis added*).

<sup>57</sup> OTP Reconsideration Decision, para. 12.

<sup>58</sup> OTP Reconsideration Decision, para. 4.



48. What the Prosecutor in fact does in her new Decision is conduct her appeal by the back door. She sets out all the arguments that she would have relied on in her appeal and uses them to say that she cannot follow the decision of the Pre-Trial Chamber. The Prosecutor seeks to usurp the Pre-Trial Chamber and strip it of all powers. This is a most extraordinary course of action on the part of Prosecutor, which must be firmly overturned by the Judges.
49. Even though State Parties which refer situations under Article 14 have the right to request the Chamber to review decisions whether to open investigations, the Prosecution claims that anything the Chamber decides is “non-binding and does not fetter the Prosecution’s exercise of discretion.”<sup>59</sup> This is discernable wrong and must be corrected by the Court. There would be no point to judicial review proceedings, and State Parties would be divested of their basic rights, if the Prosecutor could at her whim determine that decisions of the Chamber could be disregarded.
50. The procedure under Article 15(3) that requires the Prosecution to obtain the authorisation of the Chamber to open an investigation highlights that it does not have unfettered discretion over the opening of investigations. In the case of an Article 14 referral, deference is given to State Parties and the Statute and Rules did not require the OTP to request permission from the Chamber; instead the Chamber may review decisions taken by the Prosecutor.
51. The Prosecution asserts that it “can find nothing in the Statute, or its drafting history, to support the notion of any broader presumption favouring the opening of investigations *at the international level*” and that instead States have “the primary responsibility [...] to investigate and prosecute” crimes under the Statute.<sup>60</sup> This claim is blind to the realities of the present situation in which only a handful of IDF soldiers have been prosecuted in Israel for theft of certain belongings passengers, and nothing more.<sup>61</sup> These proceedings were a mockery of justice for the families of the deceased and the countless victims who were harmed and traumatised. Israel has refused to cooperate at all with the ICC in respect

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<sup>59</sup> OTP Reconsideration Decision, para. 3.

<sup>60</sup> OTP Reconsideration Decision, para. 55.

<sup>61</sup> See, The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, para. 160.

of the present situation (another matter which the Prosecutor has not taken into account)<sup>62</sup>. The Prosecutor does not mention that the Appeals Chamber has confirmed that “*the overall purpose of the Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole*”.<sup>63</sup> It is undeniable however the Prosecutor tries to dress it up, that the ICC is truly the Court of last resort in this case to prevent impunity.<sup>64</sup>

52. The Prosecutor also claims that she can disregard the Chamber’s Decision because she “disagrees with the [Chamber’s] approach to the standard of review under article 53(3)(a)”.<sup>65</sup> The OTP asserts that the Chamber “conducted a *de novo* review—measuring the opinion of the Prosecution against the opinion of the Pre-Trial Chamber, without deference.”<sup>66</sup> The Prosecutor has erred on both counts: the Chamber applied the proper standard of review, fully in accordance with well-established principles of judicial review; and the Prosecutor is definitely not entitled to ignore the Chamber’s Decision on the basis that she thinks that the Chamber applied the wrong standard of review. No margin of deference permits the Prosecutor to disregard the errors identified by Chamber if she so chooses.
53. There is no disagreement that the appropriate standard of review under Article 53(3)(a) is an *error-based* review, as explained by Prosecutor.<sup>67</sup> The OTP expressly concedes that the Chamber can intervene “if the Prosecution misinterpreted the law, breached a principle of natural justice, or was unfair; if it took irrelevant information into account in reaching its decision, or failed to take account of relevant information; or if it reached a factual conclusion which was so unreasonable that no reasonable person with the same information could have made it.”<sup>68</sup> This is precisely the standard that the Chamber applied

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<sup>62</sup> It stands out that the Prosecutor has nowhere in her Decisions noted the complete failure of Israel to cooperate with or assist the OTP in any way. The Prosecutor has also not once made any reference to the extent to which the Comoros has sought to cooperate with the OTP and assist however possible with the investigation. It is a notable omission by the Prosecutor on both counts.

<sup>63</sup> *Prosecutor v. Gaddafi et al.*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, ICC-01/11-01/11-565, 24 July 2014, para. 217.

<sup>64</sup> See, Rome Statute, Preamble.

<sup>65</sup> OTP Reconsideration Decision, para. 57.

<sup>66</sup> OTP Reconsideration Decision, para. 36.

<sup>67</sup> OTP Reconsideration Decision, paras. 41-42.

<sup>68</sup> OTP Reconsideration Decision, para. 63.

in response to the Comoros' submissions, which were exactly to the same effect, citing the ICC's case law:

*“to challenge a discretionary decision, appellants must demonstrate that ‘the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,’ or that the Trial Chamber ‘[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion,’ or that the Trial Chamber’s decision was ‘so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion.’”<sup>69</sup>*

54. The Chamber did not conduct its own new review of the evidence (which it did not have); it only considered each of the error-based grounds for review relied on by the Comoros and made a determination on each alleged error.<sup>70</sup> Section III of the Chamber's Decision to Reconsider is titled “Analysis of the grounds of review” and it goes through each error submitted, and makes its findings limited to those errors.<sup>71</sup> The Prosecutor is certainly not entitled unilaterally to disregard these findings.

## **2. The Prosecutor erred in not applying the correct legal standard for determining whether to open an investigation**

55. The Comoros submits that Prosecutor has not applied the ‘reasonable basis to proceed’ standard in deciding whether to open an investigation. Article 53(1) clearly requires the Prosecutor to initiate an investigation “*unless he or she determines that there is no reasonable basis to proceed under the Statute*”. In the present case the Prosecutor has erred in assessing the evidence in respect of gravity to a much higher standard, closer to that of ‘beyond reasonable doubt’. This is a recurring and overarching error that pervades the whole Decision and all aspects of the OTP's assessment of gravity.

56. There is easily ‘a reasonable basis’ to proceed in light of the available evidence in respect of gravity. But the Prosecutor has instead required proof of elements consistent with gravity, such as whether live ammunition was deliberately used to target civilians, to be

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<sup>69</sup> *Prosecutor v. Kony, et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009 citing *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3, 1 November 2004. See, Comoros Review Application 2015, para. 53.

<sup>70</sup> Chamber's Decision to Reconsider, paras. 16-48.

<sup>71</sup> See, Chamber's Decision to Reconsider, para. 16.

established to the highest criminal standard before she can open an investigation. This is a fundamental error of law as proof so that the trier of fact is certain or even near certain is only required if, *after* investigation, accused are to be charged and prosecuted.

57. The OTP contests “Pre-Trial Chamber I’s interpretation of article 53(1)” because it claims that the Chamber “consider[ed] that an investigation was required if *any* piece of information, in isolation, permitted a relevant inference” rather than “considering the totality of the available information”.<sup>72</sup> This is a complete misreading of the Chamber’s ruling, and is in fact a convoluted argument that has no substance and merit. The Chamber never decided anywhere that evidence and information must be only examined “in isolation”.<sup>73</sup> Of course all relevant evidence must always be taken account as the Chamber did in its analysis. The Chamber held that apparently conflicting evidence is not a proper basis to find that no investigation should be initiated as the very purpose of an investigation is to inquire into such matters and collect further evidence to resolve differences that may exist.<sup>74</sup> No reasonable prosecutor would disagree. Of course, when there is no evidence to support an inference reasonably consistent with gravity, no investigation is merited. But that is not the case here. There will naturally be a conflict in the evidence from the IDF and the victims – that will exist in almost every preliminary examination between alleged perpetrator and victim. The investigation stage exists to settle these differences.
58. The Pre-Trial Chamber held that when the evidence and information could lead to different conclusions – not viewed in isolation, but assessed in the context of all the evidence – that is not a justification *per se* for refusing to investigate further.<sup>75</sup> Instead, the Prosecution only needs to be satisfied that there is evidence that provides a reasonable basis that factors in favour of gravity exist, even if there may be a competing conclusion. This is precisely the position taken by the Prosecutor in other Situations, such as in the case against Sudanese President Al-Bashir when the OTP argued that he could be charged with genocide providing that the existence of genocidal intent was one reasonable inference

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<sup>72</sup> OTP Reconsideration Decision, para. 33.

<sup>73</sup> Chamber’s Decision to Reconsider, para. 36.

<sup>74</sup> Comoros Review Application 2015, para. 10.

<sup>75</sup> Chamber’s Decision to Reconsider, para. 36.

that could be drawn, and even though other reasonable inferences may have been possible that were inconsistent with such intent.<sup>76</sup>

59. The Chamber's ruling is rightly to the effect that the OTP does not have to prove the gravity of the crimes to the exclusion of all possible inferences, including those that the defence will raise, in order to open an investigation. A mere possibility is obviously not sufficient. The Chamber applied the proper test as has been repeatedly set out in the case law.<sup>77</sup> As the express language of the Statute provides, the Prosecutor must open an investigation when there is a reasonable basis to proceed, not when it is proven that the crimes occurred. The example cited by the OTP of the use of live fire from the helicopters prior to any soldiers boarding the Mavi Marmara, is an apt one. Even though this evidence is disputed by the IDF and the Turkel Commission, the Chamber found that this is not a reasonable basis to discount it.<sup>78</sup> It is clearly not just a mere possibility. And even if some passengers may be genuinely mistaken<sup>79</sup>, there is ample clear evidence from several witnesses confirming the firing of live rounds before boarding<sup>80</sup>, and in any event this is a classic issue that could only be clarified in full by investigation. The witnesses at the very least should be interviewed instead of prejudging that they could all be mistaken or confused.
60. The Chamber took all the same factors into account that the OTP looked at<sup>81</sup>, and found that the OTP erred because it was unreasonable to find at this early stage that live fire could only have been used once the soldiers were on the ship. The Chamber found that this evidence as a whole could heighten the gravity of the crimes, as it could show they were committed as part of a plan or policy to target civilians, or in which it would have been foreseen that such crimes could occur; in other words, not as an unplanned accident. The Chamber has not ruled that this is the only factor that must be considered in "isolation"; on the contrary it has highlighted this is one of many factors that a reasonable prosecutor should take into account as being relevant to gravity.

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<sup>76</sup> *Prosecutor v. Al-Bashir*, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-12, 10 March 2009, para. 17. Also see, *Situation in The Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, paras. 102-111

<sup>77</sup> Chamber's Decision to Reconsider, paras. 35, 36.

<sup>78</sup> Chamber's Decision to Reconsider, paras. 34-36. See, OTP Reconsideration Decision, paras. 33, 34.

<sup>79</sup> OTP Reconsideration Decision, para. 104.

<sup>80</sup> Comoros Review Application 2015, paras. 101-103.

<sup>81</sup> Chamber's Decision to Reconsider, para 34.

