PARTLY DISSENTING OPINION OF JUDGE PÉTER KOVÁCS

1. I regret that I cannot join the Majority's opinion in requesting the Prosecutor to reconsider her decision of 6 November 2014 not to open an investigation in the Situation of the Registered Vessels of Comoros, Greece and Cambodia. My points of disagreement are various. However, for the sake of judicial economy and preventing an appearance of drafting a parallel decision to that of the Majority, I will provide a conceptual dissent only based on my overall assessment of the Majority decision and the submissions of the parties and participants. The dissent will only focus on those major points which I believe to be fundamental, without attempting, to the extent possible, to engage into another round of assessment of the facts.

2. It is important to begin with a short analysis on the necessity of conducting a review on the merits under article 53(3)(a) of the Statute. As a matter of law, the Chamber is not legally compelled to address the application of Comoros on the *merits* solely because the State has requested it to do so. Rather the Chamber is called upon to conduct such a review on the merits *only* if it is convinced that the issues raised in said application reveal clear error(s) on the part of the Prosecutor, which prompt such a review and reconsideration of her decision. It does not mean that because the Chamber may have arrived at a different conclusion on the basis of the facts presented that the Prosecutor's decision was erroneous and should be accordingly reconsidered.

3. This interpretation is clear from a plain reading of article 53(3)(a) of the Statute, which stipulates that, "[a]t the request of the State making a referral

under article 14 […], the Pre-Trial Chamber *may* review a decision of the Prosecutor under paragraph 1 […] not to proceed and *may* request the Prosecutor to reconsider that decision" (emphasis added). The usage of the verb "may" twice in the text of this provision makes it evident that, as a matter of principle, conducting a full-fledged review of the Prosecutor's decision is neither a duty nor automatic. Rather it entails that the Pre-Trial Chamber enjoys a margin of discretion to filter those applications which warrant review on the merits from those which do not deserve the Court's attention. The fact that a State Party which has made the referral is entitled to request a review and reconsideration of the Prosecutor's decision does not mean *per se* that the Pre-Trial Chamber is obliged to carry out such a review. The drafting history of this provision reveals that the drafters intended to leave some flexibility for the relevant body requested to carry out such review.

4. The 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission (the "1994 ILC Draft"), on the basis of which the Rome Statute was premised, envisaged a process for reviewing the Prosecutor's decisions not to initiate investigations or proceed with prosecutions. According to article 26(5) of the 1994 ILC Draft, "[a]t the request of a complainant State […], the Presidency *shall* review a decision of the Prosecutor not to initiate an investigation […], and may request the Prosecutor to reconsider the decision" (emphasis added).

5. The reference to the verb "shall" in this provision suggests that this earlier draft proposal imposed an obligation on the relevant body, in that case the Presidency, to conduct a review of the Prosecutor's decision under all

circumstances and regardless of the seriousness or particular nature of the application put forward before the Chamber. Yet, realising this negative implication resulting from the strict formulation of paragraph 5, the commentary on the draft article clarified that the intention was to leave the Presidency with some discretion to decide whether to review a decision taken by the Prosecutor not to proceed with a prosecution.[1] Consequently, the verbs "may" and "shall" subsequently appeared in square brackets under article 54(8) in the Report of the Preparatory Committee which was submitted to the Rome Conference.[2] But this time it was clear that the review would encompass both decisions not to initiate an investigation and prosecution. As of that moment, the verb "shall" disappeared from all subsequent draft proposals discussed at the Committee of the Whole. Instead, it was replaced with the verb "may",[3] which was retained until it found its way in the text of article 53(3)(a) of the Statute. Thus, had the drafters intended to impose an automatic obligation on the Pre-Trial Chamber to review a decision of the Prosecutor not initiate an investigation on the merits, they could have retained the verb "shall" as initially introduced by the working group of the ILC. However, this was not the case and the law as it stands provides the necessary discretion for the Pre-Trial Chamber to decide on whether it is

[1] "[T]he Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with a prosecution. If not, the Prosecutor must so inform the Presidency which *may* at the request of the complainant State […], review a decision of the Prosecutor not to proceed"(emphasis added).

[2] Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, UN Doc A/CONF.183/2, art. 54(8).

