

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/13
Date: 11 May 2020

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

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

Public

**Prosecution's Consolidated Response to the Third "Application for Judicial
Review by the Government of the Comoros" (ICC-01/13-100), and the
Observations of Victims (ICC-01/13-107 and ICC-01/13-108)**

Source: Office of the Prosecutor

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Introduction

1. The Government of the Comoros has again sought review¹ of the Prosecutor’s determination that there is no potential case arising from the situation which is sufficiently grave to be admissible before the Court.² The Comoros’ application is supported by the independently represented victims,³ and those represented by the Office of Public Counsel for Victims.⁴ While the Prosecution respectfully disagrees with the Comoros and the participating victims on the merits of this request, and for this reason submits that it should be dismissed, it nonetheless concurs that the protracted litigation in this situation should be brought to an end.⁵ The Comoros’ request for further forms of relief, joined by the victims, should in any event be dismissed.⁶

2. The Prosecution also takes the opportunity to register its respectful disagreement with the Comoros’ and the victims’ apparent implication of prosecutorial bad faith. Compared to other situations before this Court, it is true that the geographic and temporal scope of this situation is relatively limited.⁷ Yet neither the facts at issue nor the procedural matters which have arisen—many of them matters of first impression—have proved to be simple. This has led to a lengthy process of litigation, at the instance of the Comoros as well as the Prosecutor, seising the Pre-Trial Chamber three times and the Appeals Chamber twice over approximately five years.⁸ While this is unusual, it certainly does not mean that the Prosecutor has sought to be obstructive, or to do anything other than to implement the Court’s requests and directions promptly, impartially and in good faith while remaining candid about

¹ See [ICC-01/13-100](#) (“Third Comoros Request”).

² See [ICC-01/13-99-Anx1](#) (“Revised Final Decision”).

³ See [ICC-01/13-107](#) (“Victims’ Response”). The Prosecution notes that the independently represented victims continue to be represented, as their lead counsel, by lead counsel for the Government of the Union of the Comoros.

⁴ See [ICC-01/13-108](#) (“OPCV Response”).

⁵ See *e.g.* [Third Comoros Request](#), paras. 6 (hoping that this matter can be “finally resolved”), 105 (suggesting that the Prosecutor may in the future “inevitably reach the same conclusion again and refuse to open an investigation”), 110 (“[a stalemate] has been reached which is most regrettable”), 127 (“deadlock”). See also [Victims’ Response](#), para. 91 (“vicious cycle”); [OPCV Response](#), paras. 3 (“procedural stalemate”), 47 (“deadlock”), 68 (“situation of impasse”).

⁶ *Contra* [Third Comoros Request](#), paras. 105-129, especially paras. 122-125 (seeking sanctions against the Prosecutor and/or the Office of the Prosecutor), 126-129 (seeking the appointment of an *amicus* Prosecutor). See also [Victims’ Response](#), paras. 4, 90, 94, 96; [OPCV Response](#), paras. 5, 7-8, 44, 55, 58-59, 69.

⁷ The original preliminary examination of this situation was complete in just under 18 months: see [ICC-01/13-6-AnxA](#) (“Article 53(1) Report”).

⁸ See [ICC-01/13-34](#) (“First Article 53(3)(a) Request”); [ICC-01/13-51 OA](#) (“Appeal Admissibility Decision”); [ICC-01/13-68](#) (“Second Article 53(3)(a) Request”); [ICC-01/13-98 OA2](#) (“Appeal Judgment”); [Third Comoros Request](#).

her appreciation of the information made available.⁹ Disagreement between litigants is on occasion an inevitable part of the judicial process, under the supervision of the Judges, but this cannot be taken to imply any lack of integrity or of respect.

3. Moreover, and as the Prosecutor has already observed, the Appeals Chamber's 2019 judgment effectively brought that long cycle of procedural litigation in this situation to an end.¹⁰ Her Revised Final Decision reflects her acceptance of this fact, and a genuine effort to comply with the judicial directions she has received.¹¹ The Pre-Trial Chamber is now asked to assess whether the Prosecutor succeeded in that aim, but this need not (and should not) call into question her respect for the Court or her grave concern for the victims of serious crime.

4. To the contrary, as the Prosecutor has demonstrated (including by recently moving to open an investigation in *Palestine*), she will seek to execute her mandate in any situation, without hesitation, provided she is satisfied of a sound legal basis under the Statute to proceed.¹² In the Prosecution's respectful submission, this is fully consistent with articles 42, 53 and 54 of the Statute, as well as the Prosecutor's implicit duty to be a good steward of the limited resources of her Office.

Submissions

5. As the Appeals Chamber has ruled, the Pre-Trial Chamber's power to review the Prosecutor's Revised Final Decision "is limited to establishing whether the Prosecutor carried out the reconsideration in accordance with the [First Article 53(3)(a) Request, read in light of the Second Article 53(3)(a) Request and the Appeal Judgment]."¹³ The Prosecution proceeds on that basis, and relies on the reasoning in the Prosecutor's Revised Final Decision, which it

⁹ See e.g. [Revised Final Decision](#), paras. 7-8. In this context, the proper exercise of the Prosecutor's mandate includes her responsibility to make relevant procedural decisions open to her (such as, for example, considering recourse to the Appeals Chamber) taking account not only the merits of the particular situation, but also the broader implications of a point of law or procedure for *all* the situations of which she is seised. *Contra* [Victims' Response](#), para. 3 (asserting that "delays significantly prejudice the rights of the victims").

¹⁰ See e.g. [Revised Final Decision](#), paras. 5-6. Notably, however, the Appeals Chamber did not find occasion to rule on the correctness of the law set out in the First Article 53(3)(a) Request, even though it confirmed—and the Prosecution recognises—that it is the law of this situation: see [Revised Final Decision](#), para. 14 (fn. 20).

¹¹ *Contra* [Victims' Response](#), paras. 2, 21; [OPCV Response](#), paras. 3, 23, 44.

¹² Cf. [OPCV Response](#), para. 2 (referring to the "unwillingness of the Prosecutor"). See also *Victims' Response*, para. 73 (suggesting that the Prosecution sought "to adopt only versions of the evidence that mitigate the IDF's liability").

¹³ [Appeal Judgment](#), para. 61. See also [Third Comoros Request](#), para. 23. In this regard, therefore, the Prosecution notes that the Third Comoros Request would seem to be on a similar but not exactly identical procedural footing as a (first) request to the Pre-Trial Chamber, under article 53(3)(a), to review the Prosecutor's decision under article 53(1) of the Statute. Cf. [Third Comoros Request](#), paras. 18-25.

will generally not seek to repeat in this response. It submits that this reasoning will, however, show:

- the Prosecution’s implementation of the directions of the Appeals Chamber in the Appeal Judgment by identifying the Prosecutor’s obligations in carrying out this reconsideration;¹⁴
- the Prosecution’s implementation of the First Article 53(3)(a) Request, as required by the Appeals Chamber, by identifying the legal interpretations of the Pre Trial Chamber (in its 2015 composition) which the Prosecutor was obliged to apply in this situation;¹⁵
- the Prosecutor’s application of the relevant legal interpretations to the five factors set out in the First Article 53(3)(a) Request.¹⁶ This led the Prosecutor to accept for the purpose of this situation key factual allegations including—the degree and nature of victimisation; the consequent impact upon direct and indirect victims; and the possibility that the identified crimes were committed according to a plan or policy among at least some members of the IDF boarding team;¹⁷ and
- the Prosecutor’s assessment of the gravity of the potential case(s) arising from this situation, within the margin of appreciation identified by the Appeal Judgment. This was done with reference to specific factors, including the five factors set out in the First Article 53(3)(a) Request, taking into account the revised factual findings as well as other information considered to be relevant in allocating weight to these factors.¹⁸

6. The Comoros not only challenges whether the Prosecutor in her Revised Final Decision properly complied with her obligation to apply the legal interpretations contained in the First Article 53(3)(a) Request,¹⁹ but more generally disagrees with the Prosecutor’s allocation of weight (individually or cumulatively) to the various relevant factors in determining whether the potential case(s) arising from the situation satisfy the gravity threshold under article 17(1)(d) of the Statute. In this way, the Comoros appears to misunderstand or to disagree with

¹⁴ See [Revised Final Decision](#), paras. 11-13.