61. The key point is that the Prosecutor erred by failing to do so and to give it any weight. And she is still refusing to do so in her new Decision. A key reason being that there is an underlying error, as identified by the Chamber, which is at the core of the OTP's mindset and which persists and is repeated throughout the new Decision. The Prosecutor has come to the premature and overly firm conclusion that there was no plan or policy to commit the crimes on account of there being violent "resistance" by the passengers, which diminishes the gravity of the crimes.<sup>82</sup> Her finding is that this "resistance" was unexpected and thus the use of force against civilians could not have been planned or foreseen. But this a conclusion that wholly overlooks the evidence of live fire prior to boarding (when there was no "resistance"), and even if the firing was for a short period of time, as well as the wealth of evidence from passengers that they acted in self-defence for fear of being killed after they were fired on from the helicopters and once soldiers came on board. Indeed, the witnesses explained how surprised they were when they were fired at with live ammunition which caused them to panic and act to defend themselves in vain as they were being attacked by heavily armed soldiers with an array of guns at the soldiers' disposal.<sup>83</sup>
62. Even if there was "resistance", the crimes could still have been committed as a result of a plan or policy to target civilians or which foresaw that civilians would be harmed. There is a host of evidence supporting this reasonable view, including the timing and location of the operation; the nature of military force used and what must have been foreseen; the extent of the violence against the passengers; the subsequent mistreatment of passengers; and the stages that followed including the interrogations which did not happen by chance.<sup>84</sup> These were factors that the Chamber referred to in taking all matters holistically into account.<sup>85</sup> It is rather the OTP, not the Chamber that has considered the evidence in isolation by honing in on the "resistance" of the passengers to make a final conclusion on planning and policy, to the exclusion of all relevant evidence. The conclusion is in effect that the Prosecutor is certain that there is no plan or policy, which is the wrong standard for deciding whether to open an investigation. It shows a single-minded and persistent refusal to address the discernable errors. The Prosecutor has even gone so far as to say

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<sup>82</sup> OTP Reconsideration Decision, paras. 88-93.

<sup>83</sup> Letter to Prosecution of 31 March 2016. See, Conf. Annex 3.

<sup>84</sup> See for example, Comoros Review Application 2015, paras. 95, 98, 99, 118-121; UNHRC Report, paras. 112-160, 172, 179; Palmer Report, paras. 40, 41, 117, 134, 145.

<sup>85</sup> Chamber's Decision to Reconsider, paras. 21.

that if there was live firing before boarding and if there was a plan or policy behind the crimes (that could implicate those in command), that would not necessarily show that the crimes were sufficiently grave.<sup>86</sup>

63. It is significant too that the Prosecutor dismisses the findings of the UN Human Rights Council fact-finding mission which “concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers”<sup>87</sup>, yet gives weight to the conclusions of the Turkel Commission report that no such thing occurred and that the IDF were resisted by the passengers which turned the situation chaotic. The OTP fails to take into account the criticisms of bias for this report.<sup>88</sup> While finding that caution should be exercised when assessing the witness evidence, no similar caution is highlighted in respect of the weight to be assigned to the Turkel Commission. And this despite the clear warnings that were made known to the Prosecutor including that:

- *The Commission report “fail[ed] to account for the deaths [which] reinforces the view that the Israeli authorities are unwilling or incapable of delivering accountability for abuses of international law committed by Israeli forces.”<sup>89</sup>*
- *“The Commission’s report notes the limitations of the evidence on which its analysis was based, but it is far from clear that it made sufficient efforts to obtain additional evidence and testimonies during its seven-month investigation ... The Commission heard testimony from only two of the more than 700 passengers and crew on the flotilla ... it appeared to make only half-hearted attempts to secure their testimony, and made no effort to utilize the extensive eyewitness testimony collected by the International Fact-Finding Mission, with which Israel refused to co-operate.”<sup>90</sup>*
- *“Highly contentious legal arguments were used by the Commission to argue for the applicability of international humanitarian law to the raid” that effectively argued “that these activists could be shot dead lawfully whether or not they were posing a direct threat to the lives of IDF soldiers.”<sup>91</sup>*

64. No reasonable prosecutor would make no mention of these serious criticisms and not take them into account, while dismissing the independent UN report, and questioning the reliability of the eyewitnesses. The Prosecutor instead asserts that she “drew no

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<sup>86</sup> OTP Reconsideration Decision, para. 101.

<sup>87</sup> UNHRC Report, para. 114.

<sup>88</sup> Comoros Review Application 2015, para. 116.

<sup>89</sup> Amnesty International Public Statement: Document – Israel / Occupied Palestinian Territories: Israeli Inquiry into Gaza Flotilla Deaths no More than a ‘White Wash’, 28 January 2011 (hereinafter “Amnesty Statement of 28 January 2011”).

(<http://www.amnesty.org/en/library/asset/MDE15/013/2011/en/96e848bd-56ee-4e6e-a817-17e07c3d5192/mde150132011en.html>).

<sup>90</sup> Amnesty Statement of 28 January 2011.

<sup>91</sup> Amnesty Statement of 28 January 2011.

conclusion as [to *sic*] the origin of live and/or less-lethal fire, since this was not material (in the circumstances of this case) to its assessment of the existence of any plan or policy for the commission of the identified crimes.”<sup>92</sup> But this is false. The Prosecutor has essentially ruled out that there was any live fire from the helicopters before boarding, and found that there was violent resistance when firing from the IDF soldiers occurred. The timing and origin of the firing is thus crucial to the OTP’s findings. And surely the origins of the firing is a factor to be taken into account when considering whether the crimes were committed as part of the plan, particularly in the circumstances of the present case. It is irrational to claim that such evidence is immaterial. It must be remembered that the plan need not be one deliberately to kill civilians to be criminal; it could include a plan from the command that foresaw that civilian deaths could result from the operation and proceeded regardless when peaceful alternatives were available.<sup>93</sup> None of these forms of liability were considered by the OTP. Rather, a rush to judgment has resulted in the same errors again, applying the wrong standard of proof.

### **3. The Prosecutor erred in her consideration of those who bear the greatest responsibility for the crimes**

65. The Chamber’s Decision to Reconsider identified that the Prosecution erred in not properly addressing the factors relevant to gravity “*by failing to consider whether the persons likely to be the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes.*”<sup>94</sup> The Chamber made clear that this factor “relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes.”<sup>95</sup> In response the Prosecutor claims that she did consider the matter and that: “it is plain that the individuals or groups which might be the object of an investigation of the identified crimes could at least include any direct physical perpetrators.”<sup>96</sup> But the Prosecutor ascribes no weight to the fact that she could investigate those who are in her view most responsible.

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<sup>92</sup> OTP Reconsideration Decision, para. 105.

<sup>93</sup> See Section V on alternatives to boarding and escalation, para. 102.

<sup>94</sup> Chamber’s Decision to Reconsider, paras. 22-24.

<sup>95</sup> Chamber’s Decision to Reconsider, para. 23.

<sup>96</sup> OTP Reconsideration Decision, para. 167.



66. The Prosecutor also errs in giving no weight to the evidence that those in command of the operation could be the persons who bear the greatest responsibility and could be the subject of her investigation.<sup>97</sup> This is a wholly unreasonable conclusion at this early stage of the proceedings. No reasonable prosecutor would conclude that no one other than those on board could be responsible. Potential perpetrators who are high ranking could plainly aggravate the seriousness of the potential case(s), and there is undoubtedly evidence that such persons could be involved to merit further investigation. As highlighted by Comoros, Israeli Government officials and military commanders have confirmed in their testimonies before the Turkel Commission that they planned the operation at various meetings and over a period, and were actively involved in overseeing the operation.<sup>98</sup> This evidence and its implications for gravity are not even mentioned by the OTP. As previously submitted, this is a “glaring omission”.<sup>99</sup>
67. Israeli politicians and military commanders have also confirmed in their testimonies that they *commanded* the operation. There would be a reasonable basis on that evidence to investigate these high-ranking officials under the doctrine of command responsibility for failure to prevent or punish the alleged crimes. The Prosecution erred in taking no account of the testimonies that refer to making “status evaluations” on “extreme situations and extreme scenarios” as evidence that could show that senior officials knew or should have known that the alleged crimes might result from the operation, and yet failed to act.<sup>100</sup> After all, the Chief of the Navy was present at the scene of attack, a fact at least reasonably consistent with command at the very highest level being exercised over the operation.<sup>101</sup> It is also at least evident that no Israeli soldiers were punished for the alleged war crimes committed. The Prosecutor has not mentioned this form of liability at any stage. Another irrational omission. No reasonable prosecutor would simply have overlooked command responsibility completely.
68. Furthermore, it is a blatant error by the OTP to exclude all consideration of high-ranking officials on the basis that the OTP claims that there is no evidence of any plan or policy to

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<sup>97</sup> OTP Reconsideration Decision, para. 169.

<sup>98</sup> Letter to Prosecution of 28 January 2016. See, Conf. Annex 3. See also, The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010, p. 35-36.

<sup>99</sup> Comoros Review Application 2015, paras. 85, 86.

<sup>100</sup> Rome Statute, Art. 28.

<sup>101</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, January 2010, p. 124-137, 270; and Military Expert Report of retired Col. Desmond Travers, Conf. Annex 1, para. 22-32.

target civilians, or of any “complicity” in the alleged crimes. First, command responsibility requires no evidence of a plan or policy or complicity, but a superior subordinate relationship, which clearly exists in the present case. Second, no reasonable prosecutor would conclude that just because officials only admitted to making “mistakes” during the operation that there is no evidence of “complicity”.<sup>102</sup> It would be highly unusual for a potential suspect in the position of the Israeli commanders to admit to an overall plan to kill civilians. But certain important admissions have been made which show planning, knowledge and command and which can be used, together with other evidence, to infer involvement. As the Comoros has highlighted, all of the circumstances could be relied on to infer a plan or policy (not just the evidence of what was said to the Turkel Commission in isolation). And there may be evidence that could support a potential defence against such a plan, namely that the passengers allegedly became violent unexpectedly and that this was an individual ‘rogue’ action in the heat of the moment etc, but this is properly a matter for consideration during an investigation. The Prosecutor has erred in relying on these types of potential defences at this stage as a means of finding that no investigation should be launched at all.