[3] See, UN Docs, A/CONF.183/C.1/WGPM/L.1, 18 June 1998, art. 54(3)(c); A/CONF.183/C.1/WGPM/L.2, 24 June 1998, art. 54 (3)*bis*(a); A/CONF.183/C.1/WGPM/L.18, 25 June 1998, art. 54(4)(a); Report of the Committee of the Whole, UN Doc. A/CONF.183/8, 17 July 1998, art. 53(3)(a).

warranted or not to engage into a full review of the Prosecutor's decision. The Majority does not make this distinction.

6. Turning to the second point of controversy, I am quite doubtful about the legal basis for the applicability of the standard of review introduced by the Majority. The Majority opts for a standard of review applied by the Appeals Chamber in respect to interlocutory appeals and final appeals on the merit. The standard applied by the Appeals Chamber finds support in the Courts statutory documents (arts 21(1)(a), (b) and (3), 81 and 83(2)). Yet, this is not so clear with respect to the standard of review to be applied within the context of article 53(3)(a) of the Statute, given the different nature of the two procedures before the Appeals Chamber and the Pre-Trial Chamber.

7. The Majority introduced for the first time a standard for reviewing negative decisions undertaken within the ambit of article 53(1) without explaining the legal basis for its endorsement. In this respect, and regardless of the practicality or validity of applying the standard of review endorsed by the Majority, I do not believe that the Pre-Trial Chamber is called upon to sit as a court of appeals with respect to the Prosecutor's decisions. Rather the Pre-Trial Chamber's role is merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53(1) of the Statute.

8. This view calls for a more deferential approach when reviewing the Prosecutor's decision on the basis of the criteria set out in article 53(1), and is implied in the text of article 53. It provides the Prosecutor with some margin of discretion in deciding not to initiate an investigation into a particular

situation. This interpretation is more in line with the main idea underlying article 53 namely, to draw a balance between the Prosecutor's discretion/independence and the Pre-Trial Chamber's supervisory role in the sense of being limited to only requesting the Prosecutor to reconsider her decision if necessary. To argue that the power of the Pre-Trial Chamber exceeds this point is daring. The Majority does not go in this direction. Instead, it preferred to conduct a stringent review, which clearly interferes with the Prosecutor's margin of discretion.

9. Be that as it may, even if I adhere to the standard of review applied by the Majority and the lack of legal explanation regarding its applicability, I still do not agree with other points reflected in the Majority's approach.

10. In relation to the third point of controversy, I find it quite difficult to adhere to the interpretation endorsed by the Majority regarding the scope of review under article 53(3)(a) of the Statute. In my view, the Majority opted for a quite narrow interpretation of article 53(3)(a) of the Statute by stating that it will confine its legal analysis and by implication its factual assessment to the criterion of gravity. Despite its declaration that the scope of review under article 53(3)(a) is limited to "the consideration underlying the Prosecutor's decision not to investigate the situation […] [namely] that the potential cases arising from such situation would not be of sufficient gravity",[4] the Majority has gone far beyond that.

[4] Majority Decision, para. 11.

11. The Majority stated that the Prosecutor's finding that the "unjustified mistreatment and harassment of passengers by the IDF forces did not amount to the war crime of torture or inhuman treatment […] is not just a matter of article 53(1)(a) […]. Rather, this is a matter that is equally relevant to the evaluation of the gravity of the potential case(s), within the meaning of article 53(1)(b)".[5] In applying this test, the Majority concluded that it would have been correct "to recognise that there [was] 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".[6] By so doing, the Majority, in effect, goes beyond the limited scope it initially designed for its review by extending its examination *lato sensu* to issues pertaining to jurisdiction under article 53(1)(a) instead of merely confining its assessment and finding to the information provided by the Prosecutor in her report in relation to gravity. This approach resulted in that the Majority entered new findings under jurisdiction (war crimes of torture and inhuman treatment) instead of reviewing the existing ones. This reveals a sort of inconsistency in the Majority's approach which sets out a principle and does not adhere to it.

12. Extending the scope of review under article 53(3)(a) beyond gravity is, in principle, in line with my understanding of this provision. Article 53(3)(a) of the Statute speaks of reviewing "a decision" of the Prosecutor not to proceed by opening an investigation into a situation and requesting a reconsideration of such "decision". It is true that one plausible interpretation would be to construe the word "decision" as encompassing the outcome of the

[5] Majority Decision, paras 27-28.
[6] Majority Decision, para. 30.