¹⁵ See [Revised Final Decision](#), paras. 7, 14.

¹⁶ See [Revised Final Decision](#), paras. 2, 7-8, 10, 15, 17-88.

¹⁷ See e.g. [Revised Final Decision](#), para. 89.

¹⁸ See [Revised Final Decision](#), paras. 90-96.

¹⁹ On this obligation, see [Revised Final Decision](#), para. 6; [Appeal Judgment](#), paras. 78, 80-83, 90-91, 94.

the *ratio decidendi* of the Appeal Judgment.²⁰ On a proper understanding of the binding ruling of the majority of the Appeals Chamber, the Prosecution submits that the Comoros' application should be dismissed.

7. Bearing in mind the extensive procedural history of this litigation, the Prosecution will confine the remainder of its remarks in this response to three matters: first, the significance of the Appeal Judgment in requiring the Prosecutor to accept the Pre-Trial Chamber's legal interpretations in the First Article 53(3)(a) Request (but not its factual conclusions), and in recognising the Prosecutor's margin of appreciation in assessing gravity provided she takes into account relevant factors; second, the need for caution in accepting at face value the Comoros' characterisation of the Prosecutor's reasoning and analysis in her Revised Final Decision; and third, the lack of justification for the other requests now made by the Comoros, as well as the procedural bars which prevent such requests being granted.²¹ The Prosecution will conclude with a brief observation on the conduct of the current proceedings.

A. The Appeal Judgment obliged the Prosecutor to apply the legal interpretations in the First Article 53(3)(a) Request, but did not bind her to accept its factual conclusions, and endorsed her margin of appreciation in assessing gravity

8. There is no doubt that the Prosecutor was obliged by the Appeal Judgment to accept the legal interpretations of the Pre Trial Chamber in the First Article 53(3)(a) Request—which she duly did. Indeed, the Prosecution expressly recalled that it sought to “apply the legal interpretations adopted by the majority of the Pre-Trial Chamber in the First Article 53(3)(a) Request, for the purpose of this reconsideration”, and set out *verbatim* its good faith understanding of the applicable principles.²² The independently represented victims also note at least one instance in which the Prosecution thus directed itself,²³ although they take issue with whether it was successful in this aim.²⁴

²⁰ See e.g. [Third Comoros Request](#), paras. 113 (submitting that the Pre-Trial Chamber should make “clear” that “errors of fact [...] are errors that must be addressed and corrected like any error of law”), 114 (seeking to re-interpret the ruling of the Appeals Chamber that “it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors” to mean that “[t]he [Pre-Trial] Chamber undoubtedly has the power to direct the OTP as to errors of fact that must be addressed and directed” with the consequence that the Prosecutor may not “assign whatever weight she wishes to the evidence”).

²¹ *Contra* [Third Comoros Request](#), para. 112.

²² [Revised Final Decision](#), para. 14. See also paras. 60, 66-67.

²³ [Victims' Response](#), para. 21.

²⁴ [Victims' Response](#), para. 23.

9. On the other hand, the Appeal Judgment did not require the Prosecutor to accept the factual conclusions of the Pre Trial Chamber in the First Article 53(3)(a) Request. Nor did it require the Prosecutor to reach any particular result or outcome in her ultimate assessment of the gravity of the potential case(s) arising from the situation. To the contrary, the Appeals Chamber recognised that this assessment “involves the evaluation of numerous factors and information relating thereto, which the Prosecutor has to balance in reaching her decision”.²⁵

10. Accordingly, the Appeals Chamber affirmed that “the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor’s decision.”²⁶ It is respectfully submitted that it is in this context that the Pre-Trial Chamber should now assess the Prosecutor’s Revised Final Decision, and that consequently the decision should not be disturbed simply because it might have reasoned differently. As the Prosecutor stated, her ultimate conclusion was reached:

[...] on the basis of [her] *assessment of the weight* [to be attributed to the factual conclusions reached by application of the legal interpretations in the First Article 53(3)(a) Request] [...]. In reaching this conclusion, the Prosecutor adheres to the affirmation of the Appeals Chamber that, *for the purpose of article 53(3)(a), the ‘result’ reached in the ‘gravity assessment’ and the ‘weight’ assigned to ‘the individual factors’ are matters for her own assessment, and where she is entitled to a margin of appreciation.*²⁷

11. The fact that the Prosecutor’s analysis still led her to the view that there was no potential case of sufficient gravity cannot mean, in and of itself, that she erred—indeed, the Appeals Chamber specifically affirmed that, having undertaken the required analysis in conformity with the directions in the First Article 53(3)(a) Request, she might still reach the same conclusion.²⁸

12. Nor is there any question that it would have been erroneous to have conditioned the Prosecutor’s Revised Final Decision on “show[ing] beyond a reasonable doubt that there is a basis to open an investigation.”²⁹ But this is not what the Prosecutor did. To the contrary, the

²⁵ [Appeal Judgment](#), para. 81.

²⁶ [Appeal Judgment](#), para. 81. *See also* para. 78. *See further* [Revised Final Decision](#), paras. 12-13, 16, 46, 50, 90, 95. *Cf.* [OPCV Response](#), para. 36.

²⁷ [Revised Final Decision](#), para. 16 (emphasis added). *See also above* fn. 26.

²⁸ *See* [Revised Final Decision](#), para. 7; [Appeal Judgment](#), para. 79.

²⁹ *See e.g.* [Third Comoros Request](#), paras. 28, 31-32.

Prosecutor properly considered the five factors set out in the First Article 53(3)(a) Request (as the required subject matter of her reconsideration) and applied the Pre-Trial Chamber’s legal interpretations to them.³⁰ In this context, she largely accepted all the material factual allegations,³¹ with just three minor exceptions, and then weighed them within her margin of appreciation for the purpose of assessing the gravity of the potential case(s) arising from the situation. The three factual allegations which she did not accept related to:

- the moral or political effect of the events on the *Mavi Marmara*, which—informed by Appeals Chamber jurisprudence—the Prosecution did not consider could be assessed on an objective basis;³²
- the Comoros’ general assertions concerning the information made available to the Prosecution, which the Prosecution does not accept to be accurate, but which in any event

³⁰ See e.g. [Revised Final Decision](#), paras. 14-16 (general overview); 17, 22-23 (considering the first factor identified in the First Article 53(3)(a) Request), 24-24 (identifying additional considerations potentially relevant to the weight to be given to the first factor); 30-32 (considering the second factor identified in the First Article 53(3)(a) Request), 33-36 (identifying additional considerations potentially relevant to the weight to be given to the second factor); 37-30 (considering the third factor identified in the First Article 53(3)(a) Request), 41-43 (identifying additional considerations potentially relevant to the weight to be given to the third factor); 44-45, 47 (considering the fourth factor identified in the First Article 53(3)(a) Request), 48-54 (identifying additional considerations potentially relevant to the weight to be given to the fourth factor), 55-68, 71, 83-88 (considering the fifth factor identified in the First Article 53(3)(a) Request), 69, 82, 86-88 (identifying additional considerations potentially relevant to the weight to be given to the fifth factor); 89 (summarising the five factors taken into account by the Prosecution), 91-95 (referring to considerations included in the Prosecutor’s final gravity assessment).

