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PRE-TRIAL CHAMBER I

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

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

Public Document

Application for Judicial Review by the Government of the Comoros

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

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I. INTRODUCTION: OVERVIEW OF GROUNDS OF REVIEW

1. Counsel for the Government of the Union of the Comoros ('the Comoros'), a State Party to the ICC, submits to Pre-Trial Chamber I this Application for judicial review in respect of the Prosecutor's latest decision on reconsideration of 2 December 2019.¹ This Application is submitted pursuant to Article 53(3)(a) and Rules 107-108, and in accordance with the jurisprudence of the Appeals Chamber, as set out below.²
2. The OTP's decision of 2 December 2019 ('OTP Second Reconsideration Decision') again finds that there is no reasonable basis to proceed with an investigation in the present case, despite the OTP's finding that war crimes that fall within the Court's jurisdiction were committed on three of the Flotilla's vessels on 31 May 2010. The OTP again, without any proper basis, relies on a professed lack of gravity to refuse to open an investigation. The Prosecutor seeks to claim that there is no reasonable basis to proceed with an investigation because no potential case is sufficiently grave to be admissible before the Court.
3. The Comoros submits that in reaching this decision the OTP has not carried out its reconsideration in accordance with the Pre-Trial Chamber's request for reconsideration of 16 July 2015 as specifically instructed by the Appeals Chamber. The Prosecutor has not addressed and corrected the errors identified by the Pre-Trial Chamber, made the same errors again, and made new errors, thus *again* failing to comply with the orders and findings of the Pre-Trial Chamber.
4. In particular, the Prosecutor repeatedly fails to apply the 'reasonable basis to proceed' standard set out in Article 53(1) of the Statute, as interpreted as a matter of law by the Pre-Trial Chamber in its 16 July 2015 decision, in order wrongly to justify her decision not to open an investigation. This is a fundamental error,

¹ Final decision of the Prosecutor concerning the 'Article 53(1) Report' (ICC-01/13-06-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019, ICC-01/13-99-Anx1, 2 December 2019 (*hereinafter* "OTP Second Reconsideration Decision").

² See, See, Part III below.

which the Prosecutor must be ordered to address and correct, together with all of the other errors that the Prosecutor has committed.

5. For all of the reasons set out below, the Government of the Comoros submits that there are compelling and cogent grounds for the Chamber to require the Prosecutor to reconsider her latest decision not to open an investigation. The Comoros respectfully requests that the Chamber direct the Prosecutor to reconsider her decision again in accordance with the Pre-Trial Chamber's decision of 16 July 2015.
6. It is to be regretted that a further Application has had to be filed by the Comoros in this case in light of the OTP's persistent and single-minded failure to comply with the Chamber's findings and orders. As a State Party committed to upholding the foundational principles and obligations of the Rome Statute, the Comoros is duty bound to bring this matter back before the Pre-Trial Chamber in hope that it can be finally resolved, despite the protracted period of these proceedings due to Prosecutor's defiance and intransigence. For this reason, and given the special and unusual circumstances of this case, the Comoros has included in its submission (see Part V) that the Chamber take all appropriate steps, including imposing sanctions, to require the Prosecutor's compliance with the orders of the Court so that there can be finality in the proceedings.

II. PROCEDURAL BACKGROUND

7. The procedural history to this Application is set out below.
8. On 6 November 2014, the OTP issued its Article 53(1) Report finding that there was no reasonable basis to proceed with an investigation.³ Although the Prosecution found that the "information available provides a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed in the context of interception and takeover of the Mavi Marmara by IDF soldiers on 31

³ Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, Annex A - Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014 (*hereinafter* "OTP Article 53(1) Report").

May 2010, including namely: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi)”⁴, the Prosecution took the decision that the “potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute.”⁵

9. On 29 January 2015, the Comoros submitted an Application to the Pre-Trial Chamber asking the Chamber to review the Prosecution’s decision not to open an investigation.⁶ In its Application, the Government of the Comoros asked the Pre-Trial Chamber to direct the Prosecutor to reconsider the decision not to investigate based on several grounds including; first, that the Prosecution incorrectly applied the ‘reasonable basis to believe’ standard, second, that the Prosecution erroneously disregarded relevant pre-conditions and contextual requirements in order to determine whether the acts committed within the jurisdiction of the Court could constitute war crimes of sufficient gravity and therefore be investigated, and third, the Prosecution’s findings regarding the scale, nature, manner of commission and impact of the crimes incorrectly ignored and overlooked critical evidence and factors while placing undue weight on factors supporting a conclusion of insufficient gravity.⁷
10. On 16 July 2015, Pre-Trial Chamber I issued its decision on the Application of the Comoros for review finding that the Prosecution should reconsider its decision not to investigate in light of the specific errors identified.⁸ The Chamber found that the Prosecution’s conclusion on gravity was materially affected by errors including “(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

⁴ OTP Article 53(1) Report, para. 149.

⁵ OTP Article 53(1) Report, para. 150.

⁶ 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, ICC01/13-3-Red, 29 January 2015 (*hereinafter* “Comoros First Judicial Review Application”).

⁷ Comoros First Judicial Review Application, paras. 9-29, 48-135.

⁸ Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, ICC-01/13-34, 16 July 2015 (*hereinafter* “PTC First Decision requesting Reconsideration”).

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.”⁹

11. On 6 November 2015, the Appeals Chamber dismissed the Prosecution’s appeal of the Pre-Trial Chamber’s decision of 16 July 2015 finding that “the Impugned Decision was not one ‘with respect to [...] admissibility’ within the meaning of article 82 (1) (a) of the Statute.”¹⁰ The OTP only appealed directly to the Appeals Chamber without seeking the leave of the Pre-Trial Chamber in the alternative, or at any later time.
12. On 29 November 2017, the Prosecutor issued her first reconsideration decision in which it was concluded that the OTP was not obliged to follow the instructions of the Chamber as to legal standard or address the errors identified. The OTP maintained the same position in regards to there being no reasonable basis to proceed with an investigation, and that therefore the preliminary examination must be closed.¹¹
13. On 23 February 2018, the Government of the Comoros submitted its second application for judicial review, in which the Government requested the Chamber to review the OTP’s First Reconsideration Decision and direct the OTP to reconsider its decision not to investigate again based on grounds including that the OTP; erred in arguing as its first position that the OTP is not required to

⁹ PTC First Decision requesting Reconsideration, para. 49.

¹⁰ Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, ICC-01/13-51, 6 November 2015, para. 66.

¹¹ Final decision of the Prosecution concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA dated 6 November 2014”, ICC-01/13-57-Anx1, 29 November 2017 (*hereinafter* “OTP First Reconsideration Decision”).

address the errors the Chambers found committed in the First OTP Decision; erred throughout in misapplying the ‘reasonable basis’ standard in respect of the factors under Article 17(1)(d) relevant to the gravity assessment; erred by failing to apply its mind to, and address, the errors identified by the Chamber; and committed the same errors again and new errors.¹²

14. On 15 November 2018, Pre-Trial Chamber I issued its decision on the Government’s judicial review application, finding that the Prosecutor is bound to comply with the Chamber’s 16 July 2015 decision which is the basis for the OTP’s reconsideration, and the Chamber retains jurisdiction to review the OTP’s reconsideration until the OTP has genuinely complied with the Chamber’s decision.¹³ On this basis, the Chamber requested that the OTP reconsider again its decision not to investigate.
15. After the Prosecutor’s application for leave to appeal this decision was granted,¹⁴ the Appeals Chamber on 2 September 2019 confirmed the impugned decision of the Pre-Trial Chamber and ordered that the OTP reconsider its decision not to investigate in accordance with the Pre-Trial Chamber’s decision of 16 July 2015.¹⁵ The Appeals Chamber found that the Prosecutor is bound by the Pre-Trial Chamber’s interpretation of the law, but the Prosecutor is not obliged to follow the instructions of the Chamber on issues of factual findings and gravity assessments.
16. Judge Eboe-Osuji issued a partly dissenting opinion to the Judgment,¹⁶ and Judge Luz del Carmen Ibáñez Carranza issued a separate and partly dissenting opinion.¹⁷

¹² Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018 (*hereinafter* “Comoros Second Judicial Review Application”).

¹³ Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, ICC-01/13-68, 15 November 2018 (*hereinafter* “PTC Second Decision requesting Reconsideration”).

¹⁴ Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’’, ICC-01/13-73, 18 January 2019.

¹⁵ Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’’, ICC-01/13-98, 2 September 2019 (*hereinafter* AC Judgment).

¹⁶ Partly Dissenting Opinion of Judge Eboe-Osuji, ICC-01/13-98-Anx, 2 September 2019 (*hereinafter* “Opinion of Judge Eboe-Osuji”).

¹⁷ Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, ICC-01/13-98-Anx1, 4 November 2019 (*hereinafter* “Opinion of Judge Carranza”).

17. On 2 December 2019, the OTP issued its second reconsideration determination in which it maintained its position that the evidence does not support a finding that there is a reasonable basis to believe that there is sufficient gravity for the case to continue before the ICC.¹⁸

III. JURISDICTION TO REQUEST A REVIEW

18. The Appeals Chamber has made clear and confirmed that the Pre-Trial Chamber has the jurisdiction and power to review the OTP's Second Reconsideration Decision of 2 December 2019 at the request of the Government of the Comoros under Article 53(3)(a) and Rule 107 and 108.
19. In addressing the Pre-Trial Chamber's power to review the Prosecution's decision on reconsideration, not to open an investigation, the Appeals Chamber relied on Rule 108(3) of the Rules of Procedure and Evidence which provides that:

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

20. The Appeals Chamber also noted that Article 53(3)(a) provides that a referring State Party may request a review by the Pre-Trial Chamber if the Prosecutor has made a decision under the criteria set out in under Article 53(1), not to proceed with an investigation:

“At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.”¹⁹

21. In its Judgment of 2 September 2019, the Appeals Chamber highlighted that “neither article 53(3)(a) of the Statute nor rule 108(3) of the Rules preclude a pre-

¹⁸ See, OTP Second Reconsideration Decision.