Prosecutor's finding as well as the ground(s) on the basis of which she decided; in this case the criterion of gravity. This interpretation is more in line with the Majority's finding. However, one may also interpret the word "decision" as merely the "conclusion arrived at"[7] by the Prosecutor, namely, her decision not to initiate an investigation into the Comoros situation, regardless of the particular ground relied upon by the Prosecutor to arrive at her decision. This entails that if the Chamber has identified material errors which would have affected the Prosecutor's final decision on the basis of jurisdiction instead of gravity, for instance, the Chamber should still point out these errors and even may request a reconsideration of the Prosecutor's decision on this ground.

13. The *ratio* underlying my position rests on the fact that any judicial body has the competence let alone the duty to determine the confines of its jurisdiction, and follows from the principle of *compétence de la compétence* consistently accepted under general international law and expressly acknowledged in both the Rome Statute and the jurisprudence of this Court.[8] Thus, if the Chamber identifies that there exists a problem related to its power to exercise jurisdiction, it is difficult to turn a blind eye to a fundamental issue as such merely because the Prosecutor has taken her decision on the basis of gravity. This is my major disagreement with the Majority's position, and I will come

[7] Shorter Oxford English Dictionary, Vol. I, 5th ed., (OUP, 2002), p. 616.

[8] Rome Statute, art. 19(1); see International Criminal Court (ICC), *Prosecutor v. William Samoei Ruto et al.*, Pre-Trial Chamber II, "Decision on the Confirmation of charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373, para. 24; *Prosecutor v. Jean Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 23; also, International Court of Justice (ICJ), *Nottebohm case (Preliminary Objection), "Judgment of November 18th, 1953"*, *I.C.J. Reports 1953*, p. 119; *Fisheries Jurisdiction Case (United Kingdom v. Iceland), Jurisdiction of the Court, "Judgment"*, *I.C.J. Reports 1973*, para. 12.

back to the issue of jurisdiction after expressing my principle understanding of gravity.

14. With respect to gravity, which is the fourth point of controversy, I believe upon review of the Prosecutor's report, the parties and participants' submissions, that the Prosecutor's findings on gravity are not necessarily unreasonable and that her decision on this particular ground does not require reconsideration. The issue revolves around our understanding of the concept and function of the gravity threshold under the Statute.

15. The inclusion of the criterion of gravity in the Statute is not superfluous and the underlying rationale for its addition goes back to the discussions which took place by the working group of the ILC in 1993. The *ratio* was that an international criminal court should be empowered to stop proceedings in relation to "acts of [in]sufficient gravity to warrant trial at the international level",[9] and that this approach would prevent the court from "being swamped with peripheral complaints".[10] This approach, at least in theory, seems to have been acknowledged in a number of decisions issued by the Court. In *Lubanga*, Pre-Trial Chamber I stated that:

> [The] gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.[11]

[9] Summary Record of the 2330th Meeting, 1994 YILC Vol. I, p. 9.
[10] *Ibid*.
[11] Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a warrant of arrest. Article 58", 10 February 2006, ICC-01/04-01/06-8-Corr, para. 41.

16. In a more recent decision, Pre-Trial Chamber II, albeit with different composition, also stated among the same lines that:

> [A]ll crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.[12]

17. The exact language was reiterated in the equivalent authorization decision issued by Pre-Trial Chamber III in the situation of Côte D'Ivoire on 15 November 2011.[13]

18. Thus, the concept of gravity in the Statute and as acknowledged by Chambers of this Court should function in such a manner as to achieve the ultimate goal for its inclusion, namely to focus on those situations/cases which are indisputably grave and deserves the attentional of the international community.

19. In this respect, I do not believe that the death of ten persons and the injury of 55 others in the *context* described in the Prosecutor's report and the Comoros submission is sufficiently grave to warrant the opening of an investigation into this situation. This is so despite the Majority's attempt to break down the Prosecutor's analysis of the various components underlying gravity (scale, nature, manner, and impact).[14] Upon comparison, for instance, between the

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[12] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC -01/09-19-Corr, p. 25, para. 56.

[13] Pre-Trial Chamber III, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", 15 November 2011, ICC-02/11-14-Corr, para. 201.

