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PRE-TRIAL CHAMBER I

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

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

Public

**Decision on the request of the Union of the Comoros to review the Prosecutor's
decision not to initiate an investigation**

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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**Unrepresented Applicants for
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Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I of the International Criminal Court hereby renders its decision on the request of the Union of Comoros to review a decision of the Prosecutor not to initiate an investigation.

I. Procedural history and preliminary matters

1. On 14 May 2013, the Comoros referred to the Prosecutor the situation “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip” ([ICC-01/13-1-Anx1](#)). In a letter sent to the Prosecutor on 29 May 2013, the Comoros specified that, in terms of temporal scope, the referral encompasses incidents allegedly committed from 31 May 2010 through to “6 June 2010 and onwards” ([ICC-01/13-1-Anx2](#), p. 2). In another letter to the Prosecutor dated 21 June 2013, the Comoros clarified that, in terms of territorial scope, the referral encompasses incidents allegedly committed on “other flotilla vessels bearing State party flags in addition to the *Mavi Marmara* [registered in the Comoros]” ([ICC-01/13-1-Anx2](#), p. 3).

2. On 6 November 2014, the Prosecutor publicly released a document entitled “Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report”, wherein she announced her determination that there was no reasonable basis to proceed with an investigation into the situation ([ICC-01/13-6-AnxA](#), the “Decision Not to Investigate”). The Prosecutor determined that there was reasonable basis to believe that the war crimes of wilful killing under article 8(2)(a)(i), wilfully causing serious injury to body and health under article 8(2)(a)(iii), committing outrages upon personal dignity under article 8(2)(b)(xxi), and, if the blockade of Gaza by Israel is to be deemed unlawful, also intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Rome Statute (the “Statute”) have been committed in the context of the referred situation. However, the Prosecutor concluded that the potential case(s) that would likely arise from the

investigation into the situation would be inadmissible by force of article 17(1)(d) of the Statute, *i.e.* insufficiently grave to warrant action by the Court. More specifically, the Prosecutor's conclusion was that "considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate" (para. 142). According to the Prosecutor, "in the context of the current referral, it is clear that the potential case(s) that could be pursued as a result of an investigation into this situation is limited to an event encompassing a limited number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations" (para. 144).

3. On 29 January 2015, the Comoros submitted the "Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation" (ICC-01/13-3-Conf, and its public redacted version [ICC-01/13-3-Red](#), the "Request for Review"), founded on two principal grounds: (i) the failure to take into account facts which did not occur on the three vessels over which the Court has territorial jurisdiction (paras 62-81); and (ii) the errors in addressing the factors relevant to the determination of gravity under article 17(1)(d) of the Statute (paras 82-135). The Chamber notes that the Comoros make a third principal argument, *i.e.* that the Prosecutor should reconsider her decision in light of the attainment by the Court of broader jurisdiction over Gaza (paras 136-138). However, as this submission is not presented as a ground of review under article 53(3)(a) of the Statute but is directed at the Prosecutor for her to take into account this new circumstance and, on this basis, reconsider her decision under article 53(4) of the Statute, the Chamber does not consider it necessary to entertain this argument.

4. On 30 March 2015, with the authorisation of the Chamber ([ICC-01/13-5](#)), the Prosecutor responded to the Request for Review (ICC-01/13-14-Conf, and its public redacted version [ICC-01/13-14-Red](#), the “Response”).

5. On 9 April 2015, the Comoros sought leave to reply to the Prosecutor’s Response ([ICC-01/13-15](#)). The Prosecutor responded to this request on 17 April 2015 ([ICC-01/13-17](#)). Additionally, on 24 April 2015, the Comoros requested that the Chamber hold an oral hearing in the proceedings ([ICC-01/13-19](#)). The Prosecutor responded on 7 May 2015 ([ICC-01/13-20](#)).