69. There is indeed ample other evidence consistent with a plan or policy to target civilians at least to the reasonable basis standard, which the Prosecutor gives no proper weight at all.<sup>103</sup> The operation did not happen by accident; it was known that hundreds of civilians were on board and the very use of zodiacs and then helicopters manned by very heavily armed soldiers with live ammunition to take over the civilian vessel is a reasonable basis to infer at the very least at this stage that there was a coordinated plan that could result in civilian deaths. As noted above, it need not be a plan to kill civilians; criminal responsibility could also arise from a plan that foresaw civilian deaths and injuries and was authorised regardless (particularly if an alternative non-confrontational plan was feasible).
70. It is certainly an error to find that because of “the violence which ensued”<sup>104</sup> once the soldiers boarded that this provides a plausible explanation for why the IDF commanders might have admitted that “mistakes” were made. They may have admitted that much, and no more, to seek to avoid criminal liability, the very liability the Comoros is requesting

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<sup>102</sup> OTP Reconsideration Decision, para. 169.

<sup>103</sup> See for example, Comoros Review Application 2015, paras. 100-110; UNHRC Report, para. 114.

<sup>104</sup> OTP Reconsideration Decision, para. 169.

the Prosecutor to investigate. It is not the Prosecutor's role at this very early stage of the case, before an investigation, to accept the explanation given by a potential accused as true without question or the need for further inquiry.

71. Moreover, as noted above, the Prosecutor has erred in making a finding at this stage that the passengers violently resisted the IDF soldiers. This is the defence of the soldiers, and the conclusion reached by the Israeli Government appointed Turkel Commission. The evidence of the passengers is consistently that they acted in fear and self-defence, believing that they were to be killed by heavily armed IDF soldiers. There is at least a reasonable basis for them being attacked by the IDF and seeking to defend themselves. No reasonable prosecutor could ever find at this stage that this version of events should be totally discarded in favour of the view taken by the IDF soldiers, and thus result in no further investigation of matter. Hence, too, the importance of the use of live ammunition before any soldiers boarded the Mavi Marmara, because it shows both the intent of the IDF soldiers as well as the reason why those on the top deck feared for their lives.
72. The use of live ammunition is also obviously relevant to those in command positions who could be responsible as orders and rules of engagement would have been provided to those sent to take over the ship. The Chief of the Navy was after all right at the scene of the operation. Orders to use live ammunition from the outset, or even if the boarding by zodiacs failed (for which there is also evidence that there was shooting with live ammunition on their approach<sup>105</sup>) would plainly be evidence that reasonably showed that those in command could be criminally responsible, thus aggravating the seriousness of the potential case(s), and warranting further investigation. It is also highly significant that the records of the meetings that are referred to in the Turkel Report, as well as the orders and rules of engagement have not been made available. These are exactly the materials that the Prosecutor would need to examine in an investigation to determine whether a plan or policy could in fact be proven (to the higher criminal standard). By refusing to open an investigation, the Prosecutor has foreclosed this possibility entirely. She has erred in concluding that there is no plan or policy, and no commanders involved, on the basis of

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<sup>105</sup> Comoros Review Application 2015, paras. 101. See also, Victim Observations pursuant to "Decision on Victims' Participation" of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, para. 19 (hereinafter "Submission of Victim Observations").

evidence that she does not have, only because she has not sought to obtain that evidence through an investigation.

#### 4. The Prosecutor erred in assessing the scale of the crimes

73. The Chamber's Decision to Reconsider identified that the Prosecution erred in not properly addressing the factors relevant to gravity concerning the scale of the crimes.<sup>106</sup> In particular, the Chamber held that "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment" speak to the scale of the crimes and "are a compelling indicator of sufficient, and not of insufficient gravity."<sup>107</sup> The OTP thus committed a "material error" by failing reasonably to take account of factors "militating in favour of sufficient gravity."<sup>108</sup>
74. The Prosecution disputes this finding by arguing that it has taken account of both the quantitative and qualitative factors to assess gravity,<sup>109</sup> and that unlike the attack in the *Abu Garda* case which targeted international peacekeepers and therefore was qualitatively a more serious factor<sup>110</sup>, the attack on the Flotilla has no such similar qualitative feature.<sup>111</sup> But this misses the point. The quantitative characteristics of the present case are relevant to showing gravity given that hundreds of persons were harmed. In any event, there are several qualitative features that heighten gravity which the OTP overlooked including that this was a civilian campaign trying to assist other civilians in Gaza who were in need of food, humanitarian aid and medical supplies<sup>112</sup>, and as noted by the Chamber, the attack invoked profound international concern, and threatened diplomatic relations and stability in the region, severing inter-State ties which have taken many years to try to restore.<sup>113</sup>
75. It is also an error to view 'quantitative' and 'qualitative' factors as mutually exclusive. The Chamber emphasised that *specific* consideration should have been given to the scale of the offences in the present case, which are considerable on any reasonable view. The

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<sup>106</sup> Chamber's Decision to Reconsider, paras. 21, 25-26.

<sup>107</sup> Chamber's Decision to Reconsider, para. 26.

<sup>108</sup> Chamber's Decision to Reconsider, para. 26.

<sup>109</sup> OTP Reconsideration Decision, para. 80.

<sup>110</sup> OTP Reconsideration Decision, para. 78.

<sup>111</sup> OTP Reconsideration Decision, para. 78.

<sup>112</sup> UNHRC Report, paras. 7, 66; Palmer Report, paras. 24, 25.

<sup>113</sup> Chamber's Decision to Reconsider, para. 48, 51.

OTP's policy makes the very point which the Prosecutor has not put into practice in the present case, that the scale of the crimes should be assessed "in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)".<sup>114</sup> There is certainly a reasonable basis on the available evidence, including the UN reports<sup>115</sup>, to take into account that intense and diverse crimes were committed over a sustained period that caused acute immediate and longer term harm and trauma to the victims and their families. It is also disconcerting that greater qualitative weight was given to the deaths of peacekeepers (on the Prosecutor's reasoning) than the deaths and violence perpetrated against unarmed human rights campaigners. It is irrational for this distinction to be regarded as being so significant that it can justify such a markedly different outcome between full investigation / prosecution for one and impunity for the other.

## **5. The Prosecutor erred in assessing the nature of the crimes**

76. The Chamber held that the OTP erred in its assessment of the substantial body of evidence of widespread abuse, harassment, and mistreatment of passengers.<sup>116</sup> The Chamber found that the Prosecutor's decision that there was no reasonable basis to believe that the crimes of torture and cruel and inhumane treatment were committed, not only materially affected the gravity analysis, but was "shockingly premature" as it required an analysis of "the level of severity of the pain and suffering inflicted by the conduct in question", which had not been undertaken by the OTP<sup>117</sup>, and which might require further information that could only be obtained through an investigation.<sup>118</sup>
77. The Comoros submits that the OTP failed to address genuinely this error or rectify it. It merely repeated its error again. The OTP disputes the Chamber's finding, responding with a prolix argument about the legal characterisation of the alleged conduct being

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<sup>114</sup> OTP Policy Paper of Preliminary Examinations, November 2013, para. 64., para. 62.

<sup>115</sup> UNHRC Report, para. 117-135, 148-151, 260-266. Palmer Report, para. 127, 128.

<sup>116</sup> Chamber's Decision to Reconsider, para. 29.

<sup>117</sup> Chamber's Decision to Reconsider, para. 30.

<sup>118</sup> Chamber's Decision to Reconsider, para. 30.

irrelevant to gravity<sup>119</sup>. In essence, the OTP asserts that because the facts “remain the same”<sup>120</sup> it will not take account of the level of severity of the pain and suffering inflicted by the conduct which is the element relevant to showing whether the conduct rises to the level of torture, or cruel or inhuman treatment. It is this aspect that the Chamber held was unreasonable and irrational to overlook as it has a bearing on gravity. The OTP has again refused to consider the evidence of the severity of the pain and suffering inflicted.

78. The OTP also claims that information that could be obtained on this matter through an investigation is merely “speculative”.<sup>121</sup> This is another flagrant error, as the entire point of the preliminary examination, which is not an investigation, is to assess the potential of gathering evidence in an investigation based on the available information. Of course, if no evidence was identified in the preliminary examination, it would be wrong to argue that this could be remedied in an investigation, but this is patently not the case in the present Situation. As the Chamber pointed out, there is ample evidence about the severity of the crimes committed that the Prosecutor should have taken into account in her assessment of gravity.<sup>122</sup>

79. The OTP also claims that it is irrelevant whether the IDF’s actions are classified as a torture, inhumane treatment or outrages upon personal dignity for the purpose of the gravity assessment because of “the absence of any established hierarchy of offences under the Statute.”<sup>123</sup> This statement is flatly in error. It is beyond doubt that the more serious the crimes, such as if the conduct constituted genocide, the more gravity should be attached to the potential cases. Indeed, the Prosecutor has herself relied on the classification of the crimes in the First OTP Decision when she found that “the level of suffering and discomfort as well as humiliation caused to passengers, the mistreatment of the passengers on the *Mavi Marmara* by IDF soldiers” was not “severe” enough to rise to the level of inhumane treatment or torture.<sup>124</sup> The Chamber held that the Prosecutor should have taken the evidence of “severity” into account. If the crimes could constitute torture and cruel treatment that would certainly have a bearing on gravity. The Prosecutor still doggedly

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<sup>119</sup> OTP Reconsideration Decision, para. 84.

<sup>120</sup> OTP Reconsideration Decision, para. 87.

<sup>121</sup> OTP Reconsideration Decision, para. 83.

<sup>122</sup> Chamber’s Decision to Reconsider, paras. 127-130.

<sup>123</sup> OTP Reconsideration Decision, para. 83.

<sup>124</sup> First OTP Decision paras. 69, 139.

refuses to do so. No reasonable prosecutor would not assess and take into account the brutality of the treatment and suffering of victims at this early, or any, stage of the proceedings.

## **6. The Prosecutor erred in assessing the manner of commission of the crimes**

80. The Chamber identified several errors in the OTP's assessment of the manner of the commission of the alleged crimes that materially affected the OTP's conclusion of insufficient gravity. The Comoros submits that the OTP has not properly addressed or genuinely sought to rectify any of these errors.

### **i. The use of live fire by the IDF prior to boarding**

81. The Chamber held that the OTP erred in concluding that the evidence of live fire before any boarding took place should not be given any weight in the gravity analysis.<sup>125</sup> As noted above, the OTP challenges the Chamber's finding by claiming that the Chamber wrongly focused on this evidence in "isolation".<sup>126</sup> This is misplaced as the Chamber clearly referred to a substantial body of evidence which showed that live fire was used before boarding, highlighting that it was an error at this early stage to place no weight on this evidence because of conflicting views expressed by the IDF and the Turkel Commission.<sup>127</sup>

82. The OTP has responded by simply re-stating its position. It has not genuinely and with an open and objective mind reconsidered its prior Decision. Instead, it continues to rely on the Turkel Commission that unsurprisingly found that live ammunition was not fired from the helicopters or anywhere before boarding. The Prosecutor also adopts in whole the position of the Turkel Commission in finding that the passengers violently resisted the IDF and thus no plan or policy to target civilians can be inferred. And even if there was pre-boarding live fire, the Prosecutor says that this does not show any plan and does not increase the gravity of the crimes. No reasonable prosecutor would ever conclude that

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<sup>125</sup>OTP Reconsideration Decision, para. 33 citing Chamber's Decision to Reconsider, para. 35. See also, First OTP Decision, para. 41.