³¹ See e.g. [Revised Final Decision](#), paras. 15 (acknowledging that, “in some instances, [the Prosecution’s] analysis remains substantially similar to that contained in the Prosecutor’s Final Decision (Original Version), as well as in the initial Article 53(1) Report—but this merely reflects the fact that the Prosecution had in these respects *already* accepted the material law and facts previously espoused by the majority of the Pre-Trial Chamber (in its 2015 composition)”, emphasis supplied), 21-23 (submitting that the Prosecution’s appreciation of the facts relevant to the first factor conforms to the First Article 53(3)(a) Request), 30-31 (submitting that the Prosecution’s appreciation of the facts relevant to the second factor conforms to the First Article 53(3)(a) Request), 37-37 (submitting that the Prosecution’s appreciation of the facts relevant to the third factor conforms to the First Article 53(3)(a) Request), 44-49 (submitting that the Prosecution’s appreciation of the facts relevant to the fourth factor conforms to the First Article 53(3)(a) Request), 55-63, 67, 79-80, 84 (revising in part the Prosecution’s appreciation of the facts concerning the alleged ‘pre-boarding live fire’, noting one factual point (concerning the relevance of allegations on the territory of the State of Israel) on which the Prosecution submits that there is no supporting information at all, and submitting that otherwise the Prosecution’s appreciation of the facts relevant to the fifth factor conforms to the First Article 53(3)(a) Request).

³² See [Revised Final Decision](#), paras. 48-49 (citing [ICC-01/04-169](#), para. 72). While criticising the Prosecutor’s conclusion, the Comoros does not address the relevant Appeals Chamber case law: [Third Comoros Request](#), paras. 72-73. Nor would the views of individuals resolve the concerns identified by the Appeals Chamber about attempting to make such assessments: *contra* [Victims’ Response](#), paras. 62-63. The independently represented victims further suggest that the Prosecution should have given weight to the fact that the direct victims, if not humanitarian assistance workers, could at least be regarded as “human rights defenders” and “civilians”: [Victims’ Response](#), paras. 45, 47-48. While the Prosecution was of course fully apprised of the status of the victims, it did not find the identified crimes to be additionally grave on this basis—in particular, it is implicit in the elements of the identified crimes themselves that the alleged conduct, if true, was not justified under international humanitarian law. The Prosecution had determined that the victims could not be regarded as humanitarian assistance workers, because of the political dimension of their activities: [Revised Final Decision](#), para. 36.

go beyond or add nothing to the matters addressed in the First Article 53(3)(a) Request;³³
and

- the relevance of alleged events on Israeli territory, once the passengers had been transferred off the *Mavi Marmara*, insofar as the Prosecution cannot identify “any information” made available “which rationally and adequately links the alleged events on Israeli territory to the identified crimes aboard the *Mavi Marmara*.”³⁴

13. Nothing in the Pre-Trial Chamber’s First Article 53(3)(a) Request, read with the Appeal Judgment, required the Prosecutor to reach a different conclusion on these factual allegations. Nor in any event was the sufficiency of the information on the five factors (which the Prosecutor was directed to reconsider) dispositive in the outcome of the Prosecutor’s reconsideration. This is because the Prosecutor accepted the factual allegations material to those factors in light of the very low standard of proof which she was obliged to apply,³⁵ notably including the allegation that the identified crimes were possibly committed according to a plan or policy among at least some members of the IDF boarding party. Yet, when weighing these factors, individually and cumulatively, the Prosecutor still reasonably concluded that the potential case(s) arising from the situation were of insufficient gravity—as she was entitled to do within the margin of appreciation identified by the Appeals Chamber.³⁶

14. In particular, in making her ultimate assessment of gravity—which was within her margin of appreciation—the Prosecutor gave particular weight to the relatively limited scale of victimisation in this situation (taking into account the impact on the victims, but also the

³³ See [Revised Final Decision](#), para. 70. This includes matters on which the Comoros disagrees with the Prosecutor’s assessment of information made available by particular witnesses, not considered by the Pre-Trial Chamber (in its 2015 composition): see e.g. [Third Comoros Request](#), paras. 89-90.

³⁴ See [Revised Final Decision](#), para. 79. See further paras. 71-78, 80-82 (noting in particular the absence of any information sufficiently linking the perpetrators of the alleged conduct on Israeli territory with the alleged perpetrators of the identified crimes). The Comoros criticises this conclusion, but overlooks that the legal interpretations in the First Article 53(3)(a) Request concerning the standard of proof do not affect the Prosecution’s approach where it finds an *absence* of information on a material point (specifically, to show that the alleged events on Israeli territory were indeed adequately linked to those on the *Mavi Marmara*): [Third Comoros Request](#), paras. 95-98; see also [Victims’ Response](#), paras. 74-75; [OPCV Response](#), para. 37. As noted in the Revised Final Decision, the Prosecution does not understand the First Article 53(3)(a) Request to have ruled on this issue: [Revised Final Decision](#), para. 80.

³⁵ *Contra* [Third Comoros Request](#), para. 33; [OPCV Response](#), paras. 25-26.

³⁶ *Contra* [Third Comoros Request](#), para. 36 (claiming “there is a presumption towards opening an investigation to provide clarity”). See also [Victims’ Response](#), para. 32. In light of the Appeal Judgment, the Prosecution understands this dictum of the majority of the Pre-Trial Chamber (in its 2015 composition) to refer to the benefit of the doubt for the purpose of fact-finding, and not to constrain the weighing of factors for the purpose of the gravity assessment. Consistent with the disposition of the Appeal Judgment, the Prosecutor duly accepted this legal interpretation of the Pre Trial Chamber in her Revised Final Decision, for the former purpose: [Revised Final Decision](#), paras. 14, 60. See further [First Article 53\(3\)\(a\) Request](#), para. 13.

number of such persons), the absence of countervailing factors which might offset this consideration, and the relatively low chance that even the victimisation in the situation could be reflected in any single case prosecuted.³⁷ She expressly considered whether the plan or policy to commit the identified crimes should lead her to a different conclusion, but determined that this should receive relatively low weight in the particular circumstances of this situation.³⁸ She also expressly recalled in this analysis the expressed views of the victims, and the majority of the Pre-Trial Chamber (in its 2015 composition).³⁹

15. The Office of Public Counsel for Victims (“OPCV”) is incorrect now to suggest—for the first time—that the Prosecutor’s assessment under article 53(1) is in some way restricted because article 14(1) of the Statute refers to “a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed”.⁴⁰ Not only does the Appeals Chamber’s judgment make no reference to such a restriction, but it is apparent from article 14(1) itself that it qualifies the type of situation which “[a] *State Party* may refer to the Prosecutor” (emphasis added). It thus sets the threshold condition for the referring entity, making clear that a State Party may not refer to the Prosecutor a situation in which there is no indication that any crime has yet been committed. But it does not modify the assessment—specified by article 53(1)—which the Prosecutor must undertake as a precondition to opening an investigation. To reason otherwise would be to make article 53(1) redundant, since article 13(b) (the only other means by which a situation may be referred to the Prosecutor) is materially similar to article 14(1).