¹⁹ Rome Statute, Art. 53(3)(a).

trial chamber from reviewing whether a decision of the Prosecutor that she considers to be ‘final’ pursuant to rule 108(3) of the Rules actually amounts to a proper final decision.”²⁰ Instead the Appeals Chamber found that “a ‘request’ by the pre-trial chamber under article 53(3)(a) of the Statute is a judicial decision, which by its very nature, imbues the pre-trial chamber with power to once again review the Prosecutor’s decision following reconsideration.”²¹ The Chamber is thus empowered to review the Prosecutor’s decisions on reconsideration until the Prosecutor has genuinely conducted her reconsideration in accordance with the Pre-Trial Chamber’s decision.

22. Indeed, the Appeals Chamber highlighted the inherent problem with the Prosecutor’s assertion that “the Pre-Trial Chamber lacked the power under article 53(3)(a) of the Statute and rule 108(3) of the Rules to ‘set aside’ her ‘final’ decision and require her to further consider her initial decision”,²² when it stated that “if the pre-trial chamber lacked such power, the Prosecutor could simply decide to ignore the basis for the pre-trial chamber’s request for reconsideration” and could “negate the effectiveness of the procedure under article 53(3)(a) of the Statute as a whole.”²³
23. As for the scope of the Pre-Trial Chamber’s review, the majority of the Appeals Chamber – with Judge Eboe-Osuji and Judge Ibáñez dissenting – decided that the Pre-Trial Chambers review is “limited to establishing whether the Prosecutor carried out the reconsideration in accordance with the pre-trial chamber’s request for reconsideration.”²⁴
24. The Appeals Chamber clarified that due to the “judicial nature” of the Pre-Trial Chamber’s request for reconsideration to the Prosecutor, the Chamber has the “power to review the Prosecutor’s decision following a request for reconsideration”, prompted by the State making a referral,²⁵ if it is asserted that the Prosecutor failed to carry out her reconsideration in accordance with the

²⁰ AC Judgment, para. 59.

²¹ AC Judgment, paras. 60, 61.

²² AC Judgment, para. 59.

²³ AC Judgment, para. 61.

²⁴ AC Judgment, paras. 60, 61.

²⁵ See, AC Judgment, paras. 57-61.

findings and instructions within the Pre-Trial Chamber's decision requesting reconsideration.

25. The present Application is thus perfectly permissible and the Pre-Trial Chamber is authorised to consider and adjudicate it.

IV. GROUNDS OF REVIEW

26. The OTP Second Reconsideration Decision commits several fundamental errors that demonstrate that the Prosecution has not carried out the reconsideration in accordance with the Pre-Trial Chamber's request for reconsideration of 16 July 2015. The clear and identifiable errors set out below show that the Prosecution has not genuinely addressed and corrected the errors identified by the Chamber, has made the same errors again, and made new errors in contravention of the Pre-Trial Chamber's decision.

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

27. It is submitted that the Prosecution has continued not to apply the 'reasonable basis to proceed' standard set out in Article 53(1) of the Statute, as directed as a matter of law by the Pre-Trial Chamber, when it maintained its position not to open an investigation in its Second Reconsideration Decision of 2 December 2019.
28. Article 53(1) of the Statute defines this legal standard in providing that the "*Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.*"²⁶ Therefore, the Prosecutor must open an investigation unless there is no reasonable basis to proceed. It is plainly not necessary to show beyond a reasonable doubt that there is a basis to open an investigation. The Prosecutor has repeatedly committed the error of applying a legal standard to the available evidence which is much higher than

²⁶ Rome Statute, Article 53(1) (emphasis added).

what both the Statute and the Pre-Trial Chamber have confirmed is required at this early stage of the proceedings.

29. In its First Decision requesting Reconsideration of 16 July 2015, the Pre-Trial Chamber underlined the “low evidentiary standard of article 53(1)(a) of the Statute” which “*does not necessitate any complex or detailed process of analysis.*”²⁷ In the Preliminary Examination phase of proceedings, the Prosecutor does not have to prove the gravity of the crimes to the exclusion of all possible other inferences (potentially consistent with the gravity threshold not being met) in order to open an investigation. As the Pre-Trial Chamber held: “[i]n 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.”²⁸ The Chamber clearly explained that the “purpose of an investigation is to provide clarity” and therefore, the Prosecutor would be “creat[ing] a short circuit and depriv[ing] the exercise of any purpose”, if the Prosecutor were to “*mak[e] the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal or not contradictory.*”²⁹ To require such clarity at the present early stage would be to judge the evidence at a higher standard than necessary, and indeed to pre-judge it prematurely.
30. On this basis, the Chamber found that the legal standard means that “[*f*]acts 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.”³⁰ Precisely because of the early stage of the proceedings, the Prosecutor should not take any one factor into consideration in isolation, even if there is conflicting evidence, whereby one view or version of the evidence is disregarded and assigned no weight in preference to an alternative version. To do so would be a rush to judgment and

²⁷ PTC First Decision requesting Reconsideration, para. 14.

²⁸ PTC First Decision requesting Reconsideration, para. 13.

²⁹ PTC First Decision requesting Reconsideration, para. 13.

³⁰ PTC First Decision requesting Reconsideration, para. 13.

would be premature at a stage when varying accounts are to be expected until an investigation can be commenced to provide clarity.

31. In short, it would be unreasonable for a prosecutor to make overly firm conclusions on which version of events to accept at this stage, when the evidence should be taken as a whole to assess whether it possesses any factors relevant to gravity which would support a reasonable basis to proceed; even if the evidence also brings contrary and contradicting views to those which may be consistent with insufficient gravity. The low evidentiary threshold at this stage of the proceedings means that it is only if the Prosecutor has insufficient evidence supporting a reasonable basis to proceed, that an investigation should not be initiated. The Prosecutor is clearly not required to prove beyond reasonable doubt (to the exclusion of all other inferences and conclusions) that the alleged crimes are sufficiently grave.

32. It is this legal standard that should have been applied by the Prosecutor in assessing the available evidence in order to comply with the Pre-Trial Chamber's decision of 16 July 2015. Instead, the Prosecutor has again acted in error by assessing the evidence in respect of gravity under a higher standard akin to the legal standard of 'beyond reasonable doubt'. This error of law (as applied to the facts) demonstrates that the Prosecutor has not properly and genuinely reconsidered her decision not to investigate in accordance with the findings and rulings of the Chamber's First Decision requesting Reconsideration of 16 July 2017.

33. Throughout the OTP Second Reconsideration Decision of 2 December 2019 the OTP has paid lip service to the Chamber's interpretation of the law and continued to commit the same error. It is evident that the Prosecutor has made premature conclusions and assigned weight, or failed to assign any weight, to evidence relevant to gravity when no conclusions should have been made at this stage until after an actual investigation. The Prosecutor has erred by finding that there is no reasonable basis to proceed when there is clearly sufficient evidence consistent with the alleged crimes being grave enough to warrant investigation (even if there may be some evidence that could potentially raise some doubts).

34. For example, in respect of evidence that the IDF sought to confiscate electronic media, and interfered with and removed the vessel's CCTV, the Prosecutor referred to two plausible explanations for these actions in order prematurely to justify assigning less weight to this evidence in the gravity assessment. The Prosecutor acknowledged that the evidence is "relevant in considering the existence of a plan or policy" as one plausible explanation, but "equally consistent" with covering up spontaneous criminal acts.³¹ The Prosecutor reasoned that the actions of the IDF could be explained as covering up its own spontaneous criminal acts during the operation, which would not indicate pre-planning. She clearly jumped to a conclusion on the evidence, and took a particular view to justify insufficient gravity when there is a perfectly plausible explanation that shows a reasonable basis to believe that the gravity threshold has been met.³² The Prosecutor clearly erred in misapplying the correct legal standard by finding that no weight can be assigned to this evidence and accordingly that it is irrelevant to the gravity assessment.³³
35. Similarly, the Prosecutor's approach to the evidence of live fire from the helicopters prior to the boarding of the Mavi Marmara falls foul of the same error. On its face, the Prosecutor appears to follow the Pre-Trial Chamber's interpretation of the legal standard by hesitantly acknowledging "for the purpose of the gravity analysis" 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" to board the Mavi Marmara, and that this "*may* have been carried out pursuant to a plan or policy."³⁴ However, the Prosecutor then goes on to rely on the purported conflicting accounts about this evidence to lower the weight to be assigned to this evidence in the gravity analysis. This finding blatantly misapplies the correct legal standard as established by the Chamber in its original decision. The Prosecutor even tries to undermine this evidence by making specific conclusions about it: "even if the conflicting accounts may not negate the existence of a plan or policy altogether, for the current purposes, they

³¹ OTP Second Reconsideration Decision, para. 87.

³² OTP Second Reconsideration Decision, para. 87, footnote 141.

³³ See, OTP Second Reconsideration Decision, para. 85.

³⁴ OTP Second Reconsideration Decision, para. 63.

necessarily suggest that its scope was, to some degree, confined.”³⁵ As the Chamber previously found, such conclusions are premature and unwarranted.

36. The Chamber’s clear guidance was that the low standard of review at this stage of the proceedings “does not necessitate any complex or detailed process of analysis” and that there is a presumption towards opening an investigation to provide clarity.³⁶ The Prosecutor has clearly failed to apply the correct legal standard as interpreted by the Chamber in its 16 July 2015 decision, and therefore continues to commit an error of law (as applied to the available evidence) which must be corrected.

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

37. In the Pre-Trial Chamber’s First Decision requesting Reconsideration of 16 July 2015, the Chamber held that it was “*of the view that the Prosecutor erred [...] 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.*”³⁷ The Chamber specifically found that the Prosecutor was mistakenly focusing on whether there was sufficient evidence at the time she issued her Article 53(3) Report – in November 2014 – to form a reasonable basis to believe that senior IDF commanders and Israeli leaders were responsible as potential perpetrators, and not the real question at issue. The Chamber emphasised that what the Prosecutor should have been determining “*relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration.*”³⁸
38. In other words, the error that the Pre-Trial Chamber identified was that the Prosecutor was in effect placing the onus on the Comoros to establish with evidence who was most responsible, when the question was simply whether the Prosecutor was capable of investigating and prosecuting those most responsible

³⁵ OTP Second Reconsideration Decision, para. 69.