6. On 24 April 2015, the Chamber, in application of the right of victims who have communicated with the Court to make observations in the present proceedings under rule 59 of the Rules of Procedure and Evidence (the “Rules”), appointed a legal representative to the unrepresented victims, and set the time limit of 5 June 2015 for the submission of observations on behalf of the victims ([ICC-01/13-18](#)). The Chamber subsequently extended this time limit ([ICC-01/13-23](#), [ICC-01/13-25](#)) and the victims’ observations were received on 22 June 2015 (ICC-01/13-27-Conf, and its public redacted version [ICC-01/13-27-Red](#), and ICC-01/13-28-Conf, and its public redacted version [ICC-01/13-28-Red](#)). Both groups of victims submit that the Chamber should request the Prosecutor to reconsider the Decision Not to Investigate. The Prosecutor (ICC-01/13-29-Conf and its public redacted version, [ICC-01/13-29-Red](#)) and the Comoros ([ICC-01/13-30](#)) filed their respective responses to the victims’ observations on 14 July 2015.

7. Being already in possession of comprehensive and detailed submissions, the Chamber has been sufficiently apprised to decide on the Request for Review. Accordingly, the Chamber does not deem it necessary to grant the Comoros leave to reply to the Prosecutor’s Response, or to hold an oral

hearing in the matter, or to receive any other submissions or information from any of the participants.

II. Nature and scope of the present review under article 53(3)(a) of the Statute

8. The Chamber notes article 53(1) and (3)(a) of the Statute and rules 107 and 108 of the Rules. Under article 53(3)(a) of the Statute, the Chamber is empowered, upon request of the entity referring a situation to the Prosecutor (*i.e.* a State Party or the Security Council of the United Nations), to review the Prosecutor's decision not to proceed under article 53(1) of the Statute and to request the Prosecutor to reconsider that decision. The subject-matter of the review under article 53(3)(a) of the Statute is the Prosecutor's "decision not to investigate", *i.e.* the considerations underlying the final conclusion that an investigation should not be opened.

9. The object and purpose of article 53(3)(a) of the Statute is to give referring entities the opportunity to challenge, and have the Chamber test, the validity of the Prosecutor's decision not to investigate. Compared to the Chamber's competence under article 15 of the Statute to authorise the Prosecutor to commence an investigation *proprio motu* – which serves to compensate for the absence of a referring entity as a check on the powers of an independent Prosecutor – the Chamber's competence under article 53(3)(a) of the Statute is fundamentally different in that it is triggered only by the existence of a disagreement between the Prosecutor (who decides not to open an investigation) and the referring entity (which wishes that such an investigation be opened), and is limited by the parameters of this disagreement. In the absence of any such disagreement, because either the Prosecutor decides to open an investigation into the referred situation or because the referring entity does not challenge the Prosecutor's decision not

to investigate, the Chamber has no competence to review the Prosecutor's decision, subject to its *proprio motu* power under article 53(3)(b) of the Statute.

10. Therefore, as the review under article 53(3)(a) of the Statute is triggered by a request of the referring entity which has the opportunity to raise before the Chamber any argument it wishes to make in order to challenge the validity of the Prosecutor's follow-up on the referral, the Chamber is not tasked with undertaking *ex novo* the entirety of the Prosecutor's assessment under article 53(1)(a) of the Statute. Rather, the scope of review is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor's conclusion not to investigate.

11. In the present case, the consideration underlying the Prosecutor's decision not to investigate the situation referred to her by the Comoros is that the potential cases arising from such situation would not be of sufficient gravity. The Comoros challenge precisely the Prosecutor's interpretation and application to the present case of the gravity test envisaged in article 17(1)(d) of the Statute and raise two main grounds of review, namely: (i) the failure to take into account facts that did not occur on the three vessels over which the Court may exercise territorial jurisdiction; and (ii) the failure to properly address the factors relevant to the determination of gravity under article 17(1)(d) of the Statute. The Chamber's determination in the present review is limited to these aspects.

12. Upon review, the Chamber must request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact.

13. The question that is asked of the Prosecutor by article 53(1) of the Statute is merely whether or not an investigation should be opened. The

Prosecutor's assessment of the criteria listed in this provision does not necessitate any complex or detailed process of analysis. In the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word "shall" in the *chapeau* of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts. Indeed, it is precisely the purpose of an investigation to provide clarity. Making the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal or not contradictory creates a short circuit and deprives the exercise of any purpose. Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under article 54 of the Statute; conversely, her powers are more limited under article 53(1) of the Statute.