[14] Majority Decision, paras 25-48.

number of deaths in the flotilla incident with the number of murders and serious injuries which prompted Pre-Trial Chamber II to authorize, by Majority, the Prosecutor to open an investigation into the situation in the Republic of Kenya, one may observe a huge discrepancy. The violence in the Kenya situation resulted in the death of about 1,220 and the serious injury of 3,561 persons in six out of the eight Kenyan provinces.[15]

20. Despite the differences of facts between the Comoros and the Kenya situations, I still believe that the comparison is justified, especially that the underlying incidents in the Kenya situation were much broader in scope and magnitude. Although the jurisprudence of this Court has so far revealed that the number of victims is not always the determinative factor for the assessment of gravity, this is the case only if the low number of victims was accompanied by another qualitative factor(s) or aggravating circumstances surrounding the situation or case *sub judice*.

21. As correctly pointed out by the Prosecutor, from a broader perspective, the flotilla campaign which resulted from "the overall restrictions and blockade imposed by Israel" had somehow an impact on the Gaza population.[16] Nevertheless, the assessment of gravity in the situation *sub judice* must indeed

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[15] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC -01/09-19-Corr, p. 73, para. 188. But even with these high numbers in the Kenya situation, the late Judge Hans-Peter Kaul dissented. Although the question of gravity was not the main focus of the dissent as the contested issue concerned the lack of crimes against humanity, gravity was an implied factor throughout his discussion, and the core of his dissent actually suggests that the Prosecutor should not have been authorized to start an investigation as the Kenya situation should have been dealt with before Kenyan domestic courts. *See*, Situation in the Republic of Kenya, "Dissenting Opinion of Judge Hans-Peter Kaul", 31 March 2010, ICC-01/09-19, p. 88, para. 10.

[16] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, paras 146-147.

be distinguished from the *overall* humanitarian crisis suffered by the Palestinian civilian population which in fact resulted from the entirety of the ongoing Palestinian-Israeli conflict. This does not lead to the conclusion as asserted by the Majority that no weight was given to the impact of crimes on the direct and indirect victims.

22. The assessment of gravity in the present situation is indeed confined to the crimes allegedly committed by IDF soldiers on board the vessels in the course of the interception of the flotilla, which is narrow in scope with much less qualitative impact. I tend to agree with the Prosecutor's conclusions in this regard.[17] As such, the Prosecutor's finding that "the potential case(s) that could be pursued as a result of an investigation into this situation is limited to an event encompassing a limited number of victims […], with limited countervailing qualitative considerations",[18] was not unreasonable.

23. In the situation of Côte d'Ivoire, the Prosecutor was similarly authorized to open an investigation but for, *inter alia*, the killings of *hundreds* of civilians in the town of Duékoué.[19] This does not mean that the Court should not deal with cases involving lesser numbers of victims. Rather it means that in the context of the *Mavi Marmara* or the flotilla incident, the gravity threshold was far from being met.

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[17] "Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", 30 March 2015, ICC-01/13-14-Red, paras 67-72.

[18] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, paras 144, 148.

[19] Pre-Trial Chamber III, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", 15 November 2011, ICC-02/11-14-Corr, para. 94.

24. This brings me to the last point which I would like to raise in relation to the assessment of gravity. Article 53(1)(b) of the Statute requires the Prosecutor to consider whether the "case is or would be admissible". This entails that the assessment of admissibility (the gravity limb in the present situation),[20] in principle, should be conducted against the back drop of a "case" and not just a "crime" as the legal and factual assessment in the Prosecutor's initial report reveals.[21] The latter is only one component of the former.

25. The distinction between a "case" and a "crime" has been addressed in the decision of Pre-Trial Chamber II authorizing the Prosecutor to start an investigation into the situation of the Republic of Kenya. In this decision, Pre-Trial Chamber II, by Majority, stated that a "case" for the purpose of conducting an admissibility assessment within the context of a situation (defined as a potential case) "encompasses both crimes and one or several persons suspected to have committed those crimes in the course of specific incidents".[22] As to the second element concerning the alleged perpetrators, Pre-Trial Chamber II stated that it "captures those who may bear the greatest responsibility for the alleged crimes committed".[23]

26. The Majority has recognized this distinction and pointed out that the Prosecutor "erred […] by failing to consider whether the persons likely to be

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[20] As it is commonly known the term "admissible" or admissibility embodies two main limbs one concerning complementarity, while the other relates to gravity.
[21] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, paras 138-147.
[22] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC -01/09-19-Corr, p. 28, para. 65.
[23] *Ibid*., p. 26, para. 60.

the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes".[24]

27. I agree with the Majority that the Prosecutor indeed disregarded this integral component of the gravity assessment in her legal and factual determination set out in the report. Instead, the Prosecutor only focused on the first limb of the gravity assessment namely, the gravity of the crimes. Notwithstanding this omission, I do not adhere to the finding of the Majority that the Prosecutor alleged "failure to take into account this relevant factor affected the determination of gravity of the potential case(s)"[25] in this particular situation.