³⁶ PTC First Decision requesting Reconsideration, para. 13.

³⁷ PTC First Decision requesting Reconsideration, para. 23.

³⁸ PTC First Decision requesting Reconsideration, para. 23.

once an investigation was initiated. The Prosecutor wrongly focused only on what evidence the Comoros had provided up to the date the Article 53(3) Report was issued, and whether this evidence was capable of indicating that individuals at a senior enough level were most responsible, in order to aggravate the seriousness of the potential cases.

39. The Pre-Trial Chamber held that the Prosecutor should not have been considering only what evidence the Comoros provided, but what the Prosecutor was capable of investigating and discovering once an investigation was initiated. The Pre-Trial Chamber found that because the Prosecutor had not considered what conclusion it might be able to make about potential perpetrators if it were to open a full investigation, it had committed an error which had to be corrected. This error “*affected the determination of gravity of the potential case(s) arising out of the situation*” because there was no reason “*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.*”³⁹
40. The Prosecution did not correct this error in its First Reconsideration Decision of 29 November 2017, and it committed the same error again in its Second Reconsideration Decision of 2 December 2019. The Prosecutor continued to hold that in her view, the analysis is “fact-sensitive.”⁴⁰ She maintained that she “does not concur that the information made available by November 2014 disclosed a reasonable basis” to conclude that senior IDF commanders and Israeli leaders were potentially responsible for the identified crimes.⁴¹ This finding is erroneous because it fails to comply with the Pre-Trial Chamber’s decision.
41. The Prosecutor wrongly fixated on “*what information was made available by November 2014*” and whether only this information “*disclosed a reasonable basis for ... a conclusion*” about the potential responsibility of senior IDF commanders and Israeli leaders.⁴² The Prosecution has used only the information it had up until November 2014 to determine that “*the potential perpetrators of*

³⁹ PTC First Decision requesting Reconsideration, para. 24.

⁴⁰ OTP Second Reconsideration Decision, para. 21.

⁴¹ OTP Second Reconsideration Decision, para. 28.

⁴² See, for example, OTP Second Reconsideration Decision, para. 28.

*the Identified Crimes were among those who carried out the boarding of the Mavi Marmara, and subsequent operations aboard, but not necessarily other persons further up the chain of command.*⁴³

42. By creating an arbitrary disclosure deadline for any evidence of potential perpetrators, the Prosecutor has incorrectly decided that because she believes the evidence available up to November 2014 only points to physical perpetrators, and not to perpetrators further up the chain of command, the ‘object of any potential investigation’ would only *“likely be focused upon the physical perpetrators, as the persons appearing to bear the greatest responsibility in the potential case(s).”*⁴⁴ By limiting the scope of who might be most responsible to only the physical perpetrators, the Prosecutor has herself created a situation whereby she does not need to consider whether the her office might be capable of finding information during an investigation which points to individuals in the chain of the command as being most responsible. The Prosecution has wrongly pre-set the ‘object of its investigation’ as only physical perpetrators who are most responsible for the crimes.
43. The Prosecutor has also deliberately excluded any information provided by the Comoros after November 2014. This evidence demonstrates that the entire operation was carefully planned and directed by several ministries and the top echelons of the IDF. This evidence comes, in particular, by way of testimony before the Turkel Commission from several senior IDF and Government officials, including the testimony of the then Minister of Defence, Ehud Barak, and the Prime Minister, Benjamin Netanyahu.⁴⁵
44. Had the Prosecution acknowledged this information, and that it would be taken into account during a full investigation, then it could not have limited the ‘object of its investigation’ only to physical perpetrators. It would have had to be

⁴³ See, OTP Second Reconsideration Decision, para. 22; OTP First Reconsideration Decision, para. 167.

⁴⁴ OTP Second Reconsideration Decision, paras. 22-24.

⁴⁵ See, The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010. Submitted to Prosecution with Letter to Prosecution of 28 January 2016; The Public Commission to Examine the Maritime Event of the 31st of May 2010, Meeting number 2 of the 9th of August 2010.

accepted that the Prosecutor is capable of investigating those individuals at the highest levels of the chain of command as being the most responsible for the crimes under consideration.

45. By accepting that the OTP is capable of investigating senior officials and leaders as potential perpetrators would certainly have increased the severity of the potential cases. By failing to follow the Pre-Trial Chamber's instructions in its First Decision requesting Reconsideration, the Prosecutor again committed an error which "*affected the determination of gravity of the potential case(s) arising out of the situation.*"⁴⁶

3. The Prosecutor erred in assessing the scale of the crimes

46. The Chamber's First Decision requesting Reconsideration of 16 July 2015 found that the Prosecutor erred by not addressing the factors relevant to gravity concerning the scale of the crimes.⁴⁷ The Chamber held that "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment" are relevant to the scale of the crimes and "are a compelling indicator of sufficient, and not of insufficient gravity."⁴⁸ The Chamber therefore found that the OTP committed a "material error" by failing reasonably to take account of factors "militating in favour of sufficient gravity."⁴⁹
47. In its Second Reconsideration Decision of 2 December 2019, the Prosecutor submits that "there is clearly no dispute that the victims of the identified crimes" amounted to "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity" and that therefore the Prosecutor's "appreciation of the scale of the identified crimes conforms to the direction of the majority."⁵⁰
48. However, the Prosecution notably omits that the Pre-Trial Chamber also highlighted evidence of "*torture or inhuman treatment*" in addition to the other

⁴⁶ PTC First Decision requesting Reconsideration, para. 24.

⁴⁷ PTC First Decision requesting Reconsideration, paras. 21, 25-26.

⁴⁸ PTC First Decision requesting Reconsideration, para. 26.

⁴⁹ PTC First Decision requesting Reconsideration, para. 26.

⁵⁰ OTP Second Reconsideration Decision, paras. 30-31.

crimes listed, which is also highly relevant to the scale of the crimes.⁵¹ This omission is most important as the Prosecutor has consistently maintained that the available evidence of abuse and mistreatment of the passengers shows that there is a reasonable basis to believe that the crime of outrages upon personal dignity were committed, but “does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment.”⁵² Once again, this is a premature and ill-informed conclusion that has been made on the evidence (conveniently to match the decision on gravity that the OTP has adopted) contrary to the correct legal standard identified by the Chamber. Evidence which would elevate the level of severity of the pain and suffering inflicted to that of torture or inhuman treatment (as clearly exists in the present case) would certainly have the effect of raising the severity of the crimes and gravity of the situation.

49. Yet, the Prosecutor asserts in her Second Reconsideration Decision that in accordance with the Appeals Chamber’s Judgment of 2 September 2019, the “Pre-Trial Chamber may not direct the Prosecutor on the question of the weight given” to the evidence concerning the scale of the crimes.⁵³ To be clear, the Appeals Chamber found 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”, but the Chamber cannot “direct the Prosecutor as to how to assess this information and which factual findings she should reach.”⁵⁴ The Prosecutor has misapplied and distorted the reasoning of the Appeals Chamber. The Appeals Chamber never held that the OTP can ignore the key factors which the Pre-Trial Chamber identified, or merely decide that no weight need be given to the evidence consistent with gravity because there may be other possible interpretations. This amounts to an abuse of the Appeals Chamber’s decision. It is disingenuous for the OTP to argue that because it has the discretion to assign weight it can just assign no weight to any evidence that shows gravity if it chooses to do so. This fundamentally undermines the very point of judicial review proceedings in which

⁵¹ PTC First Decision requesting Reconsideration, para. 26.

⁵² Article 53(1) Report, para. 139.

⁵³ OTP Second Reconsideration Decision, para. 32.

⁵⁴ AC Judgment, para. 80.

the Chamber is clearly authorised to identify errors which the Prosecutor is obliged to address and correct.

50. The Pre-Trial Chamber clearly directed the Prosecutor to take into account evidence of torture or inhuman treatment as being relevant to the scale of the crimes and thus to the gravity requirement. The Prosecutor has in effect completely ignored this direction in violation of the Chamber's 16 July 2015 decision. The Prosecutor has therefore not corrected the error identified by the Chamber, and should be again directed to do so.
51. The Prosecutor has committed a further, and new, error in its assessment of the scale of the crimes. The Prosecutor wrongly claims that "in light of its observations on the likely objects of any investigation or prosecution, that it is not necessarily true that *any* potential case arising from this situation will encompass *all* the victimization which has been identified in the situation as a whole."⁵⁵ This amounts to another duplicitous attempt to downgrade the seriousness of the case prematurely in violation of the Pre-trial Chamber's decision.
52. The Prosecutor is trying to suggest that one individual physical perpetrator could not have encompassed *all* the victimisation that has been identified in the situation, in the same way that an individual with command responsibility over these physical perpetrators could have done so. Yet, as set out above, the OTP clearly has the ability to investigate the persons in command of the operation who ordered and supervised it, and not just the individual perpetrators who boarded the Flotilla.
53. The OTP's analysis of the scale of the potential cases in this manner is manifestly unreasonable as it artificially segregates the various crimes so as to try to dilute the scale of all the crimes between individual direct perpetrators, instead of rightly considering them as a whole. No reasonable prosecutor would assess the scale of the crimes in this way. It is a perverse finding which should be rejected

⁵⁵ OTP Second Reconsideration Decision, para. 34.

by the Chamber. The Prosecutor should be ordered to correct this error. Not only does the Pre-Trial Chamber's First Decision requesting Reconsideration indicate that all the identified crimes should be considered as a whole, but the Prosecutor's own policy of Preliminary Examinations makes clear that both the quantitative and qualitative factors relevant to the scale of the crimes should be assessed together:

“The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).”⁵⁶

54. In any event, cases before the ICC can have multiple accused to cover the full spectrum of the alleged unlawful conduct. The Prosecutor is completely wrong to claim that one potential physical perpetrator might not encompass all the victimisation in the situation in order to diminish the potential scale of the crimes. The Prosecutor's proclivity to only rely on the potential outcomes which diminish the gravity of the situation, and not the potential outcomes increasing gravity, highlight that Prosecutor's findings are demonstrably unreasonable and in error.
55. In this regard the Comoros also notes the OTP's definitive determination that the victims on the Mavi Marmara were not “humanitarian assistance workers within the meaning of article 8(2)(b)(iii) of the Statute” because, in the view of the Prosecutor, the mission was politicised and not neutral. The Prosecutor erroneously uses this conclusion to seek to address the Pre-Trial Chamber's finding that the crimes committed in the present situation “exceed[] the number of casualties in actual cases” before the Court,⁵⁷ and to try to distinguish this situation from the cases of *Abu Garda* and *Banda*.⁵⁸

⁵⁶ OTP, Policy Paper of Preliminary Examinations, November 2013, para. 62.