B. Characterisations of the Prosecutor’s analysis in the Revised Final Decision should be approached with caution

16. Various passages of the Comoros’ application appear to reflect misunderstandings of the Prosecutor’s reasoning in the Revised Final Decision, or to raise matters which are not properly within the scope of the reconsideration conducted by the Prosecutor, on the basis of the First and Second Article 53(3)(a) Requests and the Appeal Judgment. The Prosecution highlights five examples, but generally invites the Pre-Trial Chamber to approach the Comoros’ arguments with caution.

³⁷ See [Revised Final Decision](#), paras. 92-93. On scale, see further below fn. 64. The victims represented by the OPCV note that a single case need not cover all the potential victimisation in a situation: [OPCV Response](#), para. 41. While this is true, this does not mean that each potential case is not required to meet the minimum threshold of gravity in article 17(1)(d).

³⁸ See [Revised Final Decision](#), para. 94.

³⁹ See [Revised Final Decision](#), para. 91.

⁴⁰ *Contra* [OPCV Response](#), para. 67 (emphasis supplied).

B.1. The existence of a plan or policy to commit the identified crimes

17. As previously noted, the Appeals Chamber stated that it is for the Prosecutor to determine the appropriate balance between the various factors established by the information made available, and to give weight to them individually and cumulatively, within a margin of appreciation.⁴¹

18. In this regard, and applying the legal interpretations in the First Article 53(3)(a) Request, the Prosecutor revised her previous position to accept the fact of a possible plan or policy on the basis of the use of live ammunition *before* the presence of IDF troops on the *Mavi Marmara*.⁴² Nonetheless, even accepting these facts, the Prosecution still concluded that this factor (the commission of the identified crimes according to a plan or policy) did not change her ultimate determination of insufficient gravity.⁴³ While the Comoros deprecates this as a “blatant” misapplication of “the correct legal standard”, it fails to substantiate this claim or to show that the Prosecutor exceeded the margin of appreciation identified by the Appeals Chamber in her weighing of the various factors relevant to the assessment of gravity. Indeed, it does not even specifically address the passage containing the material analysis by the Prosecutor, and seems to confuse the Prosecutor’s view of the *weight* assigned to this factor with her acceptance of the material facts.⁴⁴

⁴¹ See *above* fn. 25. See also [Revised Final Decision](#), para. 95 (noting that “the Prosecutor’s competence in carrying out preliminary examinations is necessarily linked with the Prosecutor’s competence in carrying out investigations” and that “[t]his may well justify the margin of appreciation afforded to the Prosecutor under article 53(1)(b), which was identified by the Appeals Chamber”).

⁴² See *e.g.* [Revised Final Decision](#), paras. 63, 68-69, 85, 89. *Contra* [Third Comoros Request](#), para. 85. See also para. 86; [Victims’ Response](#), paras 68, 72; [OPCV Response](#), paras. 29-30. The Prosecution is uncertain of the basis on which the Comoros states that “the Prosecutor has committed the flagrant error of continuing to disregard evidence of live fire *before any* boarding of the ship” (emphasis supplied). To the Prosecution’s understanding, it is commonly accepted that there was no live fire before the (unsuccessful) *first* attempt at boarding, which many witnesses agree was attempted by surprise. The point at dispute for the past few years has been whether live fire was then employed prior to the (successful) *second* attempt at boarding, a few minutes later, before IDF troops could reasonably have been considered to have been in any danger. Applying the legal interpretations in the First Article 53(3)(a) Request, the Prosecution duly revised its position in this respect: see *below* fns. 44, 48.

⁴³ See [Revised Final Decision](#), para. 94. See also *above* para. 14.

⁴⁴ *Contra* [Third Comoros Request](#), para. 35 (citing [Revised Final Decision](#), paras. 63, 69). See also paras. 91, 117. Paragraph 63 of the Revised Final Decision does indeed reflect the Prosecution’s acceptance of the allegation that “live rounds may have been fired on a more than isolated and exceptional basis in the period of approximately three minutes before the IDF attempted for the second time to board the *Mavi Marmara*” and that this was “taken into account [...] in considering whether the identified crimes were committed according to a plan or policy.” Paragraphs 67 and 68 subsequently accept the fact that the identified crimes were indeed possibly committed according to a plan or policy, and paragraph 69 explains the apparent limits of the available information in this regard. Paragraph 89 recapitulates this factual conclusion. Paragraph 94 explains the basis on which, notwithstanding the *fact* of the possible plan or policy, this *factor* was assigned “relatively low weight” among other relevant factors in the Prosecutor’s gravity analysis.

19. Likewise, the Comoros appears to misunderstand the Prosecutor’s approach in considering the weight to be assigned to the interference with electronic media and CCTV on the *Mavi Marmara*.⁴⁵ Applying the legal interpretations in the First Article 53(3)(a) Request, the Prosecutor agreed that this fact was adequately established for the present purpose,⁴⁶ that it was “relevant in considering the existence of a plan or policy”,⁴⁷ and accordingly considered that it was adequately established that “the identified crimes were committed according to a plan or policy among some but not necessarily all of the IDF troops who carried out the boarding.”⁴⁸ However, since the interference with electronic media/CCTV did not “suggest that the plan or policy is of any wider scope than otherwise might be inferred”, nor otherwise materially alter the characteristics of the plan or policy, it did not “require greater weight to be given to the conclusion concerning the possible existence of a plan or policy” than she had otherwise assigned in her ultimate gravity assessment.⁴⁹ Again, the Prosecutor respectfully submits that this was reasonable, and fell within her margin of appreciation.

B.2. The likely objects of any investigation

20. The Prosecution expressly accepted that the individuals or groups of persons that are likely to be the object of any investigation of the potential case(s) arising from this situation include those who may bear the greatest responsibility for the identified crimes.⁵⁰ Consequently, the Prosecutor did not err as the Comoros seems to suggest. The somewhat different question on which the Comoros and the independently represented victims now seem to focus—which was not the thrust of the Pre-Trial Chamber’s legal analysis in the First Article 53(3)(a) Request, at least in the Prosecution’s understanding⁵¹—is whether there is

⁴⁵ *Contra* [Third Comoros Request](#), para. 34. *See also* [Victims’ Response](#), para. 79.

⁴⁶ [Revised Final Decision](#), para. 84.

⁴⁷ [Revised Final Decision](#), para. 87.

⁴⁸ [Revised Final Decision](#), para. 85. The victims represented by the OPCV criticise the characterisation of the possible plan or policy as speculative, but rather it represents the Prosecution’s assessment of the information made available, even applying the low standard of proof, taking account of the circumstances as a whole: *contra* [OPCV Response](#), para. 32.

⁴⁹ [Revised Final Decision](#), paras. 85, 87 (noting that such conduct “was equally consistent with efforts to cover up planned or spontaneous criminal acts, and this is relevant to the weight assigned to it”). Likewise, the Prosecutor took a similar approach with respect to the violence inherent to the commission of the identified crimes, and the significance of the identified crimes occurring on the *Mavi Marmara* (as opposed to other vessels in the flotilla): *compare* [Third Comoros Request](#), paras. 99-104, with [Revised Final Decision](#), paras. 86, 88. *See also* [First Article 53\(3\)\(a\) Request](#), para. 43 (describing the events aboard the *Mavi Marmara* as “unique”); [Victims’ Response](#), paras. 77, 80.

⁵⁰ *See* [Revised Final Decision](#), paras. 17-29, especially para. 24. *Contra* [Third Comoros Request](#), paras. 37-45.