14. The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself only in paragraph (c), *i.e.* in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require the application of exacting legal requirements. This is not contradicted by the low evidentiary standard of article 53(1)(a) of the Statute, or by the fact that an analysis under article 53(1)(b) of the Statute involves potential and not actual cases.

15. Finally, the Chamber considers it necessary to add that there is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under article 53(1) of the Statute which are erroneous, but within some field of deference. The role of the Chamber in the present proceedings is to exercise independent judicial oversight.

III. Analysis of the grounds of review

A. *Alleged failure to take into account facts that did not occur on the three vessels over which the Court may exercise territorial jurisdiction*

16. Under the first ground of review, the Comoros (Request for Review, para. 19) challenge the Prosecutor's argument that "[she] is not entitled to assess the gravity of the alleged crimes committed by the IDF [Israeli Defense Forces] on the *Mavi Marmara* in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC" (Decision Not to Investigate, para. 137). In her Response, the Prosecutor states that she "intended the common sense proposition that legal and factual analysis [...] should be confined, where feasible, to the territorial parameters of the Court's jurisdiction", although there may be exceptions "when there is a rational link with those broader circumstances", but that such link does not exist between the events at issue and the "events in Gaza" (paras 53, 56).

17. The stance that the Prosecutor cannot consider for the assessment of gravity any information in relation to facts occurring elsewhere than on the three vessels over which the Court may exercise territorial jurisdiction rests on an untenable understanding of jurisdiction. The rules of jurisdiction in part 2 of the Statute limit the Court's power to make judgement, *i.e.* to examine a given conduct and make a judicial finding of whether such conduct

constitutes a crime, but do not preclude the Court from considering facts that in themselves occur outside of its jurisdiction for the purpose of determining a matter within its jurisdiction. Thus, the rules of jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes which were committed elsewhere than on the three vessels falling into its jurisdiction, but the Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence as well as their gravity.

18. By articulating in the Decision Not to Investigate a principle without basis in the law, the Prosecutor committed an error. However, the Chamber observes that the Prosecutor did not in fact apply the principle she announced, and did take into account certain facts “outside of the Court’s jurisdiction” for the purposes of her analysis under article 53(1) of the Statute, such as for her conclusion that crimes were committed only on the *Mavi Marmara* and that no serious injuries occurred on the other vessels in the flotilla (para. 138), or for her conclusion that the identified crimes had no significant impact on the population in Gaza (para. 141).

19. Therefore, the Chamber is of the view that the articulation of the erroneous abstract principle did not, as such, affect the validity of the Prosecutor’s assessment of gravity. The various factors considered by the Prosecutor in the context of her assessment of gravity need to be examined individually. This analysis falls under the second ground raised by the Comoros and is addressed in the following section.

B. Alleged failure to properly address the factors relevant to the determination of gravity under article 17(1)(d) of the Statute

20. The errors alleged by the Comoros under this second ground relate to the Prosecutor’s assessment of the factors which she identified as relevant for the determination of the question whether the potential case(s) that would

form the focus of the investigation would be grave enough within the meaning of article 17(1)(d) of the Statute. The Chamber observes that the factors referred to by the Prosecutor in the Decision Not to Investigate are indeed suitable for this determination.

21. In this regard, the Chamber is attentive to the Court's previous decisions in relation to the interpretation of the requirement of "sufficient gravity" within the meaning of article 17(1)(d) of the Statute, in particular with respect to the assessment of the gravity of the "potential cases" at the pre-investigative stage. More specifically, the Chamber recalls that: (i) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and (ii) gravity must be assessed from both a "quantitative" and "qualitative" viewpoint and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims, are indicators of the gravity of a given case.¹

i. Consideration with respect to the potential perpetrators of the crimes

22. In the Decision Not to Investigate, the Prosecutor correctly stated that an evaluation of gravity includes consideration of whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed (para. 135). Nonetheless, the Prosecutor did not provide within the

¹ Pre-Trial Chamber II, "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#)", 31 March 2010, ICC-01/09-19-Corr paras 60-62; Pre-Trial Chamber III, "[Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire](#)", 15 November 2011, ICC-02/11-14-Corr, paras 203-205.

actual evaluation of the gravity of the potential case(s) a discrete analysis of this factor. The Comoros' argument is that this "is a glaring omission" that demonstrates that the Prosecutor did not apply the very criteria for assessing gravity which she herself identified (Request for Review, para. 85).