⁵⁷ PTC First Decision requesting Reconsideration, para. 26.

⁵⁸ OTP Second Reconsideration Decision, para. 36.

56. Whether or not the passengers can be considered humanitarian workers within the meaning of article 8(2)(b)(iii), it is indisputable that the passengers were unarmed, civilian passengers⁵⁹ who viewed themselves as human rights campaigners. The fact that the aim of the Flotilla was to advocate for human rights, plainly should not mean that the qualitative weight of the deaths and injuries of the passengers should be considered to be any less. In fact, the unlawful killing and injuring of unarmed civilians advocating for human rights should have led the Prosecutor to recognise that the victimisation in the present situation covers not only the passengers on the ship, but other human rights campaigners who would feel threatened and silenced by the crimes committed – a conclusion that would surely heighten the gravity of the situation. It is a very similar analysis that the Prosecutor applied in the *Abu Garda* and *Banda* cases to find sufficient gravity,⁶⁰ and which should rightly and consistently be applied to the present situation as well.

57. For all these reasons, the Comoros submits that the Prosecutor has erred by failing to correct the errors identified by the Chamber concerning the scale of the identified crimes, and has committed new errors which materially affect the Prosecutor's assessment of gravity, which she should be directed to correct.

4. The Prosecutor erred in assessing the nature of the crimes

58. As noted above, the Prosecutor has patently ignored the Chamber's legal interpretation of the 'reasonable basis to proceed' standard in respect of the evidence of torture and inhuman treatment, and has therefore erred by disregarding evidence of the nature of the crimes for the purpose of the gravity analysis.

59. In its First Decision requesting Reconsideration, the Pre-Trial Chamber found that the Prosecutor's exclusion of evidence on the mistreatment of passengers included evidence of: *“overly tight handcuffing for extended periods, beating, denial of access to toilet facilities, denial of medication (such as for diabetes,*

⁵⁹ See, Article 53(1) Report, para. 49.

⁶⁰ See, for example, OTP Second Reconsideration Decision, paras. 35-36.

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.”⁶¹

60. The Chamber found that excluding this evidence from the assessment of the severity of the pain and suffering inflicted for the purpose of determining whether the nature of the crimes could be considered to be torture or inhuman treatment was “surprisingly premature,”⁶² and stated that “*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.*”⁶³

61. The Prosecutor tried to justify her position by reference to the Appeals Chamber’s Judgment which noted that the Pre-Trial Chamber “directed the Prosecutor as to what factual findings she should reach and what weight she should assign the certain factors in her gravity assessment.”⁶⁴ The Appeals Chamber stated that the “Prosecutor is not bound by these determinations of the Pre-Trial Chamber”⁶⁵ – specifically in regards to the Pre-Trial Chamber’s determination about what factual findings should be made.⁶⁶ The Prosecutor therefore claims that “no weight necessarily attaches to the possibility that the conduct identified as outrages upon person dignity could potentially be characterised” as more severe conduct such as inhuman treatment or torture.⁶⁷ This finding is fundamentally flawed. The Prosecutor has erroneously misapplied the Appeals Chamber’s Judgment. It does not extinguish the OTP’s duty to apply the Pre-Trial Chamber’s legal interpretation of the ‘reasonable

⁶¹ PTC First Decision requesting Reconsideration, para. 29.

⁶² PTC First Decision requesting Reconsideration, para. 30.

⁶³ PTC First Decision requesting Reconsideration, para. 30.

⁶⁴ AC Judgment, paras. 91, 92.

⁶⁵ AC Judgment, para. 94.

⁶⁶ AC Judgment, para. 92.

⁶⁷ OTP Second Reconsideration Decision, para. 42.

basis to proceed' standard. The Prosecutor is bound to apply the Chamber's interpretation of the reasonable basis standard to all evidence and in its gravity assessment.

62. The OTP has thus erred in deciding that for the purpose of assigning weight to the 'nature' of the crimes in the gravity analysis, it "only accords neutral significance to the *legal* characterisation of the identified conduct, but gives weight instead to the *factual* nature of the identified conduct."⁶⁸
63. Had the Prosecutor properly followed the Chamber's legal interpretation it would have acknowledged that "[i]n the presence of several plausible explanations of the available information," – namely that the evidence of the treatment of the passengers could plausibly have been characterised as torture, inhumane treatment and outrages upon person dignity – "the presumption of article 53(1), ... is that the Prosecutor investigates in order to be able to properly assess the relevant facts."⁶⁹ To make a determination of excluding certain information at this early stage would, indeed, be prematurely judging the issue, as it would necessitate complex or detailed analysis more suitable for an investigation.⁷⁰
64. It is also plainly wrong for the Prosecutor to ignore the fact that the legal characterisation of the evidence would have a substantial effect on the question of gravity. It is beyond doubt that on the facts in the present case the crime of torture is more serious than the crime of outrages upon personal dignity. Yet the Prosecutor has again refused in error to engage with any assessment which might lead to the conclusion that the crimes should be characterised as torture or inhumane treatment.
65. No reasonable prosecutor would consistently evade addressing the severity of the pain and suffering endured by the victims as a result of the identified crimes, and refuse to examine this factor in detail during an investigation. The Prosecutor therefore has continued to commit the same error by failing to apply the

⁶⁸ OTP Second Reconsideration Decision, para. 43.

⁶⁹ PTC First Decision requesting Reconsideration, para. 30.

⁷⁰ PTC First Decision requesting Reconsideration, para. 30.

reasonable basis standard in accordance with the Pre-Trial Chamber's decision of 16 July 2015 to the available evidence concerned the alleged torture of passengers.

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

66. In the First Decision requesting Reconsideration, the Chamber found that the Prosecutor committed an error when she failed to consider “the significant impact of such crimes on the lives of the victims and their families.”⁷¹ The Chamber found that the Prosecutor had committed an error by disregarding this evidence, and instructed the Prosecutor to take this factor into account in her assessment of gravity.
67. In response the Prosecution in its Reconsideration Decision of 2 December 2019 merely relies on the Appeals Chamber's Judgment which noted in general that “the Prosecutor enjoys a margin of appreciation, which the pre-trial chamber has to respect when reviewing the Prosecutor's decision.”⁷² The Prosecutor provides no further indication of its assessment of the impact of the crimes on the lives of the victims and families, beyond just saying that it has been considered.⁷³
68. The Comoros submits that the Prosecutor is wrong to take the Appeals Chambers determination that it has a ‘margin of appreciation’ to mean that it need not provide any reasons or explanation in respect of its assessment. The Appeals Chamber found that the Prosecutor must be granted a ‘margin’ of appreciation, not absolute, unfettered and unquestionable appreciation. The Prosecutor has abused this ‘margin’ by claiming that it need not actually address the errors identified by the Chamber. By providing no reasons for its general statement that the impact on the victims and their family has been considered, the Prosecutor is effectively ignoring the countless victim statements and evidence provided to the OTP that address this exact point. The Prosecutor was provided with numerous victim statements, which included submissions from the victims on the physical

⁷¹ PTC First Decision requesting Reconsideration, para. 47.

⁷² AC Judgment, para. 81.

⁷³ OTP Second Reconsideration Decision, para. 50, 89. See, AC Judgment, para. 77.

and psychological impact of the attack on both themselves and their families, before the Prosecutor's Article 53(1) Report was issued in November 2014. In addition, after the Prosecutor was asked to reconsider her decision on 16 July 2015, the OTP was provided with the victim applications and accompanying statements of every victim approved to participate in the proceedings, numbering almost 400 victims. Each victim application specifically addressed the physical and psychological impact of the attack on the victims. The following examples provide a sample of what victims have stated about the serious long-term psychological impact of the attack on them and their families:

- *“During the attack I was scared for my life. It appeared to be a very aggressive and violent attack and I witnessed people dead, dying and many, many injured. I have not had an experience like this before where people I know have been injured by deliberate violence. I was stunned and shocked emotionally. The scale of the violence was great and I felt powerless to help so many injured people who appeared in such a short space of time. I was also fearful for my friends who I could not find thinking that they were dead. We were taken prisoner and lost our belongings and dignity during and after the attack. ...Since I returned [home] I have not returned to full-time work ... I have not been able to return to this as I felt like a different person. I experience anxiety if I have pressure or feel confined.”⁷⁴*
- *“Because of the shot my mouth were demolished and I lost seven teeth. I had four surgeries. I've witnessed how Furkan Dogan were killed. Ali Haydar Bengi, Abdulhamit Kahraman and Ahmet Bekar were shoot next to me. Muhlis Turan and Ahmet Bekar were eyewitnesses when I was shot. Because of all this what happened my family and I have psychological problems. There was a intentionally target when the soldier shoot at my head.”⁷⁵*
- *“I am still receiving psychological treatment due to the trauma that I suffered ... Due to the attacks in Israel and the torture I was subjected to I still live with the fear of death. With every sudden movement – such as screaming or a hand gesture – I become panicked and can't breathe.”⁷⁶*
- *“The horror that we faced on the ship from the start of the attack to the whole horrific experience cannot be described in simple words because we have seen hell, and we do not wish to any charity activists*

⁷⁴ Victim Application of a/40006/13.

⁷⁵ Victim Application of a/05045/14.