28. It is true that in her response to the Comoros application for review, the Prosecutor stated that the analysis conducted against the applicable standard at this stage, does not suggest that "'senior IDF commanders and Israeli leaders' were responsible or planners of the apparent war crimes'".[26] This statement indeed reveals confusion on the part of the Prosecutor as to the intended meaning of "those who bear the greatest responsibility". It apparently limits the gravity assessment to the seniority of the alleged suspect(s) rather than their actual role in the commission of the crimes. Although "those who bear the greatest responsibility" are quite often at the

[24] Majority Decision, paras 22-23.
[25] Majority Decision, para. 24.
[26] "Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", 30 March 2015, ICC-01/13-14-Red, para. 62.

top of the hierarchy, in some instances mid-level perpetrators could also bear the greatest responsibility.[27] The Prosecutor does not spell out this distinction.

29. Despite this confusion, I still do not believe that the Prosecutor committed a material error in refraining from examining this second limb of gravity which relates to those who bear the greatest responsibility. In particular, conducting an examination as to who bear the greatest responsibility was not, in the context of the Prosecutor's examination, determinative for her final decision. This is so because the Prosecutor already found that the crimes committed within the context of the entire situation (and therefore *any* potential case) have not reached the required threshold. Accordingly, proceeding with an analysis concerning those who may bear the greatest responsibility would have been superfluous. From this perspective, I do not find that the Prosecutor committed a material error in refraining to conduct an assessment of this element of gravity.

30. Having said the above, I do not think that requesting the Prosecutor to reconsider her decision not to initiate an investigation in the Comoros situation on the basis of gravity is really necessary. The Majority could have also focused on possible errors which fall under the ambit of jurisdiction proper instead of looking solely into gravity, which was reasonably assessed by the Prosecutor. Perhaps one may find some flaws in the Prosecutor's findings in relation to war crimes under article 53(1)(a) of the Statute (apart from the limited findings on war crimes of torture and inhuman treatment

[27] *Situation in the Democratic Republic of the Congo*, Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 13 July 2006, ICC-01/04-169, para. 73.

referred to above), which could have been addressed by the Majority. Certainly the Majority has not done so, because it has opted, in principle, for a narrow scope of review which is supposedly confined to gravity. In this respect, the Majority overlooked the fact that it is inherent and an integral function for any judicial body to determine its own competence, and when there is an apparent lack of jurisdiction, the matter stops there. On my part, the possible errors which may be identified under article 53(1)(a) are not compelling to change my overall position that it is unnecessary that the Prosecutor initiates an investigation in this situation. However, I have some observations on war crimes which are worth mentioning, and since the Majority believes that the Prosecutor should reconsider her decision, it would have been more convincing to look into possible defects in relation to war crimes as discussed below.

31. The facts of the situation cast some doubt as to whether the constitutive elements of the war crimes of wilful killing (article 8(2)(a)(i) of the Statute) or wilfully causing great suffering (article 8(2)(a)(iii) of the Statute) are met. The injuries sustained by the individuals on board the *Mavi Marmara* were apparently incidental to lawful action taken in conjunction with protection of the blockade.

32. According to the San Remo Manual applicable to armed conflicts at sea, which may be deemed as indicative of "principles and rules of international law, including the established principles of the international law of armed conflict" under article 21(1)(b) of the Statute: "Customary international law provides that a blockading party is entitled to prevent all vessels from entering or leaving the blockaded area. Merchant vessels believed on

reasonable grounds to be breaching the blockade may be captured"[28]. Under this rule, a ship that is non-violent and not resisting may nonetheless be captured because of its attempting to breach a blockade. It is clear that not only was it the *Mavi Marmara's* intention to breach the blockade, but this was its main purpose, as an act of protest. With this in mind, Israeli forces had a right to capture the vessel in protection of their blockade. Furthermore, irrespective of this right, it was a logical reaction. Faced with a potential breach of the blockade, the IDF acted out of necessity.