<sup>126</sup> OTP Reconsideration Decision, para. 33.

<sup>127</sup> See paras. 85, 86 below. See also, para. 116-122 below.

firing live ammunition from a helicopter at unarmed civilians below did not significantly heighten the gravity of the offences.

83. The Prosecutor instead raises defensive arguments like that these could have been warning shots<sup>128</sup>, and could only have lasted for a short time<sup>129</sup>, and that it was dark, and that the passengers who give this evidence were themselves shot at and as they would have been focused on their own injuries they may have been mistaken about witnessing shooting from the helicopters.<sup>130</sup> A reasonable prosecutor would surely consider that unarmed witnesses who were being shot at (even if for a short time in an obviously noisy situation) should not be disbelieved about the origin of the fire, certainly not so much so that any further investigation is refused. Yet, the Prosecutor even claims that these witnesses may be biased in accusing the IDF, but does not anywhere acknowledge that the IDF and the Turkel Commission could be biased in their denial of using live fire before boarding. The Prosecutor also consistently favours the Turkel Report over the UN Reports (without explanation), which noted that there had been firing from the helicopters.<sup>131</sup>
84. The Prosecutor is at pains to try to find any reason to caution against the evidence of live firing before boarding from helicopters and the surrounding zodiacs, attempted line by line to find reasons to disbelieve the witnesses (without having interviewed them).<sup>132</sup> It is a quite unusual, and certainly erroneous, approach to adopt as a prosecutor. As with the Turkel Commission, the Prosecutor's stance is that there was so much noise and smoke, and confusion that how can anyone be sure of anything about the timings.<sup>133</sup> That is again an error as to the correct standard of proof. The Prosecutor does not have to be *certain* at this stage. She will have to be before going to trial (if that ever happened), but that would be after a full investigation into these crimes in order to determine what actually happened and the timings on all of the evidence. There is clearly a reasonable basis to investigate the crimes in light of the evidence of pre-boarding fire and all the other evidence highlighted by the Comoros that shows the gravity of the alleged crimes.

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<sup>128</sup> OTP Reconsideration Decision, para. 119.

<sup>129</sup> OTP Reconsideration Decision, paras. 110, 111.

<sup>130</sup> OTP Reconsideration Decision, paras. 112-123.

<sup>131</sup> UNHRC Report, para. 114 (The Mission "has concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers.).

<sup>132</sup> OTP Reconsideration Decision, paras. 99-126.

<sup>133</sup> See, for example, OTP Reconsideration Decision, paras. 115, 118, 122.



85. The OTP contests the Chamber’s holding that “the question whether live fire was used by the IDF prior to the boarding of the *Mavi Marmara* is material to the determination of whether there was a prior intent and plan to attack and kill unarmed civilians – something that informs the Prosecutor’s conclusions with respect to the manner of commission of crimes and, in turn, the ultimate determination that the potential case(s) would not be of sufficient gravity.”<sup>134</sup> The Prosecutor argues that even if there was such fire it would be irrelevant. It is disingenuous for the OTP to suggest that there was no plan because the operation did not go according to plan (as the Turkel Commission found, with mistakes being made), let alone that there was any plan to commit the crimes, in light of the failed first attempt at boarding and the overall pattern of events that followed, including the IDF’s graduated approach and use of non-lethal weapons to try to clear the upper deck.<sup>135</sup> This overlooks that these actions are still all consistent with an attack on civilians in which the use of live fire was envisaged, as it undoubtedly did occur, and that it was not just one big accident by a few rogue soldiers. In addition, a plan or policy in which it is foreseen that civilians could be targeted and harmed is still a plan that can attract criminal responsibility at the highest levels and which therefore heightens the gravity of the offences; a legal consideration that the OTP never once addresses.
86. Moreover, the evidence of live fire before boarding from the helicopters and zodiacs is relevant to the alleged “resistance” of some passengers. A key factor never addressed by the Prosecutor is how passengers thinking they were being fired at would respond (even if they may have been wrong about it being live ammunition). The evidence is that they instantly feared for their lives and those of their fellow passengers, and thus acted in self-defence to protect themselves against the heavily armed soldiers.<sup>136</sup> Instead, all the Prosecutor does in her Reconsideration Decision is to repeat that “there was no reasonable basis to believe the identified crimes were committed according to a plan or a policy” given the “*undisputed* fact that the passengers aboard the *Mavi Marmara*, uniquely, resisted the IDF boarding operation.”<sup>137</sup> This is a misrepresentation as it is certainly disputed that the passengers resisted the boarding such that the attack on them could

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<sup>134</sup> Chamber’s Decision to Reconsider, para. 34.

<sup>135</sup> OTP Reconsideration Decision, paras. 124, 125.

<sup>136</sup> UNHRC Report, para. 98; Supplemental Submissions to the Prosecution on the Referral from the Union of the Comoros, 19 May 2014, Annex 1; Richard Lightbown, Commentary on the Available Primary Data on the Israeli Attack on the Gaza Freedom Flotilla 31 May 2010, 15 May 2014, p. 145, 147-149.

<sup>137</sup> OTP Reconsideration Decision, para. 90 (emphasis added).

somehow be justified. The witnesses explain how they acted in self-defence, and the Prosecutor erred in discounting their evidence in favour of the IDF position that this was a “unique” and unexpected situation for which they cannot be blamed.

87. This is the precise dispute that should be the subject of the investigation, yet the OTP has in haste decided the key issue against the victims. Where there is a reasonable basis that shows that unarmed civilians were targeted, even if disputed by the perpetrators, or if other inferences exist, a reasonable prosecutor is obliged to and would initiate an investigation.

ii. Cruel and abusive treatment of detained passengers in Israel

88. The Chamber found that the OTP erred in concluding that evidence of cruel and abusive treatment of the passengers once they arrived in Israel was unconnected to the conduct of the IDF soldiers who boarded the Flotilla, and was thus irrelevant in assessing gravity.<sup>138</sup> The Chamber held that the OTP should have taken into account that this evidence of “systematic abuse reasonably suggests a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*, at least in the form of tacit acquiescence of the military or other superiors” and is evidence of the existence of a plan or policy that affects the gravity of the crimes.<sup>139</sup>

89. The OTP has steadfastly refused to take account of this evidence in its gravity assessment because “there does *not* appear to be a reasonable basis to believe that any abuse of the *Mavi Marmara* passengers on Israeli territory was itself *systematic*, nor that any such conduct was relevantly associated with the identified crimes aboard the *Mavi Marmara*”.<sup>140</sup> The reason for the latter conclusion is that the abusive conduct in Israel was in the OTP’s view not committed or coordinated by the IDF, but by immigration officers, police and airport staff at installations unrelated to the military.<sup>141</sup> This is an astonishing finding. No-one is alleging that the same IDF soldiers participated in the interrogations and mistreatment in Israel. The evidence shows that the abuse of passengers continued from the Flotilla, as passengers were taken from the ships to be interrogated in Israel.

<sup>138</sup> Chamber’s Decision to Reconsider, paras. 37, 38.

<sup>139</sup> Chamber’s Decision to Reconsider, para. 38.

<sup>140</sup> OTP Reconsideration Decision, para. 144.

<sup>141</sup> OTP Reconsideration Decision, paras. 140, 141.

There is a reasonable basis, at least, to believe that all of this unlawful conduct was part of a plan or policy to target the civilian passengers which was overseen and coordinated by the Israeli authorities who had control over, and worked with, all of the different forces involved. It would be most unexpected for such a large-scale operation that took place under the glare of the international community to have occurred randomly without any coordination. No reasonable prosecutor would ever disregard this evidence as showing no plan at all, from which no inference could be drawn about those in command and their responsibilities in respect of what happened on the Mavi Marmara, including under the doctrine of command responsibility – all of which are highly relevant to the gravity of the alleged crimes. The interrogation process must have been pre-planned and co-ordinated with the operations against the Flotilla.<sup>142</sup>

90. It was plainly an error for the Prosecutor to fail to take this and all other evidence into account that was relevant to the manner of commission of the crimes. There is ample evidence that hundreds of passengers were subjected to abuse in Ashdod and thereafter, and it is wrong to conclude at this early stage that it was not “systematic”, and wrong to take the view so firmly that it was completely unrelated to what happened during the IDF operation on the ship.

iii. Unnecessarily cruel treatment of passengers during the taking of the Mavi Marmara and attempts to conceal the crimes

91. The Chamber held that the OTP erred in failing to take account of evidence of unnecessarily cruel treatment of passengers such as being “shot multiple times, in the face while trying to cover their heads, or from behind, or after they surrendered and pleaded with the IDF to stop firing at civilians”<sup>143</sup>, as well as evidence that the IDF sought to conceal these crimes. The Chamber found that the Prosecutor “erred in not recognising

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<sup>142</sup> See, testimony of Ehud Barak at para. 105 below. The testimony from the IDF Chief of General Staff, Gabi Ashkenazi, also confirms as much: “*In parallel to all the preparations at sea, a designated compound in the port of Ashdod was prepared in conjunction with the various government offices. IDF forces, Israel Police, and representatives of government offices, set up in the compound with the goal of receiving the hundreds of passengers of the ships. In the course of preparations for the operation, training was carried out for forces of the police Special Reconnaissance Unit, and the Masada Force, the Prisons Service intervention unit.*” (The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number 4, on 10.08.2010, p. 35-36.

<sup>143</sup> Chamber’s Decision to Reconsider, para. 39 noting Comoros Review Application 2015, para. 106.

one of the reasonable alternative explanations”, namely that it was evidence consistent with a deliberate plan or policy.<sup>144</sup>

92. The Prosecution concedes that the facts “were *also* consistent with the Comoros’ conclusion (there was a plan or policy)”, but again refuses to consider this evidence as a factor affecting gravity, claiming that the OTP need only consider this conclusion if it can be shown that the conclusion the OTP prefers is unreasonable.<sup>145</sup> This is a completely flawed understanding of the applicable standard under Article 53(1) to open an investigation. Even if there are several reasonable inferences to be drawn, as long as it is reasonable to believe that there is evidence consistent with a plan or policy showing sufficient gravity, an investigation must be initiated. It is not for the Prosecutor at this early stage to decide which one she prefers (and certainly not to choose one that best favours the interests of potential suspects); that is to pre-judge the investigation and to apply a higher standard of proof before an investigation is even launched.

iv. Crimes on the other vessels of the Flotilla

93. The Chamber held that “without an investigation, it is impossible to conclude, as the Prosecutor does, that the absence of crimes aboard the other vessels comparable to those aboard the *Mavi Marmara* is a factor that would negate, or militate against, the possibility that the identified crimes resulted from a deliberate plan, as this is not the only reasonable inference that could be drawn from this fact.”<sup>146</sup>

94. The OTP claims that the Chamber “simply disagrees with the Prosecution’s conclusion, positing that an alternative ‘reasonably possible’ interpretation may exist” and “impose[s] a burden upon the Prosecution to conduct an investigation unless it can eliminate all reasonably possible *speculations* about the apparent facts which might satisfy the article 53(1) test.”<sup>147</sup> This is the Prosecutor again wrongly conducting an ‘appeal’ of the Decision to Reconsider through her new Decision instead of in good faith addressing the errors identified by the Judges.