⁷⁶ Victim Application of a/40001/13.

to take that experience, it was very shocking, I still have nightmares about it and it is really stressing.”⁷⁷

- *“I still have nightmares of what had happened to me and what I saw on the ship has caused me severe memories of the dead that I saw and it affects me from time-to-time when I think about it. It has made me incredibly paranoid and I have trouble getting on board any board or ship since the incident and am terrified to go out to se[a] again.”⁷⁸*
- *“I have spoken to many who are not coping, and it saddens me that so many people are really suffering from disturbed sleep or increased anxiety and even aggression.”⁷⁹*
- *“I could not work because of psychological problems for long time. I could not inform my family for 3 days, they think that I have been killed. My wife, my children, my dad and my mother have been affected very badly. After 3 years when we talk about this incident they are crying.”⁸⁰*

69. No reasonable prosecutor would continue as though this information did not exist. It is indisputable that the physical, psychological and emotional harm to the direct and indirect victims, and their families, was substantial. It has been disregarded by the Prosecution and the Comoros urges the Chamber to direct the Prosecutor to correct this error.

70. In identifying this error, the Pre-Trial Chamber stated that the importance of the impact of the crimes on the victims “must not be undervalued and needs not be complemented by a more general impact of these crimes beyond that suffered by the victims.”⁸¹ The impact of the crimes on the victims is sufficient to demonstrate that the gravity threshold has been met. The Pre-Trial Chamber made clear that while other “considerations with respect to the impact of the crimes beyond the suffering of the victims could be relevant”, additional considerations affecting impact are “not required” and their absence does not “outweigh[] the significant impact of the crimes on the victims.”⁸²

⁷⁷ Victim Application of a/15238/15.

⁷⁸ Victim Application of a/05078/14.

⁷⁹ Victim Application of a/05100/14.

⁸⁰ Victim Application of a/05058/14.

⁸¹ PTC First Decision requesting Reconsideration, para. 47.

⁸² PTC First Decision requesting Reconsideration, para. 47.

71. It is submitted that the Prosecutor erred in her reconsideration of other factors concerning the impact of the crimes by not only disregarding relevant information, but by seeking to rely on other information to diminish and outweigh the information submitted on the impact to the victims.
72. The Pre-Trial Chamber had found that the Prosecutor ignored available evidence that events “had an impact going beyond the suffering of the direct and indirect victims” in that it “would have sent a clear and strong message to the people in Gaza (and beyond)” in relation to the blockade and delivery of humanitarian aid.⁸³ The Chamber held that the Prosecutor had failed to correct this mistake and had repeated the same error again.
73. In response to this finding by the Pre-Trial Chamber,⁸⁴ the Prosecutor simply stated that she cannot entertain the ‘moral and political’ impact of the crimes because the OTP is in no position to assess the symbolic importance of the crimes.⁸⁵ In essence the Prosecution is saying that it will wholly ignore and disregard such evidence. This stance is erroneous and unsustainable. If it were correct it would mean that the Prosecutor could never assess the impact of any event on a population and this factor would be meaningless to any gravity assessment, which cannot be right.
74. The victims of the attack have repeatedly offered to be interviewed by the Prosecutor, and all victim applications have been submitted to the Prosecutor for review.⁸⁶ Among the victims are Palestinian and Israeli nationals, including a member of the Knesset, who could provide further evidence about the impact of the crimes not only on themselves as victims, but on their families, friends and communities both in Palestine and Israel, and abroad. The Prosecutor has failed to collect and assess any of this evidence, and now refuses to open an investigation to further examine this factor and gain clarity. This is clearly contrary to the 16 July 2015 legal interpretation of the Pre-Trial Chamber which

⁸³ PTC First Decision requesting Reconsideration, para. 48.

⁸⁴ PTC First Decision requesting Reconsideration, para. 48.

⁸⁵ OTP Second Reconsideration Decision, para. 49.

⁸⁶ See, for example, Comoros First Judicial Review Application, paras. 13, 15; Comoros Second Judicial Review Application, paras. 27, 29, 45.

held that “facts which are difficult to establish, or which are unclear ... are not valid reasons not to start an investigation but rather call for the opening of such an investigation.”⁸⁷

75. Instead, the Prosecution again relies on the ‘margin of appreciation’ identified by the Appeals Chamber to assert that it has discretion to assess the weight of any moral or political impact, and in claiming to rely on this discretion, “gives this consideration minimum weight in its assessment of the gravity ... since the effect of such a ‘message’ cannot be assessed with any degree of reliability.”⁸⁸
76. The Prosecutor further refers to evidence submitted which indicates that the crimes were of international attention and concern, in particular, fact-finding efforts by several States and the United Nations. Instead of accepting this information as evidence of the significant international impact of the crimes, the Prosecutor simply dismisses it by stating that the “four reports all varied in aspects of their analysis and conclusions.”⁸⁹ The Prosecutor has again erred by disregarding information because of the purported existence of conflicting accounts. The fact that the UN conducted two international inquiries in itself highlights the gravity of the crimes committed. No reasonable prosecutor would try to sideline these international investigations as being irrelevant. The OTP’s findings in this regard are decidedly unreasonable and irrational. The OTP should be directed to correct these findings and reconsider its decision.
77. The Prosecutor also addressed the fact that criminal proceedings were opened in five jurisdictions. The OTP claimed that each domestic jurisdiction has discontinued proceedings “without even considering it necessary or appropriate to open a criminal investigation.”⁹⁰ The OTP improperly tries to use this information to diminish the severity of the crimes. Yet it mischaracterises the national proceedings. For example, in respect of the criminal proceedings initiated in Turkey, the Prosecutor referred to a bilateral agreement between Israel and Turkey which included a payment of compensation for the victims.

⁸⁷ PTC First Decision requesting Reconsideration, para. 13.

⁸⁸ OTP Second Reconsideration Decision, para. 50.

⁸⁹ OTP Second Reconsideration Decision, para. 51.

⁹⁰ OTP Second Reconsideration Decision, para. 52.

However, the Prosecutor failed to mention that this agreement which resulted in the closing of the criminal proceedings in Turkey was enforced without the consent of the victims and victims' family members. It is also misleading for the Prosecutor to imply that all victims of the attack received a share of any compensation. Instead, the fund was only designated for the families of the 10 individuals killed during the attack, leaving hundreds of other victims of serious injury, abuse and distress without either compensation or a means of seeking accountability. In addition, the family members of the victims who were killed strongly opposed the agreement that was forced on them. The national prosecutions were certainly not discontinued on the basis of a lack of any evidence.

78. The Prosecutor similarly implied that the investigations in Germany, Spain and Sweden were dismissed because it was 'inappropriate' to open an investigation. In fact, each was dismissed due to jurisdictional considerations, and in some cases the local authorities sought to recommend that the case be referred to the ICC. It is therefore totally incorrect for the Prosecutor to suggest that local authorities believed the proceedings were not "justified",⁹¹ instead they simply were not able to proceed with the case in their domestic jurisdictions. The Prosecutor has ignored this fact and instead sought to portray the outcome of the domestic proceedings as an "indication of insufficient gravity."⁹²
79. This is a deplorable finding to have made considering that the evidence of the dismissal of these domestic proceedings was provided to the Prosecutor in order to emphasise that the victims have been unable to proceed in domestic jurisdictions. They have truly exhausted all domestic remedies and are looking to the ICC as a forum of last resort. This by no means reduces the gravity of their cases; it rather highlights the importance of the ICC's role.
80. By using the outcome of domestic proceedings to try to diminish the impact of the crimes, the Prosecutor is acting contrary to the Pre-Trial Chamber's explicit guidance that the impact of the crimes on the victims "must not be undervalued

⁹¹ See, OTP Second Reconsideration Decision, para. 53.

⁹² OTP Second Reconsideration Decision, para. 53.

and needs not be complemented by a more general impact of these crimes beyond that suffered by the victims.”⁹³ The Prosecutor is impermissibly using a misleading and incorrect interpretation of the domestic proceedings to diminish evidence of the impact of the crimes on the victims – which should be enough to highlight and heighten the gravity of the crimes themselves.

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

81. In the Pre-Trial Chamber’s decision of 16 July 2015, the Chamber identified several errors committed by the Prosecutor in her assessment of the manner of the commission of the crimes. The Chamber found that these errors materially affected the Prosecutor’s conclusion on gravity, and therefore asked the OTP to correct these errors in accordance with its findings within its decision of 16 July 2015. It is submitted that the Prosecutor has not genuinely reconsidered her findings in accordance with the Chamber’s decision, and has again committed the same errors identified by the Chamber.

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

82. In its decision of 16 July 2015, the Pre-Trial Chamber recognised that the issue of whether there was live fire onto the Mavi Marmara before any soldiers boarded is “extremely serious and particularly relevant to” the possibility that “a prior intention to attack and possibly kill passengers on board the Mavi Marmara” existed.⁹⁴ The Chamber identified that the Prosecutor had erred by disregarding evidence of live fire before boarding stating that “for her to disregard available information other than when that information is manifestly false” is “inconsistent with the wording of article of article 53(1) of the Statute and the object and purpose” of the assessment under this provision.⁹⁵
83. The Chamber held that the Prosecutor had erred by accepting one version of the available information over another, rather than seeking to open an investigation

⁹³ PTC First Decision requesting Reconsideration, para. 47.

⁹⁴ PTC First Decision requesting Reconsideration, paras. 34, 36.

⁹⁵ PTC First Decision requesting Reconsideration, para. 35.

properly to consider both accounts and versions of the events. The Prosecutor was directed to reconsider her decision in light of the Chamber’s guidance and interpretation of the legal standard which set out that if “*unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite.*”⁹⁶

84. The Prosecutor has not reconsidered her decision in accordance with the Chamber’s decision, has wholly disregarded relevant evidence and continues to rely on the existence of conflicting accounts to seek to minimise and disregard the clear evidence of live fire before boarding in the OTP’s gravity assessment.