33. Arguably, a merchant vessel that "'clearly resists' capture must be warned that it may be attacked if it persists"[29]. The *Mavi Marmara* was warned 4 times[30]. The resistance combined with the attempt at breaching the blockade, creates the fear for patrolling coast guard and navy that there appears to be a military purpose for the vessel's intrusion. A clear refusal to submit to the policing authorities in such a case makes the vessel a legitimate target.

34. As the Prosecutor correctly acknowledged, "[I]f it is assumed that Israel's blockade of Gaza was legal, Israel was entitled to enforce the blockade by these means. Subject to the issue of prior warning, and clear and intentional failure by the vessels to stop or other forms of resistance, Israel could lawfully direct an attack against relevant vessels of the flotilla. For the relevant period, those vessels would lose the protection to which they were otherwise entitled

[28] Louise Doswald-Beck (ed.), "San Remo Manual on International Law Applicable to Armed Conflicts at Sea", Cambridge Univ. Press: Cambridge, (1995), art. 98, 146 (f). [San Remo Manual]
[29] Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, and Department of Transportation, U.S. Coast Guard, "The Commander's Handbook on the Law of Naval Operations" NWP 1-14M, (October 1995) at art. 7.10; San Remo Manual, para. 98.
[30] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, para. 105.

as merchant or similar vessels"[31]. A vessel that loses its civilian status in such a way becomes a legitimate military objective "whose destruction […] offers a definite military advantage because […] the effectiveness of the blockade is preserved".[32]

35. It is quite clear that Israeli forces gave sufficient warning to allow the ship a chance to change its route or abandon its protest. The *Mavi Marmara* seems to have ignored repeated warnings from Israel to desist, and there was violent resistance once the IDF tried to board the ship[33]. Based on the facts as reported by various commissions of inquiry, and as reflected in the Prosecutor's report, it appears that the IDF soldiers, upon boarding the vessel, were met with direct violent resistance from a large group of passengers who had gathered on the roof of the ship. The passengers attempted to impede the soldiers with use of their fists, knives, chains, wooden clubs, iron rods, and slingshots with metal and glass projectiles[34]. At the initial stage of boarding the vessel, it appears that three soldiers were attacked, captured, and taken to the hold of the ship[35]. Additional information available also indicates that 9

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[31] *Ibid.*, para. 92.

[32] Wolff Heintschel von Heinegg, "Blockade" in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (last updated: April 2009), at para. 47, Available at: < http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252 >.

[33] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, paras 104-109 [Palmer-Uribe Report]; Report of the International Fact-Finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, U.N. Doc. A/HRC/15/21, 27 September 2010, paras 108-109, 113, and 148 [HRC Report]; Turkel Commission, The Public Commission to Examine the Maritime Incident of 31 May 2010 – Part I, 2011, pp. 139-140, 142-146, 180, and 222-223 [Turkel Report].

[34] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, at para 40; Palmer-Uribe Report, paras 119, and 123-124; HRC Report, paras. 114-116; Turkel Report, pp. 149-163, 247-250, and 255.

[35] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, at para 40; Palmer-Uribe Report, para. 125; Turkel Report,

IDF soldiers were seriously injured by passengers, two having been shot[36]. It was this violent resistance that prompted the use of force by IDF soldiers. There was no need for the same level of force on the other intercepted ships, as passengers of those ships (i.e. *Rachel Corrie*) did not meet capture with violent resistance[37].

36. The violent and active resistance of the individuals on the *Mavi Marmara*, while not amounting to direct participation in hostilities, nonetheless meets the threshold of resistance that would require use of force by the boarding soldiers. This conclusion is reinforced by various findings on the part of the Prosecutor as well as the Turkel Commission. According to the Prosecutor's report:

> Based on IDF soldiers' own accounts, they were unprepared for, did not anticipate, and were surprised by the level of resistance and violence engaged in, by the passengers of the vessel […]. [T]he Israeli authorities did not have information indicating that passengers intended to respond to any boarding attempt with organised, violent resistance.[38]

37. The Turkel Commission also noted that faced by unanticipated situation, the IDF soldiers made "difficult, split-second decisions regarding the use of force, under conditions of uncertainty, surprise, pressure, and in darkness, with the perception of a real danger to their lives and with only partial information

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pp. 151-154, 158-164, 167-172; HRC Report, para. 125; Turkish Report, p. 115. Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, February 2011, p. 114. [Turkish Report]

[36] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, at para 40; Turkel Report, pp. 192-193.