⁵¹ *Contra* [Victims’ Response](#), para. 25. *See* [First Article 53\(3\)\(a\) Request](#), para. 23 (the consideration “whether the persons likely to be the object of the investigation [...] would include those who bear the greatest

any basis to consider that the investigation could also encompass “senior officials and leaders as potential perpetrators”.⁵² In her Final Revised Final Decision, the Prosecutor was of the view that the factual information available to her by November 2014 did not support such a conclusion, even applying the legal interpretations in the First Article 53(3)(a) Request.⁵³ Nor in any event was she strictly required by the Pre-Trial Chamber (in its 2015 composition) to resolve this question, since it required her to reconsider whether those “most responsible” might ultimately be prosecuted, and not those who were most hierarchically senior.⁵⁴ This is what the Prosecution did.⁵⁵

21. In this context, the Prosecution notes the distinction, already affirmed by this Pre-Trial Chamber in the Second Article 53(3)(a) Request,⁵⁶ between information made available by November 2014 (which formed the basis for the Prosecutor’s original Article 53(1) Report) and information made available thereafter.⁵⁷ The former is material to the reconsideration requested by the Pre-Trial Chamber under article 53(3)(a). However, the latter is material only to the Prosecutor’s own (discretionary) review under article 53(4) of the Statute, which, as the Pre-Trial Chamber has previously held, is not susceptible to judicial scrutiny at the request of the referring State and therefore falls outside the terms of the Revised Final Decision.⁵⁸

B.3. The legal characterisation of certain conduct

22. Likewise, the Prosecutor properly applied the legal interpretations in the First Article 53(3)(a) Request regarding the scale and/or nature of the identified crimes, insofar as it is alleged that this conduct amounted to inhuman treatment or torture.⁵⁹ Specifically, the Prosecutor expressly stated that she gave “weight” in the gravity analysis to “the *factual*

responsibility for the identified crimes” relates to whether those persons would be “the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those” persons).

⁵² [Third Comoros Request](#), para. 45. *See also* [Victims’ Response](#), paras. 24-26.

⁵³ [Revised Final Decision](#), para. 28. *See also* paras. 19-20. This conclusion took account both of the statements by victims, and the public documents submitted to the Prosecution: *contra* [Victims’ Response](#), paras. 26-29. *See also below* fn. 66.

⁵⁴ *See* [First Article 53\(3\)\(a\) Request](#), para. 23.

⁵⁵ *See above* fn. 50.

⁵⁶ *See* [Second Article 53\(3\)\(a\) Request](#), paras. 52-55. This determination is final for the purpose of this situation as it was not subject to appeal: [Appeal Judgment](#), para. 84.

⁵⁷ *Contra* [Third Comoros Request](#), paras. 41-43.

⁵⁸ *See* [Revised Final Decision](#), para. 9 (citing [Second Article 53\(3\)\(a\) Request](#), paras. 52-55). In any event, as the Prosecution has previously observed, nothing in the information subsequently made available would have altered the Prosecutor’s assessment.

⁵⁹ *Contra* [Third Comoros Request](#), paras. 46-50, 58-65, *especially* para. 50; [Victims’ Response](#), para. 31.

nature of the identified conduct, which is not materially in dispute.”⁶⁰ While she only accorded “neutral significance to the *legal* characterisation of the identified conduct”,⁶¹ this was consistent with the Appeal Judgment which expressly identified the conclusion in the First Article 53(3)(a) Request that “acts qualifying as torture or inhuman treatment were committed” as “an example of when the majority [of the Pre-Trial Chamber, as composed in 2015] had impermissibly ‘applied its interpretation of the ‘reasonable basis to believe’ standard to the facts”.”⁶² In light of this specific finding by the majority of the Appeals Chamber, the Prosecutor’s approach was clearly not erroneous, and did not exceed the scope of the discretion afforded to her in assigning weight to the relevant factors for the purpose of her gravity analysis.

B.4. The impact on victims

23. The Comoros also asserts that the Prosecution failed to provide an adequate “indication of its assessment of the impact of the [identified] crimes on the lives” of victims.⁶³ But this is no more than a disagreement with the Prosecutor’s ultimate conclusion, finding that there was no potential case of sufficient gravity notwithstanding the weight given to the impact on the victims. The Comoros fails to show that the Prosecutor exceeded her margin of appreciation, especially in light of her clear statements which correctly acknowledged the factual nature of the identified crimes and the scale of victimisation.⁶⁴ It is not required that the Prosecutor quotes passages from these statements *verbatim*, and the absence of such quotations cannot be interpreted as meaning that the Prosecutor disregarded such information.⁶⁵ Likewise, as previously noted, testimony received by the Prosecutor at the seat of the Court, under rule

⁶⁰ [Revised Final Decision](#), para. 43 (emphasis supplied). The Comoros itself appears to accept, albeit equivocally, that it is the factual nature of the relevant conduct which is really of significance: *see e.g.* [Third Comoros Request](#), para. 64 (“*on the facts* in the present case the crime of torture is more serious than the crime of outrages upon personal dignity”, emphasis added). It has not been shown that the Prosecution disregarded any information concerning the factual nature of the identified conduct: *contra* [Victims’ Response](#), para. 50; [OPCV Response](#), para. 33.

⁶¹ [Revised Final Decision](#), para. 43 (emphasis supplied). In other words, for example, the Prosecution did not consider that the identified conduct (defined by its factual nature) was less grave simply because it was legally characterised as outrages upon personal dignity rather than inhuman treatment.

⁶² [Revised Final Decision](#), para. 42 (quoting [Appeal Judgment](#), para. 92). In this context, having already correctly taken into account the factual nature of the identified conduct, which is not in dispute, it is not an impermissible “pre-judgment” for the Prosecution to assign a certain weight to this question for the purpose of the preliminary examination—indeed, this is the purpose of preliminary examination. Rule 104(2) does not impose any obligation upon the Prosecution. *Contra* [Victims’ Response](#), paras. 37, 53.

⁶³ *Contra* [Third Comoros Request](#), para. 67. *See also* paras. 66, 68-71; [Victims’ Response](#), paras. 56, 59.

⁶⁴ *See* [Revised Final Decision](#), paras. 44-47.

⁶⁵ *Cf.* [Victims’ Response](#), paras. 56, 59; [OPCV Response](#), para. 38.

104(2), will not necessarily be granted greater weight for the purpose of article 53(1) than equivalent written material.⁶⁶

24. Indeed, in the lengthy original version of the Prosecutor’s Final Decision, filed before the Second Article 53(3)(a) Request, the Prosecutor demonstrated detailed familiarity with all of the information made available, including the contents of the applications filed by participating victims, and did not disregard any of this information.⁶⁷ Given the need for the Revised Final Decision to be filed promptly, it was reasonable for the Prosecution not to rehearse all of this information anew.

25. The recent judgment of the Appeals Chamber in *Al Hassan* does not demonstrate that the Prosecutor erred in the weight she assigned to the scale of the identified crimes in this situation.⁶⁸ To the contrary, the Appeals Chamber affirmed that even “the quantitative criteria alone are not determinative of the gravity of a given case”, and that such assessments must only be made “on a case-by-case basis”; it noted that the gravity of the *Al Hassan* case was founded not only on the number of victims of the charged crimes but also the fact that “the crime against humanity of persecution affected the entire population of Timbuktu and its region”, over a period of around 10 months.⁶⁹ Nor does the number of victims participating in these proceedings necessarily weigh significantly in this context, given that the quantitative scale of identified crimes aboard the *Mavi Marmara* is not reasonably in dispute.⁷⁰ While the Prosecution agrees that events beyond the jurisdiction of the Court may be taken into account in the assessment of gravity if they are rationally and adequately linked to the conduct which is within the Court’s jurisdiction,⁷¹ events aboard other vessels in the Flotilla were not comparable to those on the *Mavi Marmara*, and so the scale of victimisation cannot simply be increased to take account of the numbers of people on those other ships, which were in any event much smaller.⁷²

⁶⁶ *Contra* [Third Comoros Request](#), para. 74. In this respect, the Prosecution further notes that the Prosecutor’s exercise of procedural discretion under rule 104(2) is not, in any event, reviewable by the Pre-Trial Chamber.