85. As noted above, the Prosecutor goes through the motions of ‘revising her position’ to “accept[] for the purpose of the gravity analysis that live rounds may have been fired” before the second attempt at boarding,⁹⁷ and that the “identified crimes may have been carried out pursuant to a plan or policy.”⁹⁸ However, the Prosecutor has committed the flagrant error of continuing to disregard evidence of live fire *before any* boarding of the ship. Cogent evidence has been submitted to the Prosecutor that there was firing from the helicopters before any rope was dropped from the helicopters and before any soldiers boarded. This evidence was submitted to the Prosecutor before its November 2015 decision, and by way of example, included the following accounts:

- A passenger on the Mavi Marmara, stated that “*While they were attempting to get on from the side of the boat, they were firing percussion grenades, paintball rounds and live rounds from the helicopters ... Within the first five to ten minutes as I was moving about the ship I came across the body of Cevdet Kiliclar. I came across his body with a bullet wound to his head within the first five to ten minutes ... Importantly I saw his body before to the best of my knowledge any of the Israeli commandos had boarded the ship. Yes no commandos were on the ship at the time his body was found so he must have been shot from a helicopter.*”⁹⁹
- Another passenger on the Mavi Marmara, stated that “*While waiting, all of a sudden a helicopter appeared above us. And it gave a strong wind below towards the ship. By force of the wind all of our belongings there*

⁹⁶ PTC First Decision requesting Reconsideration, para. 36.

⁹⁷ OTP Second Reconsideration Decision, para. 63.

⁹⁸ OTP Second Reconsideration Decision, para. 67.

⁹⁹ See, Comoros First Judicial Review Application, para. 101.

*flew to the sea. In fact, it was so effective that some of our friends lost their balance. Then, they dropped various bombs like tear gas, blast, smoke and gas bombs. The attack continued for a long time. Afterwards, without landing the ship they started to shoot with guns using real bullets. Several friends were shot and fell down wounded. While gunfire was continuing, they released ropes and began to land to the ship.*¹⁰⁰

- A passenger on the Mavi Marmara, stated that *“On the helicopter, which was 9-10 meters above us, there was no country flag, insignia or pennant. The helicopter hovered in the air for about a minute and then opened fire ... After the helicopter had opened fire on us, in order to prevent us escaping to the right or left, thick ropes were thrown out from each side of the helicopter; it was then that I understood that soldiers would repel down.”*¹⁰¹
- A passenger on the Challenger I looking at the Mavi Marmara as it was being attacked, and that she witnessed *“shooting from the helicopter. People fell down on the top deck of the Mavi Marmara.”*¹⁰²
- A passenger on the Sofia, stated *“I could see the helicopters, two helicopters, above the Mavi Marmara. I could hear shots. And I would like to emphasize that I know the difference between live ammunition and other ammunition. I had been a soldier myself and it was live ammunition. And these shots were fired before any Israeli soldier was on the boat.”*¹⁰³
- A passenger on the Gazze I, stated that *“Suddenly two helicopters, whose lights were off, started hovering above the Mavi Marmara. We heard weapons being fired followed by the sound of bombs. I was shocked by what I saw through my binoculars. They were firing at people.”*¹⁰⁴

86. The Prosecutor again completely ignores this and other relevant evidence, and refuses to accept the position that there is evidence of live fire before any boarding of any soldiers on the Mavi Marmara. As the Pre-trial Chamber recognised, this evidence is “extremely serious and particularly relevant to” the possibility of a plan or policy to attack civilians, and therefore to the gravity analysis.¹⁰⁵ The Chamber instructed that the Prosecutor should not “disregard

¹⁰⁰ Statement of a/05068/14. See, Comoros First Judicial Review Application, para. 101.

¹⁰¹ Statement of a/40039/13; Comoros First Judicial Review Application, para. 101. See also, Richard Lightbown, Commentary on the Available Primary Data on the Israeli Attack on the Gaza Freedom Flotilla 31 May 2010, 15 May 2014 submitted to the Prosecution in the Supplemental Submissions of 19 May 2014.

¹⁰² Comoros First Judicial Review Application, para. 101.

¹⁰³ Comoros First Judicial Review Application, para. 101.

¹⁰⁴ Statement of a/40035/13. See, Comoros First Judicial Review Application, para. 101.

¹⁰⁵ PTC First Decision requesting Reconsideration, paras. 34, 36.

available information other than when that information is manifestly false.”¹⁰⁶ Here the Prosecutor has disregarded the evidence of live fire before any boarding and has failed to take it into account. This alone demonstrates that the Prosecutor has failed to correct the errors identified in the Chamber’s 16 July 2015 decision and has merely committed the same errors again.

87. The Prosecutor recognised that the evidence might demonstrate live fire before the second attempt at boarding and a plan and policy but only after she repeats her prior arguments for disregarding this evidence. This includes “factual considerations” which the Prosecutor mistakenly declares are “not at this stage reasonably in dispute”, including that the identified war crimes of killing civilian passengers was only committed in the context of the passengers’ violent resistance against the IDF boarders; that the IDF acted reasonably in seeking to board the ship by surprise; and that the IDF used none lethal weapons and a graduated approach to the use of force.¹⁰⁷
88. Each of these assertions has been consistently and cogently contested by the Comoros as well as the victims based on the available evidence and witness statements. It is plainly false and misleading to suggest that they are not in dispute and therefore support a finding that live fire was not part of a plan or policy. The Comoros previously disputed the Prosecutor’s conclusions regarding violent resistance based on the available evidence. This evidence shows that there was firing from the helicopters before any rope dropped and before soldiers boarded the ship.¹⁰⁸ The Comoros has raised legitimate questions based on the evidence about the IDF’s methods of enforcing the blockade and questioned why a military operation was used against civilian passengers when less aggressive tactics could have been employed.¹⁰⁹ Last, no part of the Comoros’ submissions has accepted on the evidence that less lethal tactics were employed by the IDF from the start of the boarding and only gradually increased when encountering resistance. This conclusion goes against all of the evidence submitted of live fire

¹⁰⁶ PTC First Decision requesting Reconsideration, para. 35.

¹⁰⁷ OTP Second Reconsideration Decision, para. 65.

¹⁰⁸ See, Comoros Second Judicial Review Application, para. 64.

¹⁰⁹ See, for example, Victim Observations pursuant to ‘Decision on Victims’ Participation’ of 24 April 2015, ICC-01/13-28-Red, 22 June 2015. paras. 11, 16-18, 21.

before any boarding, which dozens of victims have reported witnessing, and for which expert evidence has been submitted.¹¹⁰ This underscores that the Prosecutor has not genuinely reconsidered her decision.

89. The Prosecutor has also revived her unsubstantiated position that victim accounts are not credible, and she goes to great lengths to try to find any reason to caution against the evidence provided by the victims – notably refusing to acknowledge that these individuals are even victims, but calling them witnesses. For example, the Prosecutor has sought to diminish the account of one victim because the passenger witnessed the events on the Mavi Marmara from the Challenger I which she estimated to be about 100 yards away, but fails to acknowledge that other victims on the Challenger I corroborated not only this victim’s account but the ability to witness the events from a nearby boat – stating that the Challenger I “stayed close by the Mavi Marmara” and that they could see “shooting down from [the helicopters] before letting down a rope.”¹¹¹ The Prosecutor has also repeated her previous doubts about two victims and has claimed that their accounts should only receive “very little weight”.¹¹²
90. It is most concerning for the Prosecutor to seek to demote and discredit the victims of the crimes without ever investigating their accounts or agreeing to interview them as the victims have repeatedly offered. No reasonable prosecutor, genuinely carrying out their duties to combat impunity, would actively and repeatedly seek to discredit and dismiss the accounts of victims of the alleged crimes concerned. It demonstrates how the Prosecutor has again failed to follow the Chamber’s decision that at this early stage of the proceedings it is an error, and contrary to Article 53(1), to “disregard available information other than when that information is manifestly false.”¹¹³
91. While the Prosecutor professes to accept that the evidence supports the possibility that there was live fire before the boarding and that this indicates a plan and policy to attack civilians, the Prosecutor uses the supposed conflicting

¹¹⁰ See, for example, Comoros Second Judicial Review Application, paras. 116-121.

¹¹¹ See, for example, Victim Application of a/05087/14.

¹¹² OTP Second Reconsideration Decision, para. 70, footnote 114.

¹¹³ PTC First Decision requesting Reconsideration, para. 35.

evidence to conclude that “even if the conflicting accounts may not negate the existence of a plan or policy, ... they necessarily suggest that its scope was, to some degree, confined.”¹¹⁴ The Prosecutor has wrongly used purported conflicting versions and interpretations of the evidence to support assigning a lower weight to this evidence for the purpose of gravity. This tactic runs contrary to the Chamber’s instructions that the presumption of article 53(1) is that several plausible explanations and conflicting accounts indicate that an investigation is necessary to properly assess the relevant facts. It is a fundamental error that must be corrected and demonstrates that the Prosecutor has not genuinely reconsidered her decision in accordance with the Pre-Trial Chamber’s decision.

b. Cruel and abusive treatment of detained passengers in Israel

92. In its 16 July 2015 decision, the Chamber found that the Prosecutor erred by disregarding evidence of cruel and abusive treatment of passengers once they arrived in Israel because, in her view, this evidence was unconnected to the conduct of the IDF soldiers on the ships.¹¹⁵ The Chamber determined that this evidence should have been considered relevant to the gravity assessment as “systematic abuse reasonably suggests a certain degree of sanctioning of the unlawful conduct ... and is evidence of the existence of a plan or policy.”¹¹⁶
93. In the OTP First Reconsideration Decision of November 2017, the Prosecutor refused to correct the error identified by the Chamber and to take into account this evidence for the gravity assessment.¹¹⁷ The Prosecutor has continued to refuse to take this information into account, and has willfully refused to reconsider her decision regarding this evidence in accordance with the Chamber’s decision and instructions.
94. In its most recent reconsideration decision, the OTP admits that it “has not sought to apply the article 53(1) standard of proof” to this evidence, and will not,

¹¹⁴ OTP Second Reconsideration Decision, para. 69.

¹¹⁵ PTC First Decision requesting Reconsideration, paras. 37, 38.

¹¹⁶ PTC First Decision requesting Reconsideration, para. 38.