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<sup>144</sup> Chamber’s Decision to Reconsider, para. 41.

<sup>145</sup> OTP Reconsideration Decision, para. 151.

<sup>146</sup> Chamber’s Decision to Reconsider, para. 43.

<sup>147</sup> OTP Reconsideration Decision, para. 158.

95. Even if there were no comparable crimes committed against civilian passengers on other vessels (which is clearly not the case) the Prosecutor erred by using this fact alone to find conclusively at this stage that the crimes on the Mavi Marmara were committed by individual soldiers (who might have been acting in self-defence; to be determined later according to the OTP by mentioned repeatedly), and not as part of a plan or policy deliberately to attack civilians (which would heighten the gravity of the crimes). It would be entirely proper and reasonable to find that the Mavi Marmara, that held the majority of civilian passengers was the object of the attack, or at least that it was foreseen as part of the plan that conducting the operation against this ship as planned would result in civilian deaths and injury. Even if other conclusions were possible, including the IDF's defence that this was an isolated incident in which mistakes were made when soldiers were attacked by passengers (which is in essence the position the Prosecutor also prematurely favours), it would be incumbent on any reasonable prosecutor to open an investigation into the matter.

96. But there is clear evidence of very serious and comparable crimes being committed on other ships which the Prosecutor failed to take into account as showing that the overall operation occurred pursuant to a plan or policy deliberately designed to target civilians or in which such an outcome was foreseeable. The Prosecutor erred by claiming that the evidence of crimes on other ships were merely "speculations". She had before her an abundance of evidence showing atrocious attacks on civilians on the other ships, including:

- IDF soldiers firing paintballs directly in the face of non-resistant passengers at close range causing one female passenger's nose to break;<sup>148</sup>
- IDF soldiers shooting a female passenger with rubber bullets and paint balls six times in the back;<sup>149</sup>
- IDF soldiers throwing two women onto the deck and pressing their faces against broken glass;<sup>150</sup>
- IDF soldiers hooding the same two women after pushing their faces into glass, handcuffing them behind their backs and making them kneel;<sup>151</sup> and,
- IDF soldiers launching a shun grenade into the face of a passenger causing him permanent partial blindness in one eye.<sup>152</sup>

<sup>148</sup> Comoros Review Application 2015, para. 121. See also, Statement of ██████████; Statement of ██████████.

<sup>149</sup> Comoros Review Application 2015, para. 121.

<sup>150</sup> Comoros Review Application 2015, para. 121.

<sup>151</sup> Comoros Review Application 2015, para. 121.

<sup>152</sup> Statement of ██████████.

97. The Prosecutor was also directed to evidence from the UN Human Rights Council’s Fact-Finding Mission Report which concluded that during the boarding of the Challenger 1, Sfendoni and the Eleftheri Mesogios, where passengers practiced no more than “passive resistance techniques”, IDF soldiers “used significant force, including stun grenades, electroshock weapons, soft-baton charges fired at close range, paintballs, plastic bullets and physical force. This resulted in a number of injuries to passengers including burns, bruises, hematomas and fractures.”<sup>153</sup>
98. No reasonable prosecutor would discount this evidence as not showing a reasonable basis of similar crimes being committed on all the ships, consistent with an intent to harm civilians which could not have happened by accident or mistake. These factors are all plainly relevant to the assessment of gravity, all of which the Prosecutor again refused to take into account.

#### **7. The Prosecutor erred in assessing the impact of the crimes**

99. The Chamber decided when assessing the impact of the crimes that “the Prosecutor erred in considering that, as a result of the alleged absence of a significant impact of the identified crimes on the civilian population in Gaza and despite their significant impact on the victims, overall the impact of the identified crimes constituted an indicator of insufficient gravity of the potential case(s)”.<sup>154</sup> The Chamber made clear that the “physical, psychological or emotional harm suffered by the direct and indirect victims of the identified crimes must not be undervalued and need not be complemented by a more general impact of these crimes beyond that suffered by the victims.”<sup>155</sup> In addition, the Chamber held that the OTP should have “recognised the possibility that the events at issue had an impact going beyond the suffering of the direct and indirect victims”, and should have taken into account the fact that the attack was “highly publicized” and would have “sent a clear and strong message to the people in Gaza”, and that the incident was grave enough to result “in several fact-finding missions.”<sup>156</sup>

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<sup>153</sup> See, Comoros Review Application 2015, para. 122 citing UNHRC Report, paras. 173.

<sup>154</sup> Chamber’s Decision to Reconsider, para. 47.

<sup>155</sup> Chamber’s Decision to Reconsider, para. 47.

<sup>156</sup> Chamber’s Decision to Reconsider, para. 48.

100. In the new Decision the Prosecutor again fails to engage in this assessment of the actual “physical, psychological or emotional harm” to the direct and indirect victims. Over 500 passengers were affected by the IDF’s attack and the life-threatening violence. They have all consistently described it as a most harrowing experience, and urged the OTP to take their intense suffering into account. Furthermore, the OTP discounts victims not on the Mavi Marmara finding that it does not believe that “crimes were committed on either of the other vessels upon which it has jurisdiction (the *Sofia* and the *Rachael Corrie*)”, and therefore the individuals on these ships could not be considered victims.<sup>157</sup> This overlooks the accounts provided to the OTP from passengers on the Rachel Corrie and Sofia / Eleftheri Mesogios who were mistreated by the IDF soldiers and who witnessed the killing of passengers on the Mavi Marmara from their vessels, as well as the UN reports which found that mistreatment had occurred on the Sofia / Eleftheri Mesogios.<sup>158</sup>

101. The Prosecutor also refuses to take into consideration the wider impact on the civilian population of Gaza, particularly in the context of the blockade by Israel and the same IDF forces. Irrespective of whether any of the aid actually got to Gaza<sup>159</sup> (which is a disputed matter<sup>160</sup>), the effect of the raid on the Flotilla by the IDF in Gaza is plainly a relevant consideration for the OTP to have applied its mind to in reconsidering its refusal to open an investigation, as is the substantial international concern the attack generated. It is misguided to claim that these factors must be treated with “caution” and cannot objectively be considered for the purpose of gravity.<sup>161</sup> The UN certainly did not refuse to address the seriousness of the matter when it commissioned two very high level inquiries. Their conclusions should have been taken into account by the OTP when assessing the gravity of the crimes for the purposes of opening an investigation. It reveals a double standard when the Prosecutor says that she cannot assess “the symbolic importance of the identified crimes” and their concern to the international community.<sup>162</sup> In the First OTP Decision, the OTP did precisely that in arguing that the impact of the crimes committed against peacekeepers in the *Abu Garda* case “strike at the very heart of the international legal

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<sup>157</sup> OTP Reconsideration Decision, para. 130.

<sup>158</sup> First Review Application, para. 122 citing the UNHRC fact-finding mission, para. 173.

<sup>159</sup> OTP Reconsideration Decision, para. 132.

<sup>160</sup> Comoros Review Application 2015, para. 126.

<sup>161</sup> OTP Reconsideration Decision, para. 133.

<sup>162</sup> OTP Reconsideration Decision, para. 133.

system” and are crimes “of concern to the international community as a whole.”<sup>163</sup> The Prosecutor gave special weight to the “concern to the international community” when assessing gravity in that case, but not in the present case.<sup>164</sup> The Prosecutor has again refused to accord appropriate weight to the relevant factors in respect of gravity, and has instead clung to irrelevant considerations (like that the aid may have been delivered<sup>165</sup>) to avoid her mandate to open an investigation.

## V. GROUND OF REVIEW FOR THE OTP DECISION ON NEW EVIDENCE

102. As noted above, the Comoros submitted new evidence to the OTP, which was not available for the First OTP Decision, in respect of each of the factors relevant to gravity, namely the potential perpetrators and the scale, nature, manner of commission and impact of the crimes. The new evidence was submitted to show that, in addition to the evidence already received (which was itself sufficient) there was certainly a reasonable basis to believe that the gravity threshold had been met in light of the further evidence that had become available. However, in the OTP Decision on New Evidence, the Prosecutor has given no weight to any of this new evidence. It has all been brushed aside. The Prosecutor is instead fixated on downgrading the seriousness of the evidence at every opportunity. It is a quite extraordinary Decision that applies a standard of proof as though in trial when all that is required is a reasonable basis that the crimes are grave. The Comoros has set out below the catalogue of errors that require this Decision to be reviewed, and for the Prosecutor to be requested by the Chamber to reconsider this new Decision under Article 53(3)(a).<sup>166</sup>

### **1. The Prosecutor erred in her considerations of the potential perpetrators of the crimes**

103. The Comoros provided the OTP with a military expert report which was prepared by retired Col. Desmond Travers who has vast experience as a military officer for over 40 years including 10 years working as a military operations officer conducting military

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<sup>163</sup> First OTP Decision, para. 145.

<sup>164</sup> First OTP Decision, para. 145; OTP Reconsideration Decision, para. 78.

<sup>165</sup> OTP Reconsideration Decision, para. 132.