⁶⁷ *Contra* [Victims’ Response](#), para. 59; [OPCV Response](#), para. 39-40.

⁶⁸ *Contra* [Victims’ Response](#), paras. 41-42.

⁶⁹ See [ICC-01/12-01/18-601-Red OA \(“Al Hassan Appeal Judgment”\)](#), paras. 73, 92, 94, 97, 101.

⁷⁰ *Contra* [Victims’ Response](#), para. 43. See [Al Hassan Appeal Judgment](#), paras. 97-98, 101-102 (noting that “the number of participating victims may provide *some indication* of the scope of victimhood”, emphasis added, in the context of the procedure adopted by the Pre-Trial Chamber in that case to admit victims, and noting that this factor was not accord “significant weight”)

⁷¹ See *above e.g.* fn. 34.

⁷² See *above* fn. 49. *Contra* [Victims’ Response](#), para. 44.

B.5. Other factors taken into account by the Prosecutor in her ultimate gravity assessment

26. In her ultimate gravity assessment, the Prosecutor’s reference to considerations arising from her professional experience and exclusive competence in investigation and case selection was not misplaced.⁷³ Such factors are germane to her gravity analysis, in light of the Appeal Judgment, and were not excluded by anything said in the First or Second Article 53(3)(a) Requests. The Comoros merely disagrees with the Prosecutor’s assessment, as illustrated by its criticism of her interpretation of the significance of the outcomes of the various international and national examinations of the events at issue in this situation.⁷⁴ Likewise, the Comoros disagrees with previous findings made by the Prosecutor, but which were not been identified by the Pre-Trial Chamber as erroneous.⁷⁵

C. The Comoros’ remaining requests should, in any event, be dismissed

27. The Comoros’ remaining requests to the Pre-Trial Chamber (seeking a declaration, sanctions, and an *amicus* Prosecutor) are unnecessary in light of the approach taken by the Prosecutor in her Revised Final Decision. In any event, they are also procedurally flawed, and consequently cannot be granted in principle.

28. While the Prosecution acknowledges the depth of feeling which the circumstances underlying this situation engender, it nonetheless respectfully submits that the ordinary procedures of this Court are adequate and appropriate in resolving those disputes which may arise.⁷⁶ Indeed, the supervisory function of the Pre-Trial Chamber under article 53(3) of the Statute exists precisely because the drafters of the Statute foresaw that the (necessarily) selective mandate of the Court may sometimes give rise to vexed questions. The Prosecutor’s sole motivation in this situation is to ensure that those procedures are applied correctly, effectively and fairly, in accordance with the Statute.

⁷³ See [Third Comoros Request](#), paras. 51-54.

⁷⁴ See [Third Comoros Request](#), paras. 76-80. See also [Victims’ Response](#), paras. 65-66.

⁷⁵ See e.g. [Third Comoros Request](#), paras. 87-88.

⁷⁶ See also [OPCV Response](#), paras. 45-46 (noting that the sanctions regime is not well adapted for disputes arising under article 53(3) of the Statute). See further para. 52 (“more drastic measures under article 42 of the Statute”, which permit the disqualification of the Prosecutor by the Appeals Chamber, “go far beyond what would be appropriate in the present circumstances”). *But see* para. 55 (nonetheless submitting “that the impartiality of the Prosecutor in this matter can by now reasonably be doubted”). While noting its respectful but emphatic disagreement with this latter statement, the Prosecution understands the OPCV to mean—in light of the apparent contradiction in its position—that any concern about the impartiality of the Prosecutor does not rise to the level required for article 42: see e.g. *above* paras. 2-4.

C.1. Declarations of law inconsistent with the Appeal Judgment

29. The Pre-Trial Chamber should decline any invitation by the Comoros or the independently represented victims to depart from the legal conclusions in the Appeal Judgment (indeed, its *ratio decidendi*) by making a declaration to the effect that “[t]he final decision” concerning the assessment of gravity in any potential case arising from this situation “cannot be left to the OTP”, or that “[t]he Chamber undoubtedly has the power to direct the OTP as to errors of fact that must be addressed *and corrected*.”⁷⁷ This request, which relies on passages from the minority (dissenting) opinions in the Appeal Judgment,⁷⁸ fails to acknowledge the express contrary rulings of the majority of the Appeals Chamber,⁷⁹ which must be upheld not only to ensure the integrity of article 21(2) of the Statute, but also the doctrine of *res judicata* given that the Appeal Judgment was rendered in the context of these very same proceedings and on the basis of the same underlying facts and circumstances.

C.2. Request for sanctions

30. The Prosecution respectfully submits that the Comoros’ and the victims’ request for sanctions in the current circumstances is not only unjustified on its merits but procedurally inapplicable.⁸⁰

31. First, there is no basis to suggest that the Prosecutor or any member of the Office has ever refused to comply with a binding direction by the Court in these proceedings, in the

⁷⁷ [Third Comoros Request](#), paras. 113-114 (emphasis added). See also paras. 49, 115-121; [Victims’ Response](#), para. 87. The Prosecution understands the Comoros to assert that the Pre-Trial Chamber should declare that it can oblige the Prosecutor to adopt specific factual conclusions, or otherwise substitute its own view for that of the Prosecutor in the fashion reserved for determinations under article 53(3)(b) of the Statute: see e.g. [Third Comoros Request](#), para. 117.

⁷⁸ See e.g. [Third Comoros Request](#), paras. 119-120.

⁷⁹ See e.g. [Appeal Judgment](#), paras. 58 (“the ‘ultimate decision’ as to whether to initiate an investigation is that of the Prosecutor”), 76 (“rule 108(3) of the Rules provides that the ‘final decision’ is for the Prosecutor. As such, the pre-trial chamber, in requesting reconsideration, cannot direct the Prosecutor as to the *result* of her reconsideration [...] This reflects a conscious choice of the drafters to leave the Prosecutor with a margin of appreciation in respect of her decision”), 77 (“the Prosecutor is required to demonstrate how she addressed the relevant issues in light of the pre-trial chamber’s directions”), 79 (“the final decision as to whether to initiate an investigation will always be for the Prosecutor”), 80 (“the Appeals Chamber considers that the Prosecutor cannot ignore a request by the pre-trial chamber to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation. However, it is not for the pre-trial chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach”), 81 (“it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors”), 82 (“the pre-trial chamber may not direct the Prosecutor as to how the information made available to her should be analysed, which factual findings she should reach, how to apply the law to the available information, or what weight she should attach to the different factors in the course of a gravity assessment”). See also above paras. 8-14.