[37] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, para. 81.

[38] *Ibid.*, paras. 106-107.

available to them."[39] It was not their goal to injure and kill civilians, but rather to avoid a breach of the blockade and capture the offending vessel. Thus, I see some merit in the Prosecutor's assessment that, "none of the information available suggests […] the intended object of the attack was the civilian passengers on board these vessels. Rather, viewed in the context of the interception operation, such an attack (i.e., the forcible boarding) appears to have been solely directed at the vessels".[40]

38. Apparently, the use of force by the IDF, in the chaos of its execution, potentially crossed the line of proportionality. Although UN commissions in their *ex post facto* evaluations argued that the IDF use of force was disproportionate,[41] the relevant legal test under article 8(2)(b)(iv) of the Statute is not what one could have predicted in hindsight. The issue at stake is whether IDF forces could have reasonably foreseen that their actions would result in disproportionate harm, at the time the operation was launched, and in those particular circumstances. The available information before the Prosecutor did not suggest that the IDF knew their attack on the vessel would result in disproportionate force.[42] This was supported by the training of the IDF troops, the rules of engagement developed for the operation, and an emphasis on the use of non-lethal weapons[43]. Furthermore, once the boarding

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[39] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, para. 106; Turkel Report, pp. 268.
[40] "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, para. 99.
[41] *Ibid.*, para. 109.
[42] *Ibid*.
[43] "Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", 30 March 2015, ICC-01/13-14-Red, para. 49; "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report", 4 February 2015, ICC-01/13-6-AnxA, para. 107; Turkel Report, pp. 118-119, 125, 128-136, 264, and 271-272.

of the vessel had commenced, there is no evidence that lends to the conclusion that it would have been reasonable or even possible to disengaged with the passengers, considering their violent response to interception and their firm intention of breaching the blockade.

39. Taking into consideration the circumstances surrounding the boarding of the *Mavi Marmara* by the IDF forces as described above, I find it unnecessary for the Prosecutor to open an investigation with regard to the limited number of acts presented as wilful killing under article 8(2)(a)(i) of the Statute or wilfully causing great suffering under article 8(2)(a)(iii) of the Statute.

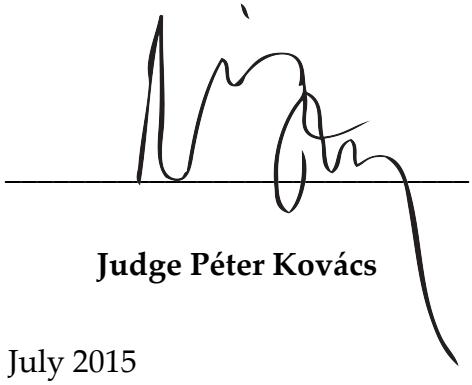
40. When I consider a close interpretation of "wilful killing", as provided by the official commentary of the ICRC, I cannot arrive at the conclusion that the tragic deaths that occurred and the injuries suffered, during the defence of the blockade, qualify as grave breaches in the way that is meant by the Geneva Conventions and the Statute in article 8(2)(a)(i) and in article 8(2)(a)(iii) of the Statute.

41. The *chapeau* of article 8(2) states, "[f]or the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention". However, the Elements of Crimes gives the following interpretation: "[t]he elements of war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea". This is why I believe that it is particularly important

to exercise judicial caution when using and interpreting the formula of '*protected persons*'. Deference must be given in a '*protected person*' analysis, for other rules of International law (such as the law of the sea, or rules governing a blockade) that are relevant to the situation and that may impact what is to be considered a reasonable and necessary action.

42. Indeed, it is likely that if an investigation was to be conducted most if not all of those acts will not qualify as war crimes within the meaning of article 8 of the Statute, either due to the difficulty in proving the *mens rea* of the potential suspect(s), or due to the existence of defences under articles 31 or 32 of the Statute (i.e., self-defence or justifiable error on the protected status of those on the *Maria Marmara*) with regard to the IDF soldiers who intervened in those difficult circumstances. It follows that the lack of prospect for any successful prosecution, together with the relatively low gravity of the alleged crimes makes it clear that the initiation of an investigation in the present situation is unwarranted.

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



Judge Péter Kovács

Dated this Thursday, 16 July 2015

At The Hague, The Netherlands