<sup>166</sup> The Comoros relies on the same factors relevant to gravity as established in the case law, and as used by Chamber and the OTP itself. The OTP has again erred in respect of its assessment of each factor. The Comoros incorporates in this section (Part V) all of the submissions it has relied on in the review of OTP Reconsideration Decision in Part IV so that they can be taken into account as well (as they are relevant to OTP’s Decision on the New Evidence) in the event that the Chamber is minded only to review the OTP Decision on New Evidence.



analysis.<sup>167</sup> His expert report included the following conclusions based on the available evidence relevant to the potential perpetrators:

- *“I am of the view that the entire operation was of such a nature - intended to be conducted in international waters and at night - that it would have to be authorised at Cabinet level.”*
- *“it does appear from the Turkel Report and all available information that the plan for the operation was ordered and implemented in a known military fashion. The chain-of-command was used in accordance with proven systems in modern armies.”*
- *“the chain of command from top-down had been arranged in conformity with systems known and in place in modern professional forces.”*
- *“the chain-of-command therefore appears to have been observed from the Government to Minister of Defence to Defence Chiefs to the Commander of the operation, to the specialist attack elements.”*
- *“the Navy Commander was in a position to observe the Mavi Marmara and it could therefore be presumed that he could have influenced at short notice the conduct of the proceedings by the Sayeret 13 soldiers had he wished to do so. This has been one of the clearest indications of the presence of a chain-of-command in my analyses experience.”<sup>168</sup>*

104. The Prosecution entirely ignores not only this evidence in the expert report, but disregards the report in its entirety, when addressing new evidence on the responsibility of potential perpetrators.<sup>169</sup> At this stage of the proceedings, the report should have been taken at face value as evidence that potential perpetrators might include senior commanders and leaders, which would without doubt heighten the gravity of the potential case(s). It is unfathomable why the Prosecutor would disregard a highly experienced military expert who could assist her in an investigation. Rather, the Prosecutor erroneously sticks to her view, as though proven, that no one other than a few soldiers on board could be responsible.

105. New evidence was also submitted which supported the conclusion that there was direction and coordination at the highest level of command. This included new victim and witness accounts of abuse, ill-treatment and other crimes committed in Ashdod, in detention in Israeli territory, and at Ben-Gurion airport.<sup>170</sup> It shows a reasonable basis for believing that there was overall political and military planning and command. But the Prosecutor

<sup>167</sup> See, Letter from Comoros of 31 August 2016; and Conf. Annex 1.

<sup>168</sup> See, Letter from Comoros of 31 August 2016, paras. 31, 32; and Conf. Annex 1.

<sup>169</sup> OTP Decision on New Evidence, paras. 328-331.

<sup>170</sup> See, for example, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, Victim Application of ██████████, and Victim Application of ██████████.

exercised her discretion irrationally in holding that there was no link between the abuse on the Mavi Marmara and what followed when these same detainees were taken to Ashdod to be interrogated.<sup>171</sup> The Prosecutor overlooks new evidence given to her that the entire operation was carefully planned and directed by several ministries and the top echelons of the IDF, including the testimony before the Turkel Commission by Minister of Defence, Ehud Barak:

*“The Israel Navy coordinated all the activity at the Port of Ashdod. One had to receive hundreds of people ... How does one interview, as there are so many assignments that derive from the law, from the way that these people enter, in this fashion in one day, legal requirements, one has to question them, and each and every one separately and in Ashdod they constructed tracks and for each track an authorized person must sit on the matter for the Ministry of Interior, who knows what to ask and is familiar with this problem ... We received prior reports that the Israeli Navy was coordinating this work in Ashdod. Our system, the Defense Ministry, made preparations to take these goods following inspection, one had to unload them, one had to check them, and one had to bring them to Gaza. ... We had a discussion on all these things and formed the impression that it was ready; these matters had been well prepared.”<sup>172</sup>*

106. A reasonable prosecutor would at least consider that those in command could be held responsible for the crimes because they “either knew or, ... should have known that the forces were committing or about to commit such crimes” or they “failed to take all necessary and reasonable measures ... to submit the matter to the competent authorities for investigation and prosecution.”<sup>173</sup> Command responsibility was not considered anywhere in the Decision on New Evidence, let alone as a factor that would have heightened the gravity of the crimes.

## **2. The Prosecutor erred in assessing the scale of the crimes**

107. During the time in which the OTP was reconsidering its decision, 307 victim applications and accounts of victims recognised by VPRS as participating victims, were submitted to the OTP.<sup>174</sup> Submissions were provided to the OTP about their relevance to showing gravity, including in respect of the scale of the crimes.<sup>175</sup> The OTP disregarded all this

<sup>171</sup> OTP Decision on New Evidence, para. 210.

<sup>172</sup> The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010. Submitted to Prosecution with Letter to Prosecution of 28 January 2016, para. 2.

<sup>173</sup> Rome Statute, Art. 28.

<sup>174</sup> See, Letter to the Prosecution of 6 May 2016, 8 June 2016, 4 July 2016, 21 July 2016 and 31 August 2016.

<sup>175</sup> See, Letter to the Prosecution of 6 May 2016, 8 June 2016, 4 July 2016, 21 July 2016 and 31 August 2016.

material on the basis that it changed nothing from its first Decision.<sup>176</sup> As noted above, the OTP is of course entitled to reach the same conclusion, but it cannot overlook key evidence in doing so.

108. The OTP was, for example, provided with new evidence from countless passengers (some wounded) who were subjected to prolonged and painful stress positions lasting as long as 8-10 hours, who passed out and vomited from the pain of the stress positions and handcuffs, and who were beaten, threatened, intimidated and made to fear for their lives,<sup>177</sup> including:

- *“On the deck, I was forced to kneel down ... I was in constant pain because of having to stay kneeled down. The pain on my hands because of the cuts caused on my wrists was unbearable. At one point, because of this pain and exhaustion, I lost my strength and I blacked out and lost my consciousness. Friends woke me back up. Only then the soldiers decided to take out the handcuff and handcuff me from front. But I was forced to continue knelling.”*<sup>178</sup>
- *“They forced us to kneel down when we were brought up. This was very difficult position to be in because I already suffered from back injury, and back hernia, and given the fact that I was also handcuffed from behind, the whole pain was unbearable. ... This went on for hours, probably 5-6. At one point, because of the pain and exhaustion, I blacked out. I don’t know how many hours I was unconscious but when I woke up we were close to Ashdod.”*<sup>179</sup>
- *“We were made to crouch here. If we made the slightest move they would point their guns at us and put the lasers of the gun in our eyes. People were fainting or dropping because they couldn’t deal with crouching in that position for so long. There were a lot of wounded people there as well and we were all made to crouch.”*<sup>180</sup>

109. Given the sheer numbers of instances of mistreatment, it is unreasonable to find that this new evidence did not show a scale of sufficiently grave proportions when considered together with all the evidence already in the OTP’s possession. New evidence of a wide range of passengers being targeted was also provided including from,

- Victims who were doctors and nurses being prevented from giving assistance and medical treatment to wounded passengers, and who were themselves shot at, beaten and abused while trying to assist the wounded,<sup>181</sup>

<sup>176</sup> OTP Decision on New Evidence, para. 190.

<sup>177</sup> See, for example, Letter from Victims of 31 August 2016.

<sup>178</sup> Victim Application of ██████████.

<sup>179</sup> Victim Application of ██████████.

<sup>180</sup> Victim Application of ██████████.

<sup>181</sup> See, Letter to Prosecution of 8 June 2016. See also, Victim Applications of ██████████, ██████████, ██████████, ██████████, and ██████████. It is unreasonable for the Prosecutor to find at this stage that this evidence was irrelevant for the purpose of gravity

- Victims who were shot at and beaten when trying to assist wounded passengers;<sup>182</sup>
- Victims who were beaten and mistreated while lying down and handcuffed;<sup>183</sup> and,
- Victims who were assaulted with rifle butts and kicked while lying on the ground and after being wounded by shooting<sup>184</sup>.

110. It is true that OTP had similar evidence before, but added together with all the new accounts, and detail provided, the overall picture on any reasonable view must be of large-scale crimes sufficient to warrant further investigation. One new aspect relevant to the scale of the crimes is the OTP's acknowledgement of new evidence of the appropriation of property of the detained passengers including evidence from 237 victims who lost "personal or professional items, especially mobile telephone and electronic equipment" and from 63 victims who lost "significant sums of cash, totalling more than \$430,000 in dollars, euros, and pounds sterling."<sup>185</sup> Even though the OTP indicates that this evidence could provide a reasonable basis to believe that an additional crime was committed under Article 8(2)(b)(xvi)<sup>186</sup>, it finds that it would have absolutely no effect on the gravity of the circumstances.<sup>187</sup> Once again, the Prosecutor refuses to take into account features that aggravate the attack, namely IDF soldiers robbing civilians, having killed and beaten them.

### 3. The Prosecutor erred in assessing the nature of the crimes

111. The Prosecution received extensive new evidence of cruelty and abuse that resulted in severe pain and suffering for the victims. It certainly showed on any reasonable view that

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merely on account of her assertions that IDF medical care itself was adequate. (See, OTP Decision on New Evidence, para. 290.) Moreover, the Prosecutor gives no weight to the several accounts of persons who stated that the IDF delayed or denied the provision of medical assistance (See, OTP Decision on New Evidence, para. 289). This evidence, at least, establishes a reasonable basis for the crimes of serious assaults on civilians being aggravated by the lack of proper medical care thereafter. Of course, this evidence must be considered together with the all the evidence of particularly serious abuse of passengers by the IDF itself, all of which shows sufficient gravity.

<sup>182</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>183</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>184</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>185</sup> OTP Decision on New Evidence, para. 234.

<sup>186</sup> OTP Decision on New Evidence, paras. 237, 238.

<sup>187</sup> OTP Decision on New Evidence, para. 239.

the crimes committed rose to the level of torture and cruel and inhuman treatment; for example (excerpts from victim applications)<sup>188</sup>:

- *“I fell on the ground after the third bullet. I laid on the ground for approximately 2 hours and I was also handcuffed. They were kicking me while I was laying on the floor and I was hit in my mouth and my nose was bleeding. They started shooting fire aimlessly on right and left and I was also hit by 4 shrapnels one of them is still in my head.”*<sup>189</sup>
- *“I fell onto my back shot from my hips and feet. I had broken bones in my head too. While I layed down on the floor a soldier appeared above me and shot me from my stomach. He then turned me over, handcuffed me and walked off.”*<sup>190</sup>
- *“During all this I was lying on the floor not wounded and looked up. In this moment a soldier took aim on my head and shoot at me. The bullet entered at the left cheek and ejected from the bottom of the right side of my throat. My cheek and my mouth were demolished.”*<sup>191</sup>

112. The OTP disregarded all of this evidence and did not take it into account for the purposes of assessing the severity and accordingly the gravity of the crimes.<sup>192</sup> The OTP repeats its same error. In addition, as noted above, the OTP received new accounts from numerous victims who describe being forced to kneel and crouch in stress positions for up to 10 hours.<sup>193</sup> The OTP has previously found that such conduct could “depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence.”<sup>194</sup> Yet in the present Situation, the OTP has again failed to consider that this new evidence could show that torture and cruel treatment were committed, thus aggravating the severity of the crimes.

113. The OTP claims that it had no new evidence to support the allegation of the desecration of a deceased passenger’s body, which was made by the widow and family of [REDACTED]. She was with her husband on the Mavi Marmara when he was killed.<sup>195</sup> This account has

<sup>188</sup> See also, Victim Application of [REDACTED].

<sup>189</sup> Victim Application of [REDACTED].

<sup>190</sup> Victim Application of [REDACTED].