⁸⁰ *Contra* [Third Comoros Request](#), paras. 122-125. See also [Victims’ Response](#), paras. 4, 90, 94, 96; [OPCV Response](#), paras. 5, 7-8, 44, 55, 58-59, 69.

meaning of rule 171(1). To the contrary, even if the Prosecution’s application of the Appeal Admissibility Decision in this situation proved to be incorrect—with respect to the nature of the binding qualities of the First Article 53(3)(a) Request—the Prosecutor plainly sought within that context to discharge her legal obligations in good faith.⁸¹ The fact that she sought to avail herself of the various procedures under the Statute cannot be taken as demonstration of misconduct.⁸² Likewise, in the Revised Final Decision, the Prosecutor made clear that she accepted the rulings of the Pre-Trial Chamber and the Appeals Chamber, and intended to comply with their guidance.⁸³ Genuine differences of opinion or even misunderstandings, respectfully expressed within the framework of the Court’s legal texts and capable of correction in the ordinary course of judicial proceedings, do not amount to misconduct, and should not attract threats of sanction.

32. Second, while the Presiding Judge of a chamber may proceed to sanction any instance of misconduct, in accordance with the Statute and the Rules, resort to rule 171(1) is expressly conditioned on the original direction being “accompanied by a warning of sanctions in case of breach”. The Prosecution does not understand that such a warning was given in either the First Article 53(3)(a) Request or the Second Article 53(3)(a) Request, nor indeed would such a warning have been necessary in the context of the Prosecutor’s continuing demonstrations of good faith (even if the Pre-Trial Chamber found her approach to be erroneous, on its merits). The Prosecution understands that the reference to article 71 and rule 171 in the Second Article 53(3)(a) Request was made in the context of a wider legal analysis by the Chamber—as to whether a “request” under article 53(3)(a) amounts to a binding order to the Prosecution—and not for the purpose of triggering rule 171(1).⁸⁴

⁸¹ See e.g. [Revised Final Decision](#), para. 8 (recalling that the original version of the Prosecutor’s final decision under rule 108(3) was some 144 pages in length). See also [ICC-01/13-T-001-ENG OA2](#), p. 120:15-18 (submission by the Comoros, before the Appeals Chamber clarifying that their concern was “not [...] the thoroughness of the task that the Prosecution has performed [but] rather the way in which that thoroughness has been directed”, based on the Comoros’ view that the Prosecution should have “tr[ie]d to decide much more quickly whether a preliminary examination should proceed to an investigation”).

⁸² See e.g. [ICC-01/13-85](#) (Prosecution’s appeal against the Second Article 53(3)(a) Request); [ICC-01/13-81](#) (denying request for suspensive effect of the Second Article 53(3)(a) Request); [ICC-01/13-73](#), paras. 40-52, especially paras. 43, 47 (certifying issues arising from the Second Article 53(3)(a) Request for appeal, and noting the divergence in interpretations of the Appeal Admissibility Decision); [ICC-01/13-69](#) (Prosecution request for leave to appeal the Second Article 53(3)(a) Request); [ICC-01/13-61](#) (Prosecution response to the Comoros’ request leading to the Second Article 53(3)(a) Request, submitting that the Pre-Trial Chamber lacked jurisdiction in light of the Appeal Admissibility Decision).

⁸³ See e.g. [Revised Final Decision](#), para. 7.

⁸⁴ *Contra* [Third Comoros Request](#), paras. 122-123; [Victims’ Response](#), para. 92. See [Second Article 53\(3\)\(a\) Request](#), paras. 101-104.

33. Third, even accepting for the sake of argument that a sanction could properly be imposed as a matter of law, and that doing so would be an appropriate exercise of the Chamber’s discretion in these circumstances—with which, in both respects, the Prosecution respectfully disagrees—the independently represented victims’ suggestion of levying a fine against the Prosecutor or her Office is also misconceived.⁸⁵ As the victims represented by the OPCV have pointed out, such a measure would be counterproductive.⁸⁶ While a formal reprimand does not entail the same practical difficulties, it would nonetheless also be misplaced and inappropriate in circumstances where, even if there is error, it did not arise from bad faith or negligence.⁸⁷

C.3. Appointment of an *amicus curiae* Prosecutor

34. The Comoros’ request to appoint an *amicus curiae* Prosecutor should likewise be dismissed. There is no basis to suggest that a power exclusively reserved for the Prosecutor can be assigned to an *amicus curiae* by means of rule 103.⁸⁸ As the victims represented by the OPCV have concluded, “such a procedure would necessitate an unprecedented interpretation of the legal provisions that could potentially go far beyond what was envisaged by the drafters of the Statute.”⁸⁹

35. While rule 103(1) enables the Pre-Trial Chamber to invite any person to submit any observation on any issue that the Chamber deems appropriate, this may only be for the purpose of assisting the Pre-Trial Chamber in carrying out its *own* functions under the Statute.⁹⁰ Again, the victims represented by the OPCV agree.⁹¹ That this power cannot be employed as a substitute for the Prosecutor’s own functions under the Court’s legal texts is illustrated by rule 103(2),⁹² which provides that “[t]he Prosecutor [...] shall have the opportunity to respond to the observations” of any *amicus curiae*.

⁸⁵ *Contra* [Victims’ Response](#), paras. 94-95.

⁸⁶ *See* [OPCV Response](#), paras. 46, 48.

⁸⁷ *Contra* [Victims’ Response](#), para. 94; [OPCV Response](#), para. 69.

⁸⁸ *Contra* [Third Comoros Request](#), paras. 126-129; [Victims’ Response](#), para. 96.

⁸⁹ *See* [OPCV Response](#), paras. 48-50. *See also* para. 8.

⁹⁰ *See also* [ICC-01/13-89](#), paras. 24-25 (recalling the guidance of the Appeals Chamber that, “when acting within the parameters of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist *it* ‘in the proper determination of the case’”, emphasis added).

⁹¹ *See* [OPCV Response](#), para. 47 (noting that “the conclusion of the *amicus* would not have any binding effect” and “could simply assist or advise the Chamber providing views”). *See also* para. 8.

⁹² *Contra e.g.* [Third Comoros Request](#), para. 129 (requesting “an independent *amicus* prosecutor to review afresh the evidence and reconsider the OTP’s decision”).

36. More generally, the legal texts of the Court expressly reserve to the Prosecutor the power, among others, to receive “referrals and substantiated information on crimes with the jurisdiction of the Court” and to “examin[e] them” prior to investigation.⁹³ The Statute exhaustively sets out the circumstances in which the Prosecutor may be constrained from exercising powers in her exclusive competence, and the proper forum and standing for such a procedure.⁹⁴ If the Prosecutor is unable to act, the Deputy Prosecutor is also “entitled to carry out any of the acts required of the Prosecutor under this Statute.”⁹⁵ In all other circumstances—subject of course to the supervision of the judges in accordance with the legal framework of the Court—the Prosecutor’s independence in carrying out her statutory functions is absolute and guaranteed.⁹⁶ As the Court has previously recognised, there is no lacuna in the assignment of prosecutorial powers solely to the Prosecutor and her Deputy,⁹⁷ and consequently resort to any doctrine of ‘inherent powers’ is not permitted.⁹⁸

C.4. Judicial order to open an investigation

37. The Prosecution notes the alternative suggestion for a sanction by the victims represented by the OPCV that “[s]omeone else must assume the function of the Prosecutor under article 53 of the Statute in this exceptional and unprecedented situation”,⁹⁹ and that consequently “the Pre-Trial Chamber should be entitled to intervene” by means of “its inherent powers to finally substitute its own findings for those of the Prosecutor, as a ‘sanction’ for failing to carry out a genuine reconsideration”.¹⁰⁰ Respectfully, the Prosecution cannot concur with this submission.

38. The discretion afforded by one provision of the Statute does not permit an entity to exercise a power which is precluded by another provision of the Statute. Consequently, since article 53(3)(a)—which is the *lex specialis* applicable to the current situation—does not

⁹³ [Statute](#), art. 42(1). *See also e.g.* [Statute](#), art. 53(1); [rules](#) 104-108. On the logic of the link between competence to make determinations for the purpose of preliminary examinations, and competence to investigate, *see above* fn. 41.