23. The Chamber is of the view that the Prosecutor erred in the Decision Not to Investigate 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. Contrary to the Prosecutor's argument at paragraph 62 of her Response, the conclusion in the Decision Not to Investigate that there was not a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, which 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.

24. The Chamber is of the view that the Prosecutor's failure to take into account this relevant factor affected the determination of gravity of the potential case(s) arising out of the situation, in particular because there appears to be no reason, in the present circumstances and in light of the parameters of the referral and scope of the Court's jurisdiction, to consider that an investigation into the situation referred by the Comoros could not lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes committed during the seizure of the *Mavi Marmara* by the IDF.

ii. Scale of the crimes

25. In the Decision Not to Investigate, the Prosecutor found that the *Mavi Marmara* was carrying over 500 civilian passengers, of which ten were killed

by IDF forces, “around 50-55” were injured, and that the number of those who suffered outrages upon personal dignity was unclear (para. 138). The Prosecutor held that the total number of victims “reached relatively limited proportions as compared, generally, to other cases” (para. 138) and took this into account for the overall determination of gravity (para. 142). The Comoros dispute this conclusion (Request for Review, paras 92-93).

26. The Chamber notes that the Prosecutor and the Comoros essentially agree on the numbers of victims of the identified crimes. In the view of the Chamber, ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment, which would be the scale of the crimes prosecuted in the potential case(s) arising from the referred situation, in addition to exceeding the number of casualties in actual cases that were previously not only investigated but even prosecuted by the Prosecutor (*e.g.* the cases against Bahar Idriss Abu Garda and Abdallah Banda), are a compelling indicator of sufficient, and not of insufficient gravity. The factor of scale should have been taken into account by the Prosecutor as militating in favour of sufficient gravity, rather than the opposite, and in failing to reach this conclusion, the Prosecutor committed a material error.

iii. Nature of the crimes

27. With respect to the nature of the crimes, the Prosecutor, in the Decision Not to Investigate, took into account the war crimes of wilful killing and wilfully causing serious injury to body and health under article 8(2)(a)(i) and (iii), and the war crime of committing outrages upon personal dignity under article 8(2)(b)(xxi) of the Statute. While observing that the “available information suggests that following the takeover of the *Mavi Marmara*, there was mistreatment and harassment of passengers by the IDF forces and that such humiliating or degrading treatment lacked justification or explanation”,

the Prosecutor “noted, however, that the information available does not indicate that treatment inflicted on the affected passengers amounted to torture or inhuman treatment” (para. 139). The Comoros argue in the Request for Review that there is “credible evidence of torture, and cruel and inhumane treatment, which the Prosecutor has completely ignored” (para. 95).

28. At the outset, the Chamber observes that the Prosecutor’s conclusion that the unjustified mistreatment and harassment of passengers by the IDF forces did not amount to the war crime of torture or inhuman treatment under article 8(2)(a)(ii) of the Statute is not just a matter of article 53(1)(a) of the Statute (*i.e.* of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed). Rather, this is a matter that is equally relevant to the evaluation of the gravity of the potential case(s), within the meaning of article 53(1)(b) in conjunction with article 17(1)(d) of the Statute, as the concept of nature of the crimes (which is indeed a relevant factor in the determination of the overall gravity), revolves around the relative gravity of the possible legal qualifications of the apparent facts, *i.e.* the crimes that are being or could be prosecuted.