<sup>191</sup> Victim Application of [REDACTED].

<sup>192</sup> OTP Decision on New Evidence, para. 294.

<sup>193</sup> See, Letter from Victims of 31 August 2016.

<sup>194</sup> Letter from Victims of 31 August 2016. See also, Iraq / UK Preliminary Examination, Report on Preliminary Examination Activities 2014, 2 December 2015, paras. 93-95; Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red, 20 November 2017, para. 194.

<sup>195</sup> Submission of Victim Observations, para. 43.

been provided to the OTP.<sup>196</sup> She gave evidence that dogs were allowed to bite her husband's body and soldiers beat, kicked and urinated on it. Even if the statement could not be located, the OTP could have asked for it from the Comoros or Victims Representatives, instead of disregarding evidence consistent with gravity. In addition, the OTP was provided with evidence that the engineer's ██████████ infant child, who was also a passenger on the ship along with his wife, was threatened by IDF soldiers. He gave a statement that was provided to the OTP, as were the statements of other passengers who witnessed the incident. They describe soldiers entering the engine control room with dogs and guns pointed at ██████████ and threatening that if he did not start the engine, passengers would not be given medical treatment and his infant child's safety would be at risk. ██████████ specifically stated that he and his child were threatened.<sup>197</sup> However, the OTP erred in dismissing this evidence in a single sentence with no explanation, claiming that there is no reasonable basis to believe the remarks were "uttered with criminal intent."<sup>198</sup>

#### **4. The Prosecutor erred in assessing the manner of commission of the crimes**

114. The Prosecution's Policy on Preliminary Examinations makes clear that the gravity analysis must consider the manner of the commission of the crimes, taking account of:

*"the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups."*<sup>199</sup>

115. The new evidence submitted provides relevant information about these factors, thereby heightening the gravity of the crimes. The Prosecutor either does not address it at all or gives it no weight in finding that her previous decision must stand. It is evident that no candid and proper reconsideration has been undertaken; the OTP has again erred in refusing to investigate on the basis of the new information received, taken together with all the evidence already in its possession.

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<sup>196</sup> Submission of Victim Observations, para. 43. Victim Application of ██████████ was also submitted by OPCV. Both she and family members were available for interview by the OTP when this information could have been confirmed.

<sup>197</sup> Statement of ██████████. See, Letter to Prosecution of 28 January 2016. See, Conf. Annex 3.

<sup>198</sup> OTP Decision on New Evidence, para. 200.

<sup>199</sup> OTP Policy Paper of Preliminary Examinations, November 2013, para. 64.

i. The use of live fire by the IDF prior to boarding (from helicopters and zodiacs)

116. In light of the OTP's view that no weight can be given to this evidence because of "conflicting accounts" and "confusion", the Comoros provided further evidence from witnesses about the use of live ammunition from the helicopters. The Comoros also sought to assist the OTP in resolving this matter by commissioning two expert reports to address it. The Prosecutor's response was to dismiss, ignore, or give no weight at all to any of this evidence.

117. The OTP was provided with a forensic expert report from Dr Peter Jerreat, who has been an accredited UK Home Office Forensic Pathologist for over 38 years and has served as a forensic expert in cases at the ICTY. Dr Jerreat provided relevant evidence on this topic including that,

- forensic evidence in the form of damage to the ship allowed for the conclusion that there was live fire from the helicopters above;
- forensic and testimonial evidence allowed for the conclusion that Ibrahim Bilgen was shot and killed before any soldiers boarded the ship, and the "injury must have occurred by firing from the helicopter as the site and track of the injury was entirely compatible with his described position";
- forensic and testimonial evidence allowed for the conclusion that Ayetullah Tekin was shot in the hands by live fire from the helicopters above;
- forensic and testimonial evidence allowed for the conclusion that Ahmet Aydan Bekar was shot on the top deck from above because "from the sites of injury, entrance and exit, it was clear that he was shot from above, consistent with firing from a helicopter" and because "[i]t would otherwise be very difficult to achieve the bullet tracks";
- forensic evidence of the "[i]njuries to [deceased] Furkan Dogan ... were entirely compatible with his described position and initially being shot from the helicopter above"; and,
- forensic and testimonial evidence of the bullet wound Muharrem Gunes received to the face allowed for the conclusion that the "injury must have occurred from firing from a helicopter above when he looked upwards whilst lying prone on the deck".<sup>200</sup>

118. This new expert evidence clearly provides a reasonable basis to find that live fire was used from the helicopters to shoot unarmed civilian passengers below both before and after boarding. At least one person, in Dr Jerreat's expert opinion, was killed before any soldiers boarded the ship. Yet, the OTP finds that the conclusions in the report must be treated

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<sup>200</sup> Forensic Expert Report of Dr. Peter Jerreat, para. 3.

“with caution” (for no proper reason<sup>201</sup>), and that “even if [Dr Jerreat’s] conclusions are correct” the evidence would not affect the OTP’s previous gravity assessment. The Prosecutor only highlights aspects of Dr Jerreat’s report (out of context and highly selectively) that support her previous conclusion.<sup>202</sup> She simply does not address the core findings of the report that show gravity (reducing her discussion of the report to a single footnote). No reasonable prosecutor would find that independent expert forensic evidence consistent with soldiers targeting and killing civilians before boarding had no bearing on the gravity of the crimes.

119. Moreover, the findings of the military expert report from retired Col. Desmond Travers are consistent with Dr Jerreat’s conclusions; for example:

- *“On balance, in light of the materials I have reviewed ... I consider that firing of live ammunition from a helicopter above occurred immediately prior to, and during the descent or rappelling onto the upper deck by soldiers from helicopters.”*<sup>203</sup>
- *“The vertical attack from helicopters, while being supported by live fire from above, was a conventional warfare manoeuvre, conducted not against combatants but civilians” ... “what occurred were assaults, ... with the intention of targeting those on board and taking possession of the Mavi Marmara by force.”*<sup>204</sup>

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<sup>201</sup> The OTP is critical of Dr Jerreat on account of the witnesses relied on, but completely overlooks as set out in his report that he inspected the ship with the witnesses present and interviewed them on site in order to understand and clarify their evidence, and to place it together with the forensic evidence, to prepare his expert report. As he indicated, he was and is available to go through all of his findings in detail with the OTP. The Prosecutor never contacted him. An invaluable resource was made available to assist the Prosecutor in clarifying the “conflicting” accounts (as she calls them), and yet she ignored it, and persisted with her original conclusion regardless. Similarly, the criticisms that Dr Jerreat did not identify the ballistics expert he worked with, and that he is not an expert in his field are completely unwarranted. As he has explained, he sought the assistance of a very experienced and leading ballistics expert, and all of his notes and findings are available to the OTP to review and consider. The OTP never once sought to inquire about these matters or meet with the experts. Instead, the Prosecutor only seeks to find fault, where there is none, in order to shut down the examination. It is disingenuous in this way to find that Dr Jerreat’s entire report must be treated with “caution” because he is not a ballistics expert and thereby overlook the key findings he has made about medical, pathological and related evidence. Considering all of the materials related to the expert report (which is only preliminary in nature) are in any event precisely the steps that would normally be undertaken as part of an investigation. See OTP Decision on New Evidence, para 265, footnote 438.

<sup>202</sup> See OTP Decision on New Evidence, footnote 438. The OTP for example highlights that the report notes that high velocity ammunition caused damage to the side of the ship, but the report also noted that there was damage to the ship consistent with firing from the helicopters above (see para 3(ii)). Similarly, the OTP is quick to point out that the report notes that it is difficult to be specific about damage to the ship due to the multiple decorations that have occurred, but fails to mention that Dr Jerreat qualified that finding by indicating that the marked contrasts between the pitted and rusted damage to the top deck as compared to the sides of the ship is consistent with multiple episodes of firing from above from helicopters as well as soldiers on the top deck (see para. 1).

<sup>203</sup> See, Letter from Comoros of 31 August 2016, para. 43; and Conf. Annex 1.

<sup>204</sup> See, Letter from Comoros of 31 August 2016, paras. 48, 49; and Conf. Annex 1.



120. Again, the OTP seeks to minimise this evidence<sup>205</sup> claiming that it “does not seem consistent with the apparent facts” (facts that the OTP has selected).<sup>206</sup> The OTP only picks out the points in the report that favour its original conclusion, such as that there was limited visibility and that the passengers may have confused non-lethal fire for live fire.<sup>207</sup> Yet, the critical aspects of the report that concern the *manner* in which the crimes were committed are given no weight at all. Instead the Prosecutor questions Col. Travers’ conclusions, as though she were a military expert, giving evidence in her own cause to justify her decision, and without relying on an alternative expert.<sup>208</sup> It is surely *in* an investigation that the veracity of expert evidence would be fully explored with the expert concerned and other experts to determine whether the allegations could be proven to the criminal standard. At this stage of only opening an investigation, there is plainly a reasonable basis, in light of the available military expert evidence, taken together with the pathologist’s evidence and that of the ballistics expert, as well as the new evidence from the witnesses (see below) to regard the crimes as sufficiently serious in light of the evidence of firing from the helicopters. The OTP never once addresses a key finding of the military expert that the evidence shows **a traditional military assault using conventional military methods, first through the use of armed zodiacs and then armed helicopters on a purely civilian objective, that is in military circles only reserved for assaults on combatants, and which requires and must have been controlled and commanded by the military hierarchy.**<sup>209</sup> In this regard, the OTP also erred in disregarding the military expert evidence of the location and method of the boarding operation and the easily achievable peaceful alternatives.<sup>210</sup>

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<sup>205</sup> See, OTP Decision on New Evidence, paras. 271, 272, 295, 297, 306, 314.

<sup>206</sup> OTP Decision on New Evidence, para. 271.

<sup>207</sup> OTP Decision on New Evidence, para. 269.

<sup>208</sup> See OTP Decision on New Evidence, paras 270-272. The Prosecutor seems to suggest that because the passengers were able to “resist” (in her view) the IDF soldiers when boarding (i.e. were not all shot already) this could not have been an operation in which it could have been planned that live and other fire would be used at the outset to allow the boarding to occur. This is an assumption made with no reference to any expertise or evidence. And as result, the OTP concludes that the civilians could not have been the object of the attack. Col. Travers arrived at his conclusions in light of his military experience and expertise and having considered all of the evidence and circumstances (see for example para. 47). As he explains, which was not taken into account by the OTP, in an operation of the kind he describes to seize the objective (the ship) firing from above occurs *while* the soldiers manoeuvre down and secure the deck (see paras 44-46). It is not a case of clearing the entire deck first. In any event, these are matters the Prosecutor could have addressed with Col. Travers before making any decision. He was available to meet with her and clarify any of these issues, and certainly could do so, with other experts if necessary, as part of an investigation.