⁹⁴ *See* [Statute](#), arts. 42, 46-47; [rules](#) 23-32, 34.

⁹⁵ [Statute](#), art. 42(2).

⁹⁶ [Statute](#), art. 42(1).

⁹⁷ In the context of article 70 proceedings, *see e.g.* [ICC-01/04-01/07-T-190-Red-ENG](#), p. 3:14-22; [ICC-01/04-01/06-T-350-Red-ENG](#), pp. 16-17 (reasoning that the Prosecutor is exclusively vested with the competence to begin proceedings under article 70 of the Statute). While the OPCV notes that, in *Lubanga*, the Trial Chamber “did not *per se* exclude the appointment of an ‘independent investigator’”, it neglects to acknowledge the Trial Chamber’s express recognition in the same passage that “it is clear that the Judges have not been given power to remove responsibility from the Prosecution by appointing an independent investigator”: *see* [OPCV Response](#), para. 51.

⁹⁸ [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), paras. 75-76.

⁹⁹ [OPCV Response](#), para. 55.

¹⁰⁰ [OPCV Response](#), paras. 58-59.

permit the Pre-Trial Chamber in any circumstances to substitute its own decision for that of the Prosecutor,¹⁰¹ then this power likewise cannot be exercised to form the basis for a sanction under article 71 or rule 171. In any event, article 71 only permits “administrative measures”, and not substantive ones, to be taken by the Court in sanctioning misconduct, and these must be “similar” in nature to those set out expressly in article 71(1), and provided in the Rules.¹⁰² As the OPCV seems to concede, rule 171 permits only the interdiction of a person from the Court’s proceedings, or a fine.¹⁰³ There is no basis in the Statute to permit the opening of an investigation without the assent of the Prosecutor that the conditions in *article 53(1)(a) and (b) (jurisdiction and admissibility)* are met¹⁰⁴—taking account of the legal guidance of the Pre-Trial Chamber—nor is there any lacuna permitting resort to any inherent powers.

39. This exhaustive legal regime is unsurprising since the concern raised by the OPCV—of a Prosecutor who seeks to “actively disrupt or terminate proceeding simply by disregarding Chambers’ orders and/or commit[ting] other forms of non-compliance”¹⁰⁵—is fundamentally incompatible with the mandate of the Prosecutor.¹⁰⁶ However, such an implication is unfounded in this case, as the OPCV itself recognises in disclaiming any possibility that proceedings under article 42 could be appropriate in this case.¹⁰⁷

D. Observation on the conduct of these proceedings

40. On a final point, while the Prosecution notes that vigorous advocacy is inherent to the practice of this Court, some of the terms employed by the Comoros unnecessarily call into question—without foundation—the personal ethical standards and honesty of the Prosecutor

¹⁰¹ This power is reserved for proceedings under article 53(3)(b) of the Statute. While the drafters of the Statute may or may not have foreseen “the possibility of endless friction” arising from article 53(3)(a), it is nonetheless the case that they consciously elected to make article 53(3)(a) materially different from article 53(3)(b): *cf. OPCV Response*, para. 64. The Appeals Chamber has repeatedly regarded this distinction as significant in interpreting the statutory regime: *see e.g. Appeal Judgment*, paras. 75-76, 79; *Appeal Admissibility Decision*, paras. 53, 56, 58-59 (“the distinction between the powers of the Pre-Trial Chamber under article 53(3)(a) and (b) reflects a conscious decision on the part of the drafters”).

¹⁰² *See Statute*, art. 71.

¹⁰³ *See OPCV Response*, para. 53.

¹⁰⁴ While article 53(3)(b) alone permits the Pre-Trial Chamber to trigger the opening of an investigation, this only applies to prosecutorial decisions not to proceed to an investigation which are “*based solely*” on article 53(1)(c) (interests of justice). Consequently, in such circumstances, the Prosecutor has already assented that the conditions in article 53(1)(a) and (b) (jurisdiction and admissibility) are met.

¹⁰⁵ *OPCV Response*, para. 50.

¹⁰⁶ *See Statute*, art. 42, *especially* art. 42(3).

¹⁰⁷ *See above* fn. 76.

or her Office.¹⁰⁸ This has the potential to bring the Court and its proceedings into disrepute.¹⁰⁹ Regardless of the merits of the substantive issues being litigated in this situation, the Prosecution respectfully observes that there is no proper basis to challenge the good faith of the Prosecutor or her Office in these proceedings. Nor does the fact that some standards of review are calibrated by the “correctness”, “reasonableness” or “rationality” of a first-instance decision maker (in this case, the Prosecution) justifies wider resort to hyperbole or name-calling.¹¹⁰

Conclusion

41. For all the reasons above, the Prosecution respectfully requests the Pre-Trial Chamber to dismiss the Comoros’ request, and affirm that the Revised Final Decision properly discharged the Prosecutor’s obligations under article 53(3)(a) and rule 108(3). In any event, the Pre-Trial Chamber should dismiss *in limine* the Comoros’ further requests.

¹⁰⁸ See [Third Comoros Request](#), paras. 2 (“The OTP again, without any proper basis, relies on a *professed* lack of gravity”, emphasis added), 6 (“[the] Prosecutor’s *defiance and intransigence*”, emphasis added), 51 (“The Prosecutor wrongly claims that [...] This amounts to another *duplicitous* attempt to downgrade the seriousness of the case”, emphasis added), 53 (“*perverse* finding”, emphasis added), 80 (“The Prosecutor is impermissibly using a *misleading* and incorrect interpretation”, emphasis added), 110 (“the Prosecutor has *no intention of ever opening an investigation* into the attack on the Flotilla, *regardless of the errors identified*, and will *continue to refuse to address these errors as identified by the Pre-Trial Chamber* in order to arrive at this outcome”, emphasis added), 115 (“The OTP has *manipulated* the Appeals Chamber’s finding”, emphasis added), 116 (“The Prosecutor has *disingenuously* failed”, emphasis added), 117 (“the OTP has *deliberately distorted* the Appeals Chamber’s language”, emphasis added).

¹⁰⁹ See [Code of Professional Conduct for Counsel](#), arts. 7(1) (“Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, [...] opposing counsel, [...] and any other person involved in the proceedings”), 24(1) (“Counsel shall take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff [...] do not bring the court into disrepute”). See further [ICC-01/04-01/06-2433](#), para. 41 (“It is [...] counsel’s positive duty to advance criticisms on any relevant issue *that have a proper evidential foundation*”, emphasis added); [ICC-01/09-01/11-2034](#), para. 12 (reminding “counsel that the dictates of professional responsibility require counsel to maintain detachment at all times from the case they are litigating”).

¹¹⁰ For this reason, and in the interest of clarity, the Prosecution observes that no issue is taken with the Comoros’ repeated assertions throughout its submission to the effect that the Prosecutor and/or the Prosecution are “unreasonable”, “wrong”, “mistaken”, and similar. The Prosecution understands these and related terms to be legal terms of art, arising from potential standards of review. Nor does the Prosecution take issue with the victims’ concern as to the ‘genuineness’ of the Prosecution’s reconsideration, even though it emphasises that on the merits of the matter the conduct of the Prosecution must be understood to have been perfectly genuine.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line. The signature is stylized and slanted.

Fatou Bensouda, Prosecutor

Dated this 11th day of May 2020

At The Hague, The Netherlands