29. The Chamber notes that the Prosecutor did not dispute that there was information that the conduct in question involved “mistreatment”, including overly tight handcuffing for extended periods, beating, denial of access to toilet facilities, denial of medication (such as for diabetes, asthma, and heart conditions), provision of only limited access to food and drink, forcing passengers to remain kneeling on decks exposed to the sun (resulting in 13 passengers receiving first-degree burns), seawater spray and wind gusts from helicopters, various physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including through the use of dogs) and blindfolding or putting hoods over the heads of passengers (Decision Not to Investigate, para. 64).

30. In light of this information, there is merit in the Comoros' statement that the exclusion, through an assessment of severity of the pain and suffering inflicted by the conduct in question, of the possibility of the war crime of torture or inhuman treatment under article 8(2)(a)(ii) of the Statute having been committed was "surprisingly premature". The proper differentiation between this crime and the war crime of outrages upon personal dignity under article 8(2)(b)(xxi) of the Statute (which according to the Prosecutor is sufficiently demonstrated) involves the application of a threshold to the level of severity of the pain and suffering inflicted by the conduct in question and cannot credibly be attempted on the basis of the limited information available at this stage, *i.e.* before the Prosecutor has even started an investigation. At this stage, the correct conclusion would have been to recognise that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test. The Prosecutor thus erred in not reaching this conclusion.

iv. Manner of commission

31. In the Decision Not to Investigate, the Prosecutor stated that the "means and extent of force used by the IDF forces against the passengers on board the vessel appears to have been excessive in a number of instances", but that "the information available does not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty" (para. 140). The Prosecutor also noted that "the commission of serious crimes was confined to one vessel, out of seven, of the flotilla". The Chamber understands that the Prosecutor's premise was that if the identified crimes were committed pursuant to some form of plan, conceived at middle or higher levels of IDF command, then these crimes

would involve a potential case sufficiently grave under article 17(1)(d) of the Statute, and, in principle, warrant investigation.

32. In the following paragraphs, the Chamber lays out its analysis with respect to the specific arguments raised by the Comoros in relation to the Prosecutor's determination on the manner of commission of the identified crimes.

a) Use of live fire by the IDF prior to boarding

33. In the Decision Not to Investigate, the Prosecutor did not make reference to the issue of the use of live fire by the IDF prior to the boarding of the *Mavi Marmara* in considering the manner of commission of the identified crimes (see para. 140). This matter was only addressed in the section "Acts allegedly constituting war crimes", in which it was stated that "the information available makes it difficult to establish the exact chain of events in light of the significantly conflicting accounts of when live ammunition was first used and from where it emanated" (para. 41). The Comoros submit that "[t]here is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters before the IDF forces boarded the *Mavi Marmara*, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians" (Request for Review, para. 101). This information consists of the statements of several persons who were on board of the vessels of the flotilla (named and quoted in the Request for Review), the conclusions of the UN Human Rights Council fact-finding mission (also quoted in the Request for Review), and autopsy reports, which, according to the Comoros, "indicate that persons were shot from above" (para. 115). In her Response, the Prosecutor does not contest that the information pointed to by the Comoros is available to her, nor does she argue that this information is anyhow misrepresented in the Request for Review.

Instead, the Prosecutor argues that she reasonably addressed the issue and drew her conclusion after considering the totality of the information made available to her (para. 81).

34. The Chamber observes that at paragraph 140 of the Decision Not to Investigate, in addressing the manner of commission of the identified crimes, the Prosecutor does not make any reference to the issue of live fire prior to boarding. Contrary to the Prosecutor's Response, the reference to this matter in a different section of the Decision Not to Investigate does not in itself assure that the matter was properly considered in reaching the relevant conclusions as to the manner of commission of the identified crimes, in particular considering that in this other section the Prosecutor concludes on this point by merely stating that "it is difficult to establish the exact chain of events". Therefore, there may be some merit already in the Comoros' assertion that the Prosecutor, for the purpose of assessing the gravity of the identified crimes, wilfully ignored this information. In the view of the Chamber, 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.

35. As noted above, in her Response the Prosecutor argues that the matter of live fire prior to the boarding was addressed at paragraph 41 of the Decision Not to Investigate, wherein she recognised that "the evidence was highly contested". The Chamber therefore understands that the explanation for the lack of the reference to this issue in the determination of the manner of commission of the identified crimes in the context of the gravity evaluation is to be found in that paragraph, although at no point in the Decision Not to

Investigate did the Prosecutor state so and this explanation has been provided by the Prosecutor, for the first time, in the Response. In any case, if the Prosecutor, as she states in the Response, had indeed set aside the issue of live fire prior to the boarding on the grounds that the “significantly conflicting accounts” make it “difficult to establish the exact chain of events”, such position would be equally erroneous. Indeed, it is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor’s assessment under this provision for her to disregard available information other than when that information is manifestly false. In the present instance, however, there is no indication that the witness statements, the UN Human Rights Council report, or the autopsy reports are manifestly false.

36. Contrary to what is implied by the Prosecutor, the availability of contradicting information should not mean that one version should be preferred over another, but both versions should be properly considered. Even more, if, as stated by the Prosecutor, the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded. For the purpose of her decision under article 53(1) of the Statute, the Prosecutor should have accepted that live fire may have been used prior to the boarding of the *Mavi Marmara*, and drawn the appropriate inferences. This fact is extremely serious and particularly relevant to the matter under consideration, as it may reasonably suggest that there was, on the part of the IDF forces who carried out the identified crimes, a prior intention to attack and possibly kill passengers on board the *Mavi Marmara*. Thus, the Chamber concludes that the Prosecutor erred in her assessment of the facts.

b) Cruel and abusive treatment of detained passengers in Israel

37. The Comoros submit that the Prosecutor ignored “an extensive body of evidence of cruel and abusive treatment of the passengers once they arrived in Israel”, with the untenable explanation that these facts occurred off the vessels over which the Court has jurisdiction (Request for Review, para. 118). The Prosecutor, in her Response, does not insist that she cannot take into account these facts, and goes as far as stating that the “information suggesting further mistreatment of some detainees once they arrived in Israeli territory is concerning” but that it “appears to concern a variety of Israeli personnel in a variety of locations and does not seem to relate especially to the IDF troops who boarded the Three Vessels, or persons in those troops’ chain of command” (para. 88).

38. In the view of the Chamber, the Prosecutor’s conclusion on this point is, at the present stage, unreasonable. Without an investigation proving the contrary, and on the basis of the limited information available to the Prosecutor, it is incorrect for her to conclude that the systematic abuse of detained passengers from the *Mavi Marmara* (which she recognises, but merely finds “concerning”) fits into the theory that the identified crimes occurred as individual excesses of IDF soldiers who boarded the *Mavi Marmara*. Rather, such 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. Thus, the Chamber concludes that the Prosecutor erred in the determination of facts under article 53(1) of the Statute.

c) "Unnecessarily" cruel treatment of passengers during the taking of the Mavi Marmara and attempts to conceal the crimes

39. The Comoros complain that the Prosecutor "discounts [...] extensive other evidence consistent with the targeting of civilian passengers and singling them out for unnecessarily cruel treatment" (Request for Review, para. 106). Specifically, the Comoros argue that the evidence shows that persons were 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. The Comoros also point out as relevant the fact that "the Israeli forces sought to conceal their crimes by confiscating all recordings of their actions" (para. 123).

40. The Chamber observes that the Prosecutor did not ignore the apparent brutality of the commission of the crimes. Indeed, the Decision Not to Investigate acknowledges that "the means and extent of force used by the IDF forces against the passengers on board the vessel appears to have been excessive in a number of instances" (para. 140). However, the Prosecutor argues, in her Response, that the Comoros' argument "presuppose that the Identified Crimes could only have been committed pursuant to a pre-existing plan, and therefore that all the evidence of criminality is also evidence of a plan" (paras 85-86).

41. Contrary to the Prosecutor's apparent submission, the question, in the present context, is not whether the apparent cruelty is compatible with the interpretation implied by the Prosecutor (excess of the individual IDF soldiers) or with the interpretation rejected by the Prosecutor and insisted on by the Comoros (action resulting from a deliberate plan). In the view of the Chamber, it is compatible with both, as is the information that the IDF forces who carried out the identified crimes attempted to conceal the crimes. Thus, the Prosecutor erred in not recognising one of the reasonable alternative

explanations of the available information, on the absence of which she then relied in concluding that the gravity requirement was not met.

d) Absence of crimes on the other vessels of the flotilla

42. The Comoros argue that contrary to the conclusion of the Prosecutor in the Decision Not to Investigate, abuse of passengers occurred not only on the *Mavi Marmara* but also on other vessels of the flotilla (paras 121-122). The argument that the commission of serious crimes was confined to one vessel, out of seven, of the flotilla was relied upon by the Prosecutor in the Decision Not to Investigate as supporting her conclusion that the identified crimes were not systematic or resulted from a deliberate plan (para. 140).

43. On the basis of the presentation of the relevant facts in the Decision Not to Investigate, the Chamber understands that while there is indication that some force was used against the persons also aboard the other vessels of the flotilla, the events aboard the *Mavi Marmara* were indeed unique. However, contrary to the Prosecutor's argument in the Decision Not to Investigate, it does not necessarily follow that this is a factor militating against the conclusion that the identified crimes occurred pursuant to a plan. Only an investigation would provide the necessary information to determine whether any other reasonable explanation exists. In fact, the *Mavi Marmara* differed greatly from the other vessels of the flotilla in that it carried at least 546 activists, *i.e.* approximately 80 % of the people of the entire flotilla, including "activists" allegedly linked to the Hamas according to some accounts (Decision Not to Investigate, para. 122), and did not carry humanitarian supplies (Decision Not to Investigate, paras 116, 138). Even if both the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia* "clearly and intentionally refused to stop" (see Decision Not to Investigate, para. 94), the level of violence used by the IDF against the *Mavi Marmara* and its passengers was significantly higher

and qualified as totally unnecessary and incredible (Decision Not to Investigate, paras 78 and 108). It is reasonable to consider these circumstances as possibly explaining that the *Mavi Marmara* was treated by the IDF differently from the other vessels of the flotilla from the outset. 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. Therefore, the Prosecutor erred in her assessment.

e) Conclusion

44. It follows from the above that the Prosecutor's analysis of the manner of commission of the identified crimes is affected by the following errors of fact:

- the Prosecutor did not correctly assess the information that live fire was used by the IDF prior to the boarding of the *Mavi Marmara*;
- the Prosecutor unreasonably failed to consider that the fact that the detained passengers suffered cruel and abusive treatment in Israel reasonably suggests that the identified crimes may not have occurred as individual excesses of IDF soldiers;
- the Prosecutor unreasonably failed to recognise the fact that the unnecessarily cruel treatment of passengers on the *Mavi Marmara*, the attempts of the perpetrators of the identified crimes to conceal the crimes, and the fact that the events did not unfold on other vessels in the flotilla in the same way as they did on the *Mavi Marmara*, are not incompatible with the hypothesis that the identified crimes were planned.

45. In the view of the Chamber, these errors are such that they make unsustainable the conclusion of the Prosecutor with respect to the manner of commission of the identified crimes, in particular with respect to the question whether the identified crimes were “systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians” – argument that was ultimately considered by the Prosecutor as an indicator of insufficient gravity of the potential case(s).

v. Impact of the crimes

46. In the Decision Not to Investigate, the Prosecutor considered the impact of the identified crimes as a factor militating against the conclusion that the potential case would be of sufficient gravity (para. 142). The underlying consideration was that the identified crimes, while having “a significant impact on victims and their families and other passengers involved”, did not have “a significant impact on the civilian population in Gaza” because “Israel made offers and proposals [...] to permit the humanitarian supplies to be delivered through an alternative route” and because “the supplies carried by the vessels in the flotilla were ultimately later distributed in Gaza” (para. 141). The Comoros challenge this conclusion and submit that “[i]t is arguable that the acts of the IDF on the Flotilla would have sent a clear message to those in Gaza that the occupation of Gaza was in full force and that even if humanitarian aid was to get through to the Gaza, its delivery would be controlled and supervised by the Israeli authorities, and could be stopped at any point” (para. 134).

47. In the view of the Chamber, the conclusion of the Prosecutor is flawed. The Prosecutor failed to consider that, before attempting a determination of the impact of the identified crimes on the lives of the people in Gaza, the significant impact of such crimes on the lives of the victims and their families, which she duly recognised, is, as such, an indicator of sufficient gravity. The

physical, psychological or emotional harm suffered by the direct and indirect victims of the identified crimes must not be undervalued and needs not be complemented by a more general impact of these crimes beyond that suffered by the victims. While considerations with respect to the impact of the crimes beyond the suffering of the victims could be relevant in order to support a finding of sufficient gravity, it is not required that any such impact, let alone one equally “significant”, be discernible such that its absence could be taken into account as outweighing the significant impact of the crimes on the victims and ultimately negating sufficient gravity. The Chamber is therefore of the view 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).

48. In any case, the Chamber is of the view that, in light of the available information, the Prosecutor should have recognised the possibility that the events at issue had an impact going beyond the suffering of the direct and indirect victims. Indeed, as submitted by the Comoros, the commission of the identified crimes on the *Mavi Marmara*, which were highly publicised, would have sent a clear and strong message to the people in Gaza (and beyond) that the blockade of Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities. Also, the international concern caused by the events at issue, which, *inter alia*, resulted in several fact-finding missions, including by the UN Human Rights Council and the UN Secretary General, is somehow at odds with the Prosecutor’s simplistic conclusion that the impact of the identified crimes points towards the insufficient gravity of the potential

case(s) on the mere grounds that the supplies carried by the vessels in the flotilla were ultimately later distributed to the population in Gaza.

IV. Conclusion

49. In the view of the Chamber, the combination of: (i) the Prosecutor's failure to consider that the persons likely to be the object of the investigation into the situation could include those who bear the greatest responsibility for the identified crimes; (ii) the Prosecutor's error as to how the scale of the identified crimes can be taken into account for the assessment of the gravity of the identified crimes; (iii) the Prosecutor's error in correctly appreciating the nature of the identified crimes; (iv) the Prosecutor's error in fact in properly assessing the manner of commission of the identified crimes, in particular with respect to the question whether the identified crimes may have been "systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians"; and (v) the Prosecutor's error in determining the impact of the identified crimes materially affects the validity of the Prosecutor's conclusion that the potential case(s) arising from the situation referred to her by the Comoros would not be of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute.

50. Accordingly, the Chamber requests the Prosecutor to reconsider her decision not to initiate an investigation. Under rule 108 of the Rules, the Prosecutor shall do so as soon as possible. Once she has taken the final decision, she shall notify the Chamber, the Comoros and the victims who have provided observations of her conclusion and of the reasons for it.

51. As a final note, the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the *raison d'être* is to investigate and prosecute international crimes of concern to

the international community, and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the events. The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute.

FOR THESE REASONS, THE CHAMBER,

unanimously,

REJECTS the Comoros' request for leave to reply to the Prosecutor's Response;

REJECTS the Comoros' request to hold an oral hearing, and,

by majority, Judge Péter Kovács dissenting,

REQUESTS the Prosecutor to reconsider the decision not to initiate an investigation into the situation referred to her by the Union of Comoros.

Judge Péter Kovács appends a partly dissenting opinion.

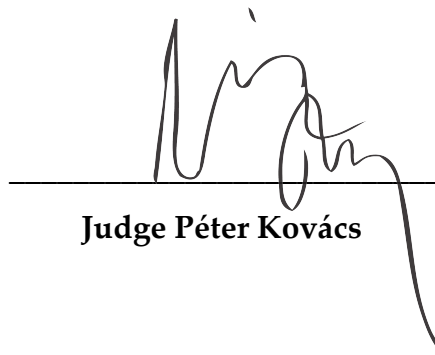
Done in both English and French, the English version being authoritative.

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Judge Joyce Aluoch
Presiding Judge

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Judge Cuno Tarfusser

A handwritten signature in black ink, appearing to read 'Péter Kovács', written above a horizontal line.

Judge Péter Kovács

Dated this 16 July 2015

At The Hague, The Netherlands