<sup>209</sup> Expert Military Report of retired Col. Desmond Travers, paras. 43-49. See, Conf. Annex 1.

<sup>210</sup> OTP Decision on New Evidence, paras. 306, 314. The OTP again substitutes the findings of the military expert with its own professed expertise on the subject without any reference to any expert; instead acting as an expert in its own cause.



ii. Cruel and abusive treatment of detained passengers in Israel

123. The OTP was provided with a considerable amount of new evidence by witnesses on this topic, for example:

- *“At Ashdod, we were there for 8-9 hours and they took our photos, fingerprints, and medical examinations. They accused us of having AIDs and cancer to harass us, and were saying very derogatory remarks, and making faces at us and making fun of us. It was so intimidating and frightening. I didn’t know what was going to happen to me. These were the things that I went through, but I saw other people go through even worse things. They were dragged around, beaten and injured, and I witnessed these things happen to other people.”<sup>219</sup>*
- *“I saw an Irish and Greek friend who were both subject to abuse in the prison [in Israel]. I could tell that those who were abused were beaten. There were bruises on their bodies. We were treated very badly in the prison. They were pushing us and tripping us, and trying to get a reaction from us. Anyone that reacted to their abuse would be beaten in the prison.”<sup>220</sup>*
- *“At the airport I was one of the last people get onto the plane. There was a Greek passenger who was beaten very badly and all of us were protesting this. One of the Israel soldiers walked up to me and put a rope around my neck. The soldier was squeezing the rope very tightly around my neck. I was on the floor and they put handcuffs behind my back. Other soldiers were also holding my legs. I thought they were going to drag me to a corner and kill me. Then I was kicked in the chest many times. I thought I would faint because it was so painful. I also remember seeing some of the female passenger physically attacked at this point.”<sup>221</sup>*

124. The OTP claims that none of this evidence is relevant to gravity as it was not committed by the IDF soldiers on the Mavi Marmara, and is dissimilar.<sup>222</sup> It has no bearing on whether the whole operation was planned and that civilians were the object of the attack.<sup>223</sup> The Prosecutor maintains her original position that it was the ship itself that was the objective of the operation, not the passengers.<sup>224</sup> This is a perverse finding in light of the widespread evidence of the appalling abuse of civilians. The Prosecutor even draws a parallel between the “resistance” on the ship to a “riot” at the airport, seemingly suggesting

<sup>219</sup> Victim Application of [REDACTED].

<sup>220</sup> Victim Application of [REDACTED].

<sup>221</sup> Victim Application of [REDACTED].

<sup>222</sup> OTP Decision on New Evidence, paras. 204-231.

<sup>223</sup> OTP Decision on New Evidence, para. 206.

<sup>224</sup> OTP Decision on New Evidence, para. 271.

that on both occasions there could be no plan to attack civilians because they were the ones causing the trouble.<sup>225</sup> Another aberrant finding.

iii. Unnecessarily cruel treatment of passengers

125. New evidence was submitted to the OTP that demonstrated unnecessarily cruel treatment of vulnerable passengers on the ship, including of:

- Beatings and mistreatment of passengers while being forced to lie down and when handcuffed;
- Instances where passengers who, after being wounded by shootings, were assaulted with rifle butts and kicked while lying on the ground;
- Passengers being bitten by dogs;
- Passengers shot at by IDF soldiers after already being wounded, handcuffed or lying on the ground; and,
- Passengers who were shot at and beaten when trying to assist wounded passengers;<sup>226</sup>

126. The OTP concedes that a substantial amount of relevant new evidence was provided.<sup>227</sup>

Part of this evidence was from witnesses who testified about IDF soldiers executing passengers who were detained or after the *Mavi Marmara* was taken over. In particular, there is new evidence of Furkan Dogan and Fahri Yildiz being executed after having been wounded, which on any reasonable view would increase the gravity of the crimes. Yet, the OTP concludes that “there is no reasonable basis to believe that any of the nine passengers who died aboard the *Mavi Marmara* were still alive and in the IDF’s custody—and thus in a position to be ‘executed’—by the time the ship was secured and the other passengers detained below deck.”<sup>228</sup> This ignores the new evidence, and rushes to a convenient conclusion that could be inconsistent with gravity. It is also an error to frame the issue as one of “securing” the ship, on the assumption that the passengers were “resisting” to such an extent that it was necessary for the IDF to “secure” the location. The evidence from the passengers, which the OTP disregards, is that the ship was attacked and completely overrun by IDF soldiers. The OTP errs in favouring the IDF position without having investigated the potential cases.

<sup>225</sup> OTP Decision on New Evidence, paras. 228, 229.

<sup>226</sup> See, for example, for all these points Letter to Prosecution of 8 June 2016.

<sup>227</sup> OTP Decision on New Evidence, para. 193.

<sup>228</sup> OTP Decision on New Evidence, para. 199.

127. This error reoccurs throughout Confidential Annex D in which the OTP (surprisingly) seeks to show that none of the killings could be executions or may not even be unlawful. For example, in the case of Furkan Dogan, the OTP seeks to discredit and contradict any evidence that demonstrates that he was executed after being wounded and incapacitated. It disregards the key evidence of every eyewitness.<sup>229</sup> It even tries to discredit the findings of the UN Human Rights Council fact-finding mission that Furkan Dogan “was lying on the deck in a conscious, or semi-conscious, state for some time”<sup>230</sup> when he was executed. The OTP fails to take into account the evidence and expertise that would have been available to the mission in relation to this matter; it merely says that it [REDACTED]

[REDACTED]<sup>231</sup>  
 Moreover, the Prosecutor disputes the evidence of Dr Jerreat stating that it does not give his report “any additional weight”.<sup>232</sup> Instead, the OTP offers its own medical opinion (without reference to any expertise) as being determinative of the matter that it is unlikely that Mr Dogan survived the first shots.<sup>233</sup> This conclusion as with all those in Annex D are completely inappropriate at this early stage when the Prosecutor is not called on to decide whether the allegations have been proved to the criminal standard.

iv. Attempts to conceal the crimes

128. The Prosecution received new evidence from witnesses about IDF soldiers attempting to conceal the crimes committed, including:

- Accounts that members of the press or individuals filming or photographing were targeted and shot at.<sup>234</sup> Importantly, this includes Furkan Dogan who was shot while kneeling in a stationary position and video recording the helicopters, and Cevdet Kiliclar who was shot in the forehead between his eye while attempting to photograph soldiers on the top deck.<sup>235</sup>

<sup>229</sup> Confidential Annex D, para. 57.

<sup>230</sup> UNHRC Report, para. 29.

<sup>231</sup> Confidential Annex D, para. 62.

<sup>232</sup> The Government of the Comoros and the Legal Representatives for the Victims consistently advised the Prosecution that it had any questions or concerns, or if it needed any additional information, to ask for it before making a decision on reconsideration. The Prosecution never asked for the victim account relied upon in the Forensic Expert Report (see Confidential Annex D, para. 58), which could have been provided to the Prosecution. Instead, the Prosecution used this point to not give the Expert Report weight and as a reason to not have to consider its conclusions as part of the gravity analysis.

<sup>233</sup> Confidential Annex D, para. 61.

<sup>234</sup> See, Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. See, Letter to Prosecution of 8 June 2016.

<sup>235</sup> UNHRC Report, p. 29, 30.

- Testimony that IDF soldiers removed CCTV cameras and footage of the attack, and destroyed the ship's external communication systems.<sup>236</sup>

129. The OTP merely reaffirms its previous decision, and refuses to consider this evidence as a factor affecting the gravity of the crimes, stating that none of the “information newly made available to it now alter[s] this assessment.”<sup>237</sup> A reasonable prosecutor would take into account that this footage could be obtained during an investigation. The entire operation was filmed by the IDF, but has never been made available, from which a prosecutor could draw inferences consistent with gravity at this initial stage. In addition, as noted above, the OTP received new evidence of the appropriation of passenger's property, including evidence from 237 victims who lost “personal or professional items, especially mobile telephone and electronic equipment.”<sup>238</sup> The footage on these devices could also be invaluable in clarifying what happened during the attack. It again shows that the IDF sought to conceal the crimes committed that on any reasonable view must heighten the seriousness of the crimes. If it was all a big ‘mistake’ (as the IDF claim), then there would be no need for the IDF and the Israeli authorities to hide any evidence that could show that it was not a planned, and excessively aggressive operation.

##### **5. The Prosecutor erred in assessing the impact of the crimes**

130. The OTP received extensive new evidence about the crimes having a “significant impact ... on the lives of the victims and their families.”<sup>239</sup> When the OTP's Decision is considered as whole, it is plain that the OTP did not give any weight to any of this evidence in its further assessment of gravity. The OTP was provided with new evidence from witnesses which clearly highlights the extent of their suffering and that of other passengers and the impact of the crimes perpetrated against them, including of:

- Physical attacks against and shooting at non-resistant passengers including doctors and nurses who were trying to give assistance and medical treatment to wounded

<sup>236</sup> See, Letter to Prosecution of 8 June 2016. See, Victim Applications of [REDACTED], [REDACTED] and [REDACTED].

<sup>237</sup> OTP Decision on New Evidence, para. 320.

<sup>238</sup> OTP Decision on New Evidence, para. 234.

<sup>239</sup> Chamber's Decision to Reconsider, para. 47.

passengers<sup>240</sup>, passengers trying to assist other wounded passengers<sup>241</sup>, passengers who were lying down and handcuffed<sup>242</sup>, passengers who were lying on the ground after being wounded by shooting<sup>243</sup>, and victims who were members of the press, filming or taking photography<sup>244</sup>;

- Passengers being shot before any soldiers were on the Mavi Marmara;
- IDF soldiers in the helicopters with guns pointed at the passengers on the ship;
- Gratuitous violence and cruelty against passengers who were already wounded; and,
- The initial shootings from the zodiac boats and of passengers who feared for their lives following this fire.<sup>245</sup>

131. The details of these violent and traumatic acts that were made available to the OTP through this new evidence should have been assessed by the OTP in considering the impact of the crimes on the direct and indirect victims. Nowhere in the new Decision is there any assessment made of such an impact for the purposes of gravity.

## VI. CONCLUSION

132. For all of these reasons, the Comoros requests the Pre-Trial Chamber to review the two new OTP Decisions not to open an investigation and to direct the Prosecutor to reconsider her Decisions in light of the discernable errors in each of them.




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**Rodney Dixon QC**

**Counsel on behalf of the Government of the Union of the Comoros**

Dated 23 February 2018,

London.

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<sup>240</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>241</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>242</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>243</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>244</sup> See, Letter to Prosecution of 8 June 2016. Victim Applications of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>245</sup> See for the last four points, Letter to Prosecution of 31 March 2016.