¹¹⁷ OTP First Reconsideration Decision, para. 144.

because it believes the legal standard does “not pertain to this question.”¹¹⁸ From the outset, it is a fundamental error for the Prosecutor to decide to follow the Chamber’s instructions as to the legal standard with regard to some evidence, but deliberately to decide not to follow the Chamber’s directions in respect of other evidence. It is precisely what the Appeals Chamber ruled that the Prosecutor did not have the power to do.¹¹⁹

95. The Prosecutor has argued that the legal standard does not need to be applied if she is not determining whether abuses and mistreatment in Israel “occurred or not” and the evidence sufficiently establishes a nexus to the crimes on the ships to come within the Court’s jurisdiction.¹²⁰ In the Prosecutor’s submission, assessing the evidence concerning the nexus to the crimes on the ships is not subject to the same legal standard. This position is plainly erroneous. It cannot be correct that evidence relevant to the question of nexus is beyond the scope of the Chamber’s interpretation of the Article 53(1) legal standard.
96. The evidence of abuses and mistreatment in Israel includes accounts from the victims of not only the mistreatment they were subjected to, but who committed these abuses – whether IDF soldiers and officials, as well as Government employees and officials, who were present, ordering and participating in the abuses.¹²¹ This evidence is plainly relevant to those responsible for the entire operation and to whether a plan or policy existed to systematically abuse the civilian passengers of the ships from the time of their capture on the high seas until they were brought ashore.
97. By asserting that evidence relevant to the question of nexus does not apply to the Chamber’s interpretation of the Article 53(1) legal standard, the Prosecutor incorrectly seeks to ignore and disregard any “difficult to establish or ... unclear” evidence which could establish a nexus.¹²² The Prosecutor has also ignored the Chamber’s instructions that evidence cannot be disregarded unless it is

¹¹⁸ OTP Second Reconsideration Decision, para. 79.

¹¹⁹ AC Judgment, paras. 77, 78.

¹²⁰ OTP Second Reconsideration Decision, paras. 79, 80.

¹²¹ See, Comoros First Judicial Review Application, paras. 118-124.

¹²² PTC First Decision requesting Reconsideration, para. 13.

manifestly false. The Prosecutor has wrongly concluded that the “nexus is not sufficiently established on the present facts.”¹²³ With this false assertion that a nexus has not been established, the Prosecution has therefore been able (without any proper foundation) to assign the abuses committed in Israel “limited weight given the absence of information linking the alleged perpetrators of the alleged conduct on Israel territory and the alleged perpetrators of the identified crimes.”¹²⁴

98. This is a completely premature determination which can in reality only be decided following a full investigation of the planning process for the entire operation and the command structure. It is entirely misconceived for the OTP to have decided at this early stage in the proceedings that those who carried out the operation on the Flotilla were unconnected to those who interrogated the passengers in Israel who had been captured by those who carried out the operation in the first instance and brought them to Israel. On its face it makes no sense at all (other than to find a way of refusing to investigate the case), and it should at least point to the need for an investigation (as held by the Pre-trial Chamber).

c. Unnecessarily cruel treatment of passengers during the taking of the Mavi Marmara and attempt to conceal the crimes

99. The Chamber held in its 16 July 2015 decision that the Prosecutor failed to take into consideration evidence of unnecessarily cruel treatment of passengers such as being “shot multiple times, in the face while trying to cover their heads, or from behind, or after they surrendered and pleaded with the IDF to stop firing at civilians” which was relevant to the gravity assessment.¹²⁵ Similarly, the Chamber made the same finding in relation to the evidence of the IDF concealing their crimes by confiscating videos and removing CCTV.¹²⁶

¹²³ OTP Second Reconsideration Decision, para. 80.

¹²⁴ OTP Second Reconsideration Decision, para. 82.

¹²⁵ PTC First Decision requesting Reconsideration, para. 41.

¹²⁶ PTC First Decision requesting Reconsideration, para. 41.

100. In its first reconsideration decision, the Prosecutor failed to correct her mistake and to take this evidence into account as being relevant to gravity.¹²⁷ The Prosecutor has repeated this error again in her latest reconsideration decision by failing to acknowledge or address the error identified by the Chamber, or the extensive evidence of the particularly cruel treatment of the passengers. The OTP has simply ignored the Chamber's directions to correct its error and therefore has not reconsidered its decision in accordance with the Chamber's decision.

101. In relation to the IDF concealing their crimes, the Prosecutor merely offers conflicting interpretations of the evidence, as noted above, to justify not addressing the way in which this evidence is relevant to the existence of a plan or policy, or how this will affect the weight assigned to this evidence for the OTP's gravity assessment. The OTP merely acknowledged that this evidence is "relevant to considering the existence of a plan or policy" but then assigned no significance or weight to this evidence. The Prosecutor clearly erred again in finding that this evidence does not heighten the gravity of the case for the purpose of opening an investigation.

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

102. The Pre-Trial Chamber found in its decision that the Prosecutor had made premature conclusions about the absence of crimes occurring on the other vessels of comparable severity to those on the Mavi Marmara, particularly in respect of the existence of a plan or policy for the gravity analysis.¹²⁸

103. Additionally, the second judicial review application of the Comoros identified evidence submitted to the Prosecutor of very serious and comparable crimes committed on board the other vessels.¹²⁹ The Comoros submitted that the Prosecutor was provided with evidence of attacks against civilians on other vessels, including that:

¹²⁷ OTP First Reconsideration Decision, para. 151.

¹²⁸ PTC First Decision requesting Reconsideration, para. 43.

¹²⁹ Comoros Second Judicial Review Application, para. 96.

“IDF soldiers firing paintballs directly in the face of non-resistant passengers at close range causing one female passenger’s nose to break; IDF soldiers shooting a female passenger with rubber bullets and paint balls six times in the back; IDF soldiers throwing two women onto the deck and pressing their faces against broken glass; IDF soldiers hooding the same two women after pushing their faces into glass, handcuffing them behind their backs and making them kneel; and IDF soldiers launching a shun grenade into the face of a passenger causing him permanent partial blindness in one eye.”¹³⁰

104. The Prosecutor has failed to address the Chamber’s identified error as well as the submissions of the Comoros regarding the evidence of the severity of crimes committed against passengers on the other vessels. No reasonable prosecutor would fail to take into account a body of evidence that demonstrates that the severity of the crimes on other ships was comparable to the crimes committed on the Mavi Marmara, which in itself affects the gravity assessment. This evidence also demonstrates the intent of the perpetrators and is highly relevant to the existence of a plan or policy to target the civilian passengers, which heightens the gravity of the case.

V. FINDINGS TO GUARANTEE COMPLIANCE WITH THE PRE-TRIAL CHAMBER’S DECISION

105. The Comoros submits that the Prosecutor’s conduct to date demonstrates that even if she is directed to reconsider her latest decision again, she will inevitably reach the same conclusion again and refuse to open an investigation.

106. In the event that the Chamber directs the Prosecutor to reconsider her latest decision (which the Comoros submits that there are compelling grounds to so order), this will be the third time the Prosecutor has been directed to address and correct the errors in her reasoning and conclusions. The timeline of the present litigation merely to open an investigation makes for quite staggering reading:

- In May of this year, it will have been 10 years since the crimes were committed against the victims of the Flotilla – with nearly 400 of these victims participating in the proceedings before the Court;

¹³⁰ See, Comoros Second Judicial Review Application, para. 96.

- It will also have been 7 years since the Comoros, as a State Party of the Court, referred the situation to the Prosecutor and requested that an investigation was urgently initiated before the Court;¹³¹ and,
- The Prosecutor was first asked to reconsider her decision not to open an investigation in July 2015 – the parties have since been engaged in this litigation for nearly five years to seek a proper, genuine and unadulterated reconsideration of the Prosecutor’s decision.

107. In the years since the situation has come before the Court, the Prosecutor has received thousands of pages of evidence and extensive victim and witness statements, but has repeatedly used all of this time to prepare lengthy reasons to decide not to investigate the case. In all the years in which the Prosecutor has been considering whether to investigate this case, the Prosecutor could have actually investigated the available evidence to decide whether to proceed further.

108. The impact of these prolonged delays on the victims is unimaginable. They have been suspended in a state of complete uncertainty about whether the crimes committed will be investigated and those responsible will be held to account. As one victim has highlighted:

“When the Prosecutor continues to resist opening the case it feels like a denial of justice, because she is trying to find a way to avoid opening the case by arguing about the process rather than assessing the substance of the case. In other words, the investigation of the deaths and injuries caused by the interception of the flotilla by the Israeli military seem less important to the Prosecutor than her defence of her own argument.”¹³²

109. For this reason the Chambers have rightly confirmed the “necess[ity] for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court” and emphasised the “internationally

¹³¹ Referral by the Government of the Union of the Comoros, 14 May 2013.

¹³² Observations of Victim a/40006/13.

recognized human rights of victims ... to know the truth, to have access to justice and to request reparations.”¹³³

110. The Comoros is deeply concerned that the stark reality is that 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. A stale mate has been reached which is most regrettable, but which cannot be allowed to prevail.

111. The Prosecutor is in fact following the course that some have urged her to take, namely, merely to assert her discretion to make the final decision, and simply to issue a new decision confirming her previous decision.¹³⁴

112. For these reasons, the Comoros urges the Chamber to direct the OTP to reconsider its last decision by adopting the following findings to guarantee that the OTP does comply in full with the Chamber’s original decision:

a. Errors of fact must be addressed and rectified in the same way as errors of law

113. The Comoros submits that it should be made clear by the Pre-Trial Chamber that errors of fact – including the OTP reaching a factual conclusion that no reasonable person could reach or failing to take proper account of relevant evidence, which the OTP has itself recognised are errors of fact¹³⁵ – are errors that must be addressed and corrected like any error of law. The final decision in respect of these errors cannot be left to the OTP to decide whether to correct such errors and comply with the Chamber’s decision. Such an approach would undermine the entire purpose of the Chamber exercising its powers of judicial

¹³³ OTP Second Decision requesting Reconsideration, para. 120.

¹³⁴ See for example, ‘The ICC Prosecutor should Reject Judges’ Decision in Mavi Marmara’, Just Security, Alex Whiting (former OTP Prosecution Coordinator), final paragraph (<https://www.justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/>).

¹³⁵ See OTP First Reconsideration Decision, para. 63: the Pre-Trial Chamber is entitled to intervene “if the Prosecution misinterpreted the law, breached a principle of natural justice, or was unfair; if it took irrelevant information into account in reaching its decision, or failed to take account of relevant information; or if it reached a factual conclusion which was so unreasonable that no reasonable person with the same information could have made it.”

review under the Statute to identify errors of both law and fact that require rectification by the Prosecutor.

114. The OTP has misinterpreted the majority judgment of the Appeals Chamber's of 2 September 2019. The majority held that "the final decision as to whether to initiate an investigation will always be for the Prosecutor."¹³⁶ The Appeals Chamber explained 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", although the Pre-Trial Chamber may oblige the Prosecutor to "take into account certain factors and/or information" during reconsideration.¹³⁷ It should be made clear that this finding cannot be twisted to mean that the Prosecutor can ignore errors of fact that have been identified by the Chamber on the basis that she has the ultimate discretion to decide factual matters, and to assign whatever weight she wishes to the evidence. This would defeat the whole purpose of the Chamber rightly identifying errors of fact. The Chamber undoubtedly has the power to direct the OTP as to errors of fact that must be addressed and corrected. It would also superficially separate errors of law and errors of fact. As Judge Eboe-Osuji stated in his dissenting opinion:

*"the distinction [between errors of law and fact] is unsustainable – if not meretricious. It is in the nature of the proverbial judicial error of cutting the baby in half. It is unhelpful in the long run, because the law does not operate in a factual vaccum. In the administration of justice, it is facts that give value to the application of the law."*¹³⁸

115. The OTP has manipulated the Appeals Chamber's finding to side step addressing the errors of fact identified by the Pre-Trial Chamber. The Comoros urges the Chamber firmly to reject this tactic.

116. The Prosecutor has misused the decision of the Appeals Chamber to argue that while she is bound by findings of law, including that contradictory evidence is not a lawful basis at this early stage to reject evidence consistent with gravity,

¹³⁶ AC Judgment, para. 79.

¹³⁷ AC Judgment, para. 81.

¹³⁸ Opinion of Judge Eboe-Osuji, para. 36.

she can nevertheless rely on the exact supposed contradictions in the evidence to justify assigning very little or no weight to the evidence consistent with gravity in favour of the evidence that lessens the seriousness of the allegations. And she does so on the wholly false premise that she is the sole determiner of the facts. Yet the error of law on the misapplication of the correct standard is directly related to the error of fact that relevant evidence was not properly taken into account and that an irrational conclusion was reached on the facts, and the identification of this error of fact by the Chamber required the OTP to rectify that it has assigned no weight to evidence consistent with gravity. The Prosecutor has disingenuously failed both to apply the rectification of the error of law to the facts and to address the error of fact itself.

117. This is evident, for example, with the Prosecutor's approach to the available evidence of the use of live fire (as noted above) which, despite demonstrating a plan or policy to attack civilian passengers, was assigned very little weight in the gravity assessment due to supposed conflicting accounts and views of the evidence.¹³⁹ The correct legal approach, as recognised by the Chamber, which the Prosecutor is bound to apply, is that such alleged contradictions are not at this stage (initiating an investigation) a proper basis to discount the fact that such evidence is consistent with the existence of a plan or policy which increases the gravity of the alleged offences. Yet, the OTP has deliberately distorted the Appeals Chamber's language by claiming that it can decide that no weight can be given such evidence, claiming that this is matter over which the OTP can make the final decision. The correct position is that the OTP is authorised to make the decision about opening an investigation or not (not the Chamber) but the OTP must in reaching that decision correct each error – both of law and fact – that the Chamber has identified. Where the Chamber has found, as is the case here, that the OTP has wrongly discounted the evidence of live fire even if it is supposedly contradictory, then the OTP is bound to give that evidence its proper weight. The OTP cannot just assert that it has decided to give that evidence no weight because it has the final say over questions of fact and the weight to be assigned. If this

¹³⁹ OTP Second Reconsideration Decision, para. 69.

were right then the OTP could merely ignore all errors of fact identified by the Chamber.

118. Where the Chamber has held that no reasonable trier of fact can reach the factual conclusion of the OTP, the OTP cannot just assert that it has reached the same conclusion again, and that is justified on the basis it has the final say on whether to open an investigation. That would defeat the whole point of judicial review proceedings.

119. Judge Eboe-Osuji's opinion identified this precise way in which the OTP could seek to evade complying with the Chamber's decision, and for that reason rightly emphasised that "'gravity' is a legal characterisation of a given circumstance on the basis of a set of facts."¹⁴⁰ The correct application of the law cannot be separated from the facts to which the law is being applied. It is vital that the Pre-Trial Chamber does not permit the OTP to elude its obligations to comply with the orders of the Chamber but trying to draw an artificial separation between errors of law and fact, claiming in effect that it is bound to correct the former but not the latter.

120. Judge Ibáñez similarly recognised rightly that there should be no distinction between the power of the Chamber to make directions as to law and fact. Her opinion confirms that the Pre-Trial Chamber should have no limitations when reviewing the Prosecutor's decision not to open an investigation when there is no express limitation in the plain wording of Article 53(3)(a).¹⁴¹ Judge Ibáñez made reference to the object and purpose of the Rome Statute, finding that the Chamber's powers must be interpreted "with a view to guaranteeing the ... object and purpose of ensuring investigation and prosecution of atrocious crimes and the internationally recognised human right to the access to justice."¹⁴²

121. The Chamber is thus urged to stop the OTP from attempting to use an illegitimate escape route for correcting the errors of fact it has made.

¹⁴⁰ Opinion of Judge Eboe-Osuji, para. 37.

¹⁴¹ Opinion of Judge Carranza, para. 46.

¹⁴² Opinion of Judge Carranza, para. 44.

b. Request to impose sanctions

122. In its Second Decision requesting Reconsideration, the Pre-Trial Chamber noted that pursuant to Article 71 of the Statute:

“The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.”¹⁴³

123. In addition, the Chamber noted Rule 171 regarding “misconduct consisting of deliberate refusal to comply with an oral or written direction by the Court.”¹⁴⁴

124. The Comoros submits that the Prosecutor’s latest reconsideration decision clearly demonstrates that the OTP has consistently failed to follow the directions of the Chamber, including by ignoring the instructions of the Chamber to consider relevant evidence, such as concerning the cruel treatment of passengers and crimes on the other vessels, as noted above.

125. The Comoros therefore requests that under the applicable provisions of the Statute and Rules the Chamber should sanction the OTP for its repeated failure to comply with the directions of the Chamber. It should be taken into account that this is the second time that the OTP has not implemented the findings and orders of the Chamber. The OTP has been given an opportunity to comply with the Court’s rulings, as it is duty bound to do. It would be wrong to give the OTP a second chance without any sanctions being imposed. Otherwise, the OTP will be given the unfitting signal that it can keep refusing to comply (through various ill conceived means) without any consequences.

¹⁴³ Rome Statute, Article 71(1).

¹⁴⁴ Rule 171.

c. Appoint an amicus prosecutor to reconsider the decision not to investigate

126. In his Partly Dissenting Opinion, Judge Eboe-Osuji warned that “the Pre-Trial Chamber and the Prosecutor may find themselves locked in an interminable loop of disputes as to whether the Prosecutor’s decisions had been compliant with the Pre-Trial Chamber’s repeated requests for reconsideration.”¹⁴⁵ The Comoros is deeply concerned that the latest reconsideration decision demonstrates that the Prosecutor has no intention of ever opening an investigation into the attack on the Flotilla, regardless, and will continue to commit errors and not comply with the Chamber’s decision.

127. The Comoros submits that to break the deadlock, an independent amicus prosecutor could be appointed to assist the Chamber by reviewing the available evidence in accordance with the Pre-Trial Chamber’s decision of 16 July 2015, and to submit its findings and observations to the Court as a decision under Article 53(3)(a) and Rule 107, and particularly Rule 108. It is submitted that this can be achieved under Rule 103 of the Rules of Procedure and Evidence, which provides that:

“At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”

128. Under the plain language of this provision, the Pre-Trial Chamber could invite a person to submit written observations on any issue. This course of action comports with the ICC’s jurisprudence, which clarifies that a Chamber has a broad discretion under Rule 103 to grant leave to *any* party at *any* stage. The Appeals Chamber has held that Rule 103 gives the Chamber a discretion to grant leave to submit observations if it “may assist the ... Chamber in the proper determination of the case.”¹⁴⁶ Jurisprudence from Trial Chamber I emphasised

¹⁴⁵ Opinion of Judge Eboe-Osuji, para. 27.

¹⁴⁶ *Prosecutor v. Lubanga*, Decision on Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-1289, 22 April 2008, para. 8. See also, Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply, ICC-02/05-01/09 OA, 9 November 2009, para. 7.

that Rule 103 observations might assist when the submissions seek “to supply information and assistance of direct relevance on certain issues that otherwise will not be available to the Court.”¹⁴⁷

129. The Comoros submits that the Chamber could be greatly assisted by an independent amicus prosecutor to review afresh the evidence and reconsider the OTP’s decision in accordance with the Chamber’s decision and with Article 53(3)(a), Rule 107, and Rule 108.

VI. CONCLUSION

130. Accordingly, the Government of the Comoros respectfully requests the Chamber to direct the Prosecutor to reconsider her latest decision not to open an investigation in accordance with the Pre-Trial Chamber’s decision of 16 July 2015.

131. The Government of the Comoros also submits that the Chamber should make all necessary findings and take all appropriate steps to ensure that the Prosecutor does not yet again fail to comply with the holdings and findings of both the Pre-Trial Chamber and the Appeals Chamber, including by imposing sanctions on the OTP due to the Prosecutor’s persistent failure to implement the directions and findings of the Pre-Trial Chamber.

¹⁴⁷ *Prosecutor v. Lubanga*, Decision Inviting Observations from Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, ICC-01/04-01/06-1175, 18 February 2008, para. 7.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'RD' followed by a long horizontal stroke.

Rodney Dixon QC
Haydee Dijkstal

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

Dated 2 March 